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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1893

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.
EDWARD DOUGLASS WHITE, 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.

PRIMROSE *v.* WESTERN UNION TELEGRAPH COMPANY.

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

No. 59. Argued November 1, 2, 1893. — Decided May 26, 1894.

A stipulation between a telegraph company and the sender of a message, that the company shall not be liable for mistakes in the transmission or delivery of a message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition, is reasonable and valid.

In an action by the sender of a cipher message against a telegraph company, which is not informed, by the message or otherwise, of the nature, importance or extent of the transaction to which it relates, or of the position which the plaintiff would probably occupy if the message were correctly transmitted, the measure of damages for mistakes in its transmission or delivery is the sum paid for sending it.

THIS was an action on the case, brought January 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message from

the plaintiff at Philadelphia to his agent at Waukeney in the State of Kansas.

The defendant pleaded: 1st, not guilty; 2d, that the message was an unrepeated message, and was also a cipher and obscure message, and therefore by the contract between the parties under which the message was sent the defendant was not liable for the mistake. At the trial, the following facts were proved and admitted:

On June 16, 1887, the plaintiff wrote and delivered to the defendant at Philadelphia, for transmission to his agent, William B. Toland, at Ellis in the State of Kansas, a message upon one of the defendant's printed blanks, the words printed below in italics being the words written therein by the plaintiff, to wit:

"THE WESTERN UNION TELEGRAPH COMPANY.

"THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

"Receiver's No.	Time Filed 18	Check

"Send the following message subject to the terms on back hereof, which are hereby agreed to. *June* 16, 1887.

"To *Wm. B. Toland, Ellis, Kansas.*

"Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases.

"FRANK J. PRIMROSE.

"☞READ THE NOTICE AND AGREEMENT ON BACK OF THIS BLANK.☜"

Upon the back of the message was the following printed matter:

"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message,

beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent for any distance not exceeding 1000 miles, and two per cent for any greater distance. No employé of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

"THOS. T. ECKERT, Gen'l Manager. NORVIN GREEN, President."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form, the written words being printed below in italics:

"THE WESTERN UNION TELEGRAPH COMPANY.

"This Company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

"Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of UNREPEATED MESSAGES, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

"THOS. T. ECKERT, General Manager. NORVIN GREEN, President.

NUMBER	SENT BY	REC'D BY	CHECK.	
Rt.	*S.*	*F. N.*	22	*Collect* 3 *extra words.*

"RECEIVED at 5 *K. p. m.* *June* 16, 1887.

"Dated *Philadelphia*, 16. *Forwarded from Ellis.*

"To *W. B. Toland, Waukeney, Kansas.*

"*Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.*

"*FRANK J. PRIMROSE.*"

The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *Destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows:

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase*."

The plaintiff testified that on June 16, 1887, he wrote the message in his own office on one of a bunch or book of the defendant's blanks which he kept at hand, and sent it to the defendant's office at Philadelphia; that he had a running account with the defendant's agent there, which he settled monthly, amounting to $180 for that month; that he did not then read, and did not remember that he had ever before read, the printed matter on the back of the blanks; and that he paid the usual rate of $1.15 for this message, and did not pay for a repetition or insurance of it.

He also testified that he then was, and for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity he did not know;

that he had frequently sent messages for him, and considered him one of his best customers during the wool season; that telegraphic messages by the present system were sent and received by sound, and were all dots and dashes; that "b" was a dash and three dots, and "y" was two dots, a space and then two dots; and that the difference between "a" and "u" was one dot, "a" being a dot and a dash, and "u" two dots and a dash, and the pause upon the last touch of the "u"; that an experienced telegraph operator, if the words were properly rapped out and he was paying proper attention, could not well mistake the one for the other, but might be misled if he was not careful; and that it was very likely that another dot could be put in if there was any interruption in the wire. He further testified that there was a great difference between the words "despot" and "destroy" in telegraphic symbols; and that the letter "s" was made by three dots, so that, if an operator received the word "purchases" over the wires, and wrote down "purchase," he omitted three dots from the end of the word.

The plaintiff introduced depositions, taken in September, 1888, of one Stevens and one Smith, who were respectively telegraph operators of the defendant at Brookville and at Ellis in the State of Kansas, on June 16, 1887.

Stevens testified that Brookville was a relay station of the company, at which messages from the East were repeated westward; that on that day one Tindall, his fellow operator in the Brookville office, handed him a copy in Tindall's handwriting of the message in question, (an impression copy of which he identified and annexed to his deposition,) containing the words "despot" and "bay," and he immediately transmitted it word for word to Ellis; that the equipment of the office at Brookville was in every respect good and sufficient, and that he had no recollection of the wires between it and Ellis having been in other than good condition on that day.

Smith testified that on that day he received the message at Ellis from Brookville, and immediately wrote it down word for word, just as received, (and identified and annexed to his deposition an impression copy of what he then wrote down,)

containing the words "destroy" and "buy," and transmitted it, exactly as he received it, to Waukeney, to which Toland had directed any messages for him to be forwarded; and that the office at Ellis was well and sufficiently equipped for its work, but he could not recall what was the condition of the wires between it and Brookville.

The plaintiff also introduced evidence tending to show that June 16, 1887, was a bright and beautiful day at Ellis and Waukeney; that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upwards of $20,000.

The Circuit Court, following *White* v. *Western Union Tel. Co.*, 5 McCrary, 103, and *Jones* v. *Western Union Tel. Co.*, 18 Fed. Rep. 717, ruled that there was no evidence of gross negligence on the part of the defendant, and that, as the message had not been repeated, the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of $1.15, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Mr. Joseph de F. Junkin, (with whom was *Mr. George Junkin* on the brief,) for plaintiff in error.

I. A telegraph company is a common carrier, and subject to the law of common carriers. This point has never been squarely before this court; but in *Delaware & Atlantic Tel. Co.* v. *Postal Tel. Co.*, 3 U. S. App. 30, 105, it was said by Butler, J.:

"It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment.

"This has been so frequently decided that the point must be regarded as settled.

"While it has not been directly before the Supreme Court of the United States, cases in which it has been so determined

are cited approvingly by that court in *Budd* v. *New York*, 143 U. S. 517.

"This case adheres to and confirms the doctrine of *Munn* v. *Illinois*, 94 U. S. 113, which is the leading case on defining the law relating to common carriers."

See also Shearman and Redfield on Negligence, §§ 354, 355, where the position for which we are contending is presented in a manner that seems to us to be unanswerable.

II. Being a common carrier, a telegraph company cannot legally impose conditions upon one whose message it accepts for transmission, relieving itself from responsibility for damages to the sender, resulting from its own negligence.

As was said by the trial judge in this case, the cases in the various state courts where the decisions turned upon this proposition, are very numerous and look both ways.

More or less well considered affirmative discussions of this proposition will be found in the following decisions of the state courts: *Rittenhouse* v. *Independent Telegraph*, 1 Daly, 474, and 44 N. Y. 263; *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; *Western Union Tel. Co.* v. *Meek*, 49 Indiana, 53; *Western Union Tel. Co.* v. *Fenton*, 52 Indiana, 1; *Tyler* v. *Western Union Tel. Co.*, 60 Illinois, 421, and 74 Illinois, 168; *Ayer* v. *Western Union Tel. Co.*, 79 Maine, 493; *Bartlett* v. *Western Union Tel. Co.*, 62 Maine, 209; *True* v. *International Tel. Co.*, 60 Maine, 9; *Telegraph Co.* v. *Griswold*, 37 Ohio St. 301; *Western Union Tel. Co.* v. *Crall*, 38 Kansas, 679; *Western Union Tel. Co.* v. *Howell*, 38 Kansas, 685; *Dorgan* v. *Telegraph Co.*, 1 Am. Law Times, (N. S.,) 406; *N. Y. &c. Tel. Co.* v. *Dryburgh*, 35 Penn. St. 298; *Hibbard* v. *Western Union Tel. Co.*, 33 Wisconsin, 558; *Candee* v. *Western Union Tel. Co.*, 34 Wisconsin, 471; *La Grange* v. *Southwestern Tel. Co.*, 25 La. Ann. 383. See also Wharton on Negligence, § 763; Shearman and Redfield on Negligence, §§ 558, 559, 565.

In *Ayer* v. *Western Union Tel. Co.*, 79 Maine, 493, 496–498, it is said: "The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds.

"1. The company relies upon a stipulation made by it with

the plaintiff, as follows: 'All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of the message should order it *repeated;* that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission, or delivery, or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same.' This is the usual stipulation printed on telegraph blanks, and was known to the plaintiff, and was printed at the top of the paper upon which he wrote and signed his message. He did not ask to have the message repeated.

"Is such a stipulation in the contract of transmission valid as a matter of contract assented to by the parties, or is it void as against public policy? We think it is void.

"Telegraph companies are *quasi* public servants. They receive from the public valuable franchises. They owe the public, care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent upon it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential for the public good, that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty, than should a carrier of passengers, or any other party engaged in a public business.

"This rule does not make telegraph companies insurers. It does not make them answer for errors not resulting from their negligence. It only requires the performance of their plain duty. It is no hardship upon them. They engage in the business voluntarily. They have the entire control of their servants and instruments. They invite the public to entrust messages to them for transmission. They may insist on their compensation in advance. Why, then, should they refuse to perform the common duty of care and diligence?

Why should they make conditions for such performance? Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on special compensation for using any particular mode or instrumentality, as a guard against their own negligence? It seems clear to us that, having undertaken the business, they ought, without qualification, to do it carefully, or be responsible for their want of care.

"It is true there are numerous cases in other States holding otherwise, but we think the doctrine above stated is the true one, in harmony with the previous decisions of this court. *True* v. *International Tel. Co.*, 60 Maine, 1; *Bartlett* v. *Western Union Tel. Co.*, 62 Maine, 209."

In *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444, 458, Mr. Justice Matthews, in delivering the opinion of the court, says: "Where the negligence of the telegraph company consists, not in delaying the transmission of the message, but in transmitting a message erroneously so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property, the actual loss based upon changes in market value are clearly within the value for estimating damages. Of this class examples are to be found in the cases of *Turner* v. *Hawkeye Telegraph Co.*, 41 Iowa, 458, and *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. 263."

In *Dorgan* v. *The Telegraph Co.*, 1 Amer. Law Times, (N. S.,) 406, Mr. Justice Woods said: "The telegraph company is engaged in a quasi public employment. Incalculable sums depend upon the alacrity, care, and good faith which it brings to the discharge of its duties. The whole business of the commercial world is to a degree dependent upon it. The public has a right to exact at least ordinary diligence. A common carrier is not allowed to protect himself by contract from liability for the result of his own negligence.

"There seems to be no good reason why the same rule should not be applied to a telegraph company."

The law as to the liability of common carriers has been so

thoroughly settled by this court that the plaintiff will content himself with simply stating the proposition and the cases supporting the same as follows:

A common carrier cannot stipulate for exemption from the consequences of his own neglect or that of his servants. *Hart* v. *Pennsylvania Railroad*, 112 U. S. 338; *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344; *York Manufacturing Co.* v. *Illinois Central Railroad*, 3 Wall. 107; *Southern Express Co.* v. *Caldwell*, 21 Wall. 264; *Railroad Company* v. *Pratt*, 22 Wall. 123; *Bank of Kentucky* v. *Adams Express*, 93 U. S. 174; *Grand Trunk Railway* v. *Stevens*, 95 U. S. 655.

Apart from all legal views of the subject, every consideration of natural justice revolts at the thought of binding a man by a contract which he has not read or which has not been called to his attention, specifically, and especially, as in this case, when the contract to which he is alleged to have been a party is upon the back of the paper which he signed.

And it is respectfully submitted that the law of this land is, or should be, with reference to these matters, that —

1. Where a telegraph company, vested by the State with the power of eminent domain in consideration of its undertaking a great public franchise, accepts for pay from a citizen a message for transmission, it thereby becomes responsible for the accurate and exact transmission and delivery of that which it received; and if the message which it delivers differs from that which was accepted by it for transmission, and damage results to the sender, the proof by the sender of such error places upon the company the burden of justifying its negligence.

2. That such company cannot shift its responsibility as such common carrier by printing upon its blanks, furnished to the senders of messages, conditions exempting it from liability for errors and mistakes in the transmission of the messages, or for all liability in cipher or obscure messages if it once accepts the messages and receives pay therefor.

3. That such company certainly cannot limit its liability

by such conditions, having once accepted a message for transmission, and received pay therefor, unless it shows affirmative notice of the conditions brought home to the sender.

It is admitted by nearly all of the courts and cases passing upon the subject, that for gross errors the company would undoubtedly be liable; that when a gross error had been committed, even the restrictive conditions would afford no protection, and the learned judge here impliedly goes that far.

But is there any reason for the drawing of such distinction? What is a gross error in such cases?

The plaintiff in any case against a telegraph company, is entirely without the means of showing how, or why, or when the mistake in a message occurred, excepting as he obtains such information from the company or its employés.

All that he can possibly show is that a mistake has occurred, somewhere and somehow occasioned by something which the defendant had done or omitted to do.

The defendant is bound to provide the best possible apparatus and the most experienced operators for its business. It is a fact of which the courts would now take judicial knowledge, that a telegraph company can transmit with absolute accuracy any written message in any language by sound, each letter being indicated by dots and pauses (or dashes, as they are called) in the working of the telegraph key.

The word as such is not sent over the wire as a whole, but letter by letter. It is not written down by the instrument, but received by the operator by means of the sound and written by him upon paper as he hears it.

These facts are in evidence in this case as well.

There is therefore no reason for any error in the transmission of a message excepting through a mistake made by a negligent operator, or through some outside cause over which the company had no control. The clearness or obscurity of a message has nothing to do with its accurate transmission. It would thus seem clear that the accurate transmission of a cipher message or word is a matter of no more difficulty than an ordinary message, and there can be no valid reason given in support of the arbitrary condition sought to be imposed by

defendant in the matter of such messages, other than what applies to ordinary words.

If a letter in a word is inaccurately transmitted, apart from the question of outside influences, the error must have come about either from a negligent sign by the sending operator, or from a negligent hearing by the receiving operator. And the defendant in error is challenged to assign other causes for the same, if any it can find.

In the present case, it was affirmatively shown that the message reached its last operator but one, with exactness — clearly showing how easy such accuracy was.

Then it suffered these changes. The absence of outside, disturbing agencies, was demonstrated by the plaintiff in so far as he could be expected so to do, when it was shown that the atmospheric conditions at Ellis were perfect.

If any other outside influences affected the wires or the message, they are entirely within the knowledge of the defendants, and may furnish good matter of a defence to the jury.

Mr. Silas W. Pettitt and *Mr. John H. Dillon* for defendant in error. *Mr. George H. Fearons* and *Mr. Rush Taggart* were on their brief.

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

This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the following message

subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: "☞ Read the notice and agreement on back of this blank. ☜"

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1st.] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the original office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d.] nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d.] nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employé of the company is authorized to vary the foregoing."

"[4th.] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that

part of the third, by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Express Co.* v. *Caldwell*, 21 Wall. 264, 269, 270; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464.

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or

deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by Mr. Justice Strong, speaking for this court, in *Express Co.* v. *Caldwell*, above cited: "Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *Railroad Co.* v. *Lockwood*, 17 Wall. 357; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 442, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that "where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 343.

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual

price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise.

In *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444, 453, the effect of such a regulation was presented by the certificate of the Circuit Court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew* v. *Electric Tel. Co.*, 17 C. B. 3, and in *Baxter* v. *Dominion Tel. Co.*, 37 Upper Canada Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American case, decided by the Court of Appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: "The public are admonished by the notice, that in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company

liable for any mistake that may occur." *Camp* v. *Western Union Tel. Co.*, 1 Met. (Ky.) 164, 168.

In *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525, 535, 536, the Supreme Court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. "The regulation," said Chief Justice Christiancy, "of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question." "The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In *Birney* v. *New York & Washington Tel. Co.*, 18 Maryland, 341, 358, the Court of Appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In *United States Tel. Co.* v. *Gildersleve*, 29 Maryland, 232, 246, 248, the same court, speaking by Mr. Justice Alvey, (since Chief Justice of Maryland, and of the Court of Appeals of the District of Columbia,) said: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for the purpose." "The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own wilful misconduct, or gross negligence, or any conduct inconsistent with good faith; nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its

dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message. And having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company."

In *Passmore* v. *Western Union Tel. Co.*, 9 Phila. 90, and 78 Penn. St. 238, at the trial in the district court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards at Philadelphia, in these words: "I hold the Tibbs tract for you; all will be right," but which, as delivered by the company in Philadelphia, was altered by substituting the word 'sold' for 'hold;' and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message, nor directed it to be repeated; and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with an opinion of Judge Hare, the most important parts of which were as follows:

"A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve; or, at the least, such as it need not condemn. By no device can a body corporate avoid lia-

bility for fraud, for wilful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid, which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule — which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents — may be a reasonable rule, and, as such, upheld by the courts."

"The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder storms and other natural causes. It is, therefore, obvious that entire accuracy cannot always be obtained by the greatest care; and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came."

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to com-

ply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition." 9 Phila. 92–94; 78 Penn. St. 242–244.

The judgment was affirmed by the Supreme Court of Pennsylvania, for the reasons given by Judge Hare and above stated. 78 Penn. St. 246; *Western Union Tel. Co.* v. *Stevenson*, 128 Penn. St. 442, 455.

In *Breese* v. *United States Tel. Co.*, 48 N. Y. 132, the plaintiffs' agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words, "Buy us seven ($700) hundred dollars in gold." In the statement of facts upon which the case was submitted, it was agreed that he had never read the printed part of the blank, and that "the message thus delivered was transmitted from the office at Palmyra, as written; but, by some error of the defendant's operators working between Palmyra and New York," it was received in New York and delivered in this form, "Buy us seven thousand dollars in gold," and the brokers accordingly bought that amount for the plaintiffs, who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In *Kiley* v. *Western Union Tel. Co.*, 109 N. Y. 231, 235–237, a similar decision was made, the court saying: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other States of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that

they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this State, and generally elsewhere, been upheld as reasonable." "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was not shown that the failure was due to the wilful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

In the Supreme Judicial Court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed. *Ellis* v. *American Tel. Co.*, 13 Allen, 226; *Redpath* v. *Western Union Tel. Co.*, 112 Mass. 71; *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; *Clement* v. *Western Union Tel. Co.*, 137 Mass. 463.

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought not by the sender, but by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance. Such were *New York & Washington Tel. Co.* v. *Dryburg*, 35 Penn. St. 298;

Harris v. *Western Union Tel. Co.*, 9 Phila. 88; and *De la Grange* v. *Southwestern Tel. Co.*, 25 La. Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect, all liability beyond the price paid was avoided. *True* v. *International Tel. Co.*, 60 Maine, 9, 18; *Bartlett* v. *Western Union Tel. Co.*, 62 Maine, 209, 215; *Candee* v. *Western Union Tel. Co.*, 34 Wisconsin, 471, 476; *Hibbard* v. *Western Union Tel. Co.*, 33 Wisconsin, 558, 564. In *Bartlett's case*, the court said: "Most, if not all, the cases upon this subject refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that owing to the liability to error, from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated; the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message is presumed to be the best judge of its importance, he must on his own responsibility make his election whether to have it repeated." 62 Maine, 216, 217.

The passage cited from the opinion of the Circuit Court of Appeals in *Delaware & Atlantic Telephone Co.* v. *Postal Telegraph Co.*, 3 U. S. App. 30, 105, in which the same judge who had decided the present case in the Circuit Court said, "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment," had regard, as is evident from the context, and from the reference to *Budd* v. *New York*, 143 U. S. 517, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In *Rittenhouse* v. *Independent Telegraph*, 1 Daly, 474, and 44 N. Y. 263, and in *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458, it does not appear that the company had undertaken to restrict its liability by express stipulation.

The Indiana decisions cited appear to have been controlled by a statute of the State, enacting that telegraph companies should "be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting, or delivering despatches." *Western Union Tel. Co.* v. *Meek*, 49 Indiana, 53; *Western Union Tel. Co.* v. *Fenton*, 52 Indiana, 1.

The only cases, cited by the plaintiff, in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be *Tyler* v. *Western Union Tel. Co.*, 60 Illinois, 421, and 74 Illinois, 168; *Ayer* v. *Western Union Tel. Co.*, 79 Maine, 493; *Telegraph Co.* v. *Griswold*, 37 Ohio St. 301; *Western Union Tel. Co.* v. *Crall*, 38 Kansas, 679; *Western Union Tel. Co.* v. *Howell*, 38 Kansas, 685; and a charge to the jury by Mr. Justice Woods, when Circuit Judge, as reported in *Dorgan* v. *Telegraph Co.*, 1 Amer. Law Times, (N. S.) 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in *Tyler* v. *Western Union Tel. Co.*, above cited.

In that case, the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker, "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1000)." It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The Supreme Court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Illinois, 439.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court, as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender is a contract or not, depends on circumstances," and "whether he

had knowledge of its terms and consented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their own control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Illinois, 431–433.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not; or else to allow to the stipulation no effect whatever, for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held, it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the

company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent of the original charges." 74 Illinois, 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation and amounts to a contract." And again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Illinois, 430, 431, 435.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back he did not venture to say that he had not read it; still less, that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message, and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them

only, and was in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot," "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying, to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15, there was substituted a word signifying that his message of June 17 had been received, (which was evidently impossible,) could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting, for the last word "purchase" in the singular, the word "purchases" in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's offices at Brookville and Ellis, in the State of Kansas, (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial,) prove that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form; and that, as written down by the operator at Ellis, it was in its altered

form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth. Nor is there anything in the case, tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within

narrower limits than were allowed to common carriers in *Hart* v. *Pennsylvania Railroad*, already cited, in which five horses were delivered by the plaintiff to a railroad company for transportation under a bill of lading, signed by him and by its agent, which stated that the horses were to be transported upon the terms and conditions thereof, "admitted and accepted by" the plaintiff "as just and reasonable," and that freight was to be paid at a rate specified, on condition that the carrier assumed a liability not exceeding two hundred dollars on each horse; and the Circuit Court, and this court, on writ of error, held that the contract between the parties could not be controlled by evidence that one of the horses was killed by the negligence of the railroad company, and was a race horse, worth fifteen thousand dollars. 2 McCrary, 333; 112 U. S. 331.

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employé of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

But it certainly was a cipher message; and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employé of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Western Union Tel. Co.* v. *Hall*, 124 U. S. 444.

In *Hadley* v. *Baxendale*, 9 Exch. 345, decided in 1854, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *Western Union Tel. Co.* v. *Hall*, above cited, and in *Howard* v. *Stillwell Co.*, 139 U. S. 199, 206, 207, Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a

breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

In *Sanders* v. *Stuart*, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case we think that the rule in *Hadley* v. *Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be, if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract, (an ignorance known to, and, indeed, intentionally procured by the plaintiffs,) the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally, *i.e.* according

to the usual course of things, from the breach' of such a contract as this." 1 C. P. D. 326, 328; 45 Law Journal, (N. S.,) C. P. 682, 684.

In *United States Tel. Co.* v. *Gildersleve*, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," Mr. Justice Alvey, speaking for the Court of Appeals of Maryland, and applying the rule of *Hadley* v. *Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars, as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Maryland, 232, 251.

In *Baldwin* v. *United States Tel. Co.*, which was an action by the senders against the telegraph company, for not delivering this message, "Telegraph me at Rochester what that well is doing," Mr. Justice Allen, speaking for the court of Appeals of New York, said: "The message did not import that a sale of any property, or any business transaction, hinged upon the prompt delivery of it, or upon any answer that might be

received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher, or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The dispatch not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752. See also *Hart* v. *Direct Cable Co.*, 86 N. Y. 633.

The Supreme Court of Illinois, in *Tyler* v. *Western Union Tel. Co.*, above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Illinois, 434. And in the recent case of *Postal Tel. Co.* v. *Lathrop*, the same court said: "It is clear enough that, applying the rule in *Hadley* v. *Baxendale*, *supra*, a recovery cannot be had for a failure to correctly

transmit a mere cipher dispatch unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying that it can contain no information of value as pertaining to a business transaction; and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss." 131 Illinois, 575, 585.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee* v. *Western Union Tel. Co.*, 34 Wisconsin, 471, 479–481; *Beaupré* v. *Pacific & Atlantic Tel. Co.*, 21 Minnesota, 155; *Mackay* v. *Western Union Tel. Co.*, 16 Nevada, 222; *Daniel* v. *Western Union Tel. Co.*, 61 Texas, 452; *Cannon* v. *Western Union Tel. Co.*, 100 No. Car. 300; *Western Union Tel. Co.* v. *Wilson*, 32 Florida, 527; *Behm* v. *Western Union Tel. Co.*, 8 Bissell, 131; *Western Union Tel. Co.* v. *Martin*, 9 Bradwell, 587; *Abeles* v. *Western Union Tel. Co.*, 37 Missouri App. 554; *Kinghorne* v. *Montreal Tel. Co.*. 18 Upper Canada Q. B. 60, 69.

In the present case, the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties,

when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the Circuit Court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message.

Judgment affirmed.

MR. CHIEF JUSTICE FULLER and MR. JUSTICE HARLAN dissented.

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

SCOTT *v.* McNEAL.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 890. Submitted October 23, 1893. — Decided May 14, 1894.

A court of probate, in the exercise of its jurisdiction over the probate of wills and the administration of estates of deceased persons, has no jurisdiction to appoint an administrator of the estate of a living person; and its orders, made after public notice, appointing an administrator of the estate of a person who is in fact alive, although he has been absent and not heard from for seven years, and licensing the administrator to sell his land for payment of his debts, are void, and the purchaser at the sale takes no title, as against him.

A judgment of the highest court of a State, by which the purchaser, at an administrator's sale under order of a probate court, of land of a living person, who had no notice of its proceedings, is held to be entitled to the land as against him, deprives him of his property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and is reviewable by this court on writ of error.

THIS was an action of ejectment brought January 14, 1892, in the Superior Court of Thurston County in the State of Washington, by Moses H. Scott against John McNeal and Augustine McNeal to recover possession of a tract of land in that county.

Statement of the Case.

At the trial, it was conceded that the title in this land was in the plaintiff until 1888; and he testified that he entered into possession thereof, and made improvements thereon, and had never parted with the possession, nor authorized any one to go upon the land; that he had demanded possession of the defendants, and they had withheld it from him; and that its rental value was $100 a year.

The defendants denied the plaintiff's title, and claimed title in themselves under a deed from an administrator of the plaintiff's estate, appointed in April, 1888; and in their answer alleged that in March, 1881, the plaintiff mysteriously disappeared from his place of abode, and without the knowledge of those with whom he had been accustomed to associate, and remained continuously away until July, 1891, and was generally believed by his former associates to be dead; and specifically alleged, and at the trial offered evidence tending to prove, the following facts:

On April 2, 1888, Mary Scott presented to the probate court of the county of Thurston, in the Territory of Washington, a petition for the appointment of R. H. Milroy as administrator of the estate of the plaintiff, alleging "that one Moses H. Scott, heretofore a resident of the above named county and Territory, mysteriously disappeared some time during the month of March, 1881, and more than seven years ago; that careful inquiry made by relatives and friends of said Moses H. Scott, at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance;" that he was never married, and left no last will or testament yet heard of; that he left real estate in his own right in this county, of the value of $600, more or less; that his heirs were three minor children of a deceased brother; and that the petitioner was a judgment creditor of Scott.

Notice of that petition was given by posting in three public places, as required by law, a notice, dated April 7, 1888, signed by the probate judge, and in these words: "In the Probate

Court of Thurston County, W. T. — Mary Scott having filed in this court a petition praying for the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock A.M., at the office of the undersigned."

At the time thus appointed, the probate court, after appointing a guardian *ad litem* for said minors, and hearing witnesses, made an order by which, "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings, when last seen (about eight years ago), and the circumstances of that time and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county: Now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on or about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian *ad litem* of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand dollars." Letters of administration were issued to Milroy, and he gave bond accordingly.

On July 16, 1888, the probate court, on the petition of Milroy as administrator, and after the usual notice, and with the consent of the guardian *ad litem* of said minors, made an order, authorizing Milroy as administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land now in question, for the price of $301.50, to Samuel C. Ward. On November 26, 1888, the probate court confirmed the sale, the land was conveyed to Ward, and the purchase money was received by Milroy, and was afterwards applied by him to the payment of a debt of Scott, secured by mortgage of the land.

Argument for Defendants in Error.

On November 26, 1889, Ward conveyed this land by warranty deed to the defendants, for a consideration paid of $800; and the defendants forthwith took and since retained possession of the land, and made valuable improvements thereon.

At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question; and objected to the rest of the evidence as irrelevant and immaterial. But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void; and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the Supreme Court of the State.

In that court, it was argued in his behalf "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law." But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. St. 309.

The plaintiff sued out this writ of error; and assigned for error that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter, and absolutely void; and that the judgment of the superior court, and the judgment of the Supreme Court of the State affirming that judgment, deprived him of his property without due process of law, and were contrary to the Fourteenth Amendment of the Constitution of the United States.

Mr. Nathan S. Porter for plaintiff in error.

Mr. Milo A. Root for defendants in error.

I. In order to give this court jurisdiction, it must appear

from the record that a Federal question was involved. This court will not entertain jurisdiction if it appears that, besides the Federal question decided by the state court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it.

The Supreme Court of Washington finds that defendants in error stand in the position of innocent purchasers; that the equities are with them; that "appellant wilfully abandoned the property in question, and he had reason to expect that proceedings of the kind would be instituted after a lapse of seven years."

These findings, if correct, are sufficient to sustain the judgment and present no Federal question. Their determination by the state court is therefore conclusive, and is sufficient to sustain the judgment.

If a statute regulating probate proceedings is itself constitutional, the decision of the state court of last resort that the provisions of such statute have been complied with in a given cause, is conclusive. In the case at bar, the constitutionality of the statutes, under which the probate proceedings were had, is not and has not been questioned.

II. Where a probate court, upon a petition setting forth jurisdictional facts, finds those facts (including the fact of death) to exist, the proceedings will protect all persons depending thereon in good faith, even though the supposed decedent subsequently prove to be alive. *Roderigas* v. *East River Savings Institution*, 63 N. Y. 460; *Plume* v. *Howard Savings Institution*, 17 Vroom, 46 N. J. L. 211, 229.

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

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the probate court of the county of Thurston and Territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

The form of the order appointing the administrator is peculiar. By that order, after reciting that the plaintiff disappeared more than seven years before, and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the probate court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888," that is to say, not at the time of his supposed murder seven or eight years before, but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon his giving bond; but this was evidently a clerical error in the order, or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is whether letters of administration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute. In *Allen* v. *Dundas*, 3 T. R. 125, in 1789, in which the Court of King's Bench held that payment of a debt due to a deceased person, to an executor who had obtained probate of a forged will, discharged the debtor, notwithstanding the probate was afterwards declared null and void and administration granted to the next of kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defence. But the court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the

life of the party may be distinguished from the present; because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction." And Mr. Justice Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." 3 T. R. 129, 130. And such is the law of England to this day. Williams on Executors, (9th ed.) 478, 1795; Taylor on Ev. (8th ed.) §§ 1677, 1714.

In *Griffith* v. *Frazier*, 8 Cranch, 9, 23, in 1814, this court, speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on an estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also *Mutual Benefit*

Ins. Co. v. *Tisdale*, 91 U. S. 238, 243; *Hegler* v. *Faulkner*, 153 U. S. 109, 118.

The same doctrine has been affirmed by the Supreme Court of Pennsylvania in a series of cases beginning seventy years ago. *McPherson* v. *Cunliff*, (1824) 11 S. & R. 422, 430; *Peebles' Appeal*, (1826) 15 S. & R. 39, 42; *Devlin* v. *Commonwealth*, (1882) 101 Penn. St. 273. In the last of those cases, it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for fifteen years, was presumed to be dead, but who, as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The Supreme Judicial Court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and that payment to such an administrator was no bar to an action brought by the man on his return; and, in answer to the suggestion of counsel, that "seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead," the court said: "The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, 96. See also *Waters* v. *Stickney*, 12 Allen, 1, 13; *Day* v. *Floyd*, 130 Mass. 488, 489.

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person who is absent from or resides out of the State, without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he has left an attorney, seven years, or sooner if

there be strong presumption of his death; and for judicial sale, if necessary, of his movable or personal property, and safe investment of the proceeds; and, upon proof that he has not been heard from for ten years, and has left no known heirs, for sale of his whole property, and payment of the proceeds into the treasury of the State, as in the case of vacant successions; but neither the curator, nor those in provisional possession, can alienate or mortgage his immovables or real estate; and if he returns, at any time, he recovers his whole property, or the proceeds thereof, and a certain proportion of the annual revenues, depending upon the length of his absence. The main object of those provisions, as their careful regulations show, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly, the Supreme Court of Louisiana held that the appointment, by a court having jurisdiction of successions, of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator under order of the court, followed by long possession, could not hold the land against his heirs; and, speaking by Chief Justice Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time, and which becomes perfect through prescription; but it was void, because the court was without authority to order it." "It is urged, on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession." And the court added that Chief Justice Marshall, in *Griffith* v. *Frazier*, above cited, disposed of that position. *Burns* v. *Van Loan*, (1877) 29 La. Ann. 560, 563.

The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other States. *French* v. *Frazier*, (1832) 7 J. J. Marsh. 425, 427; *State* v. *White*, (1846) 7 Iredell, 116; *Duncan* v. *Stewart*, (1854) 25 Alabama, 408; *Andrews* v. *Avory*, (1858) 14 Grattan, 229, 236; *Moore* v. *Smith*, (1858) 11 Richardson, 569; *Morgan* v. *Dodge*, (1862) 44 N. H. 255, 259; *Withers* v. *Patterson*, (1864) 27 Texas, 491, 497; *Johnson* v. *Beazley*, (1877) 65 Missouri, 250, 264; *Melia* v. *Simmons*, (1878) 45 Wisconsin, 334; *D'Arusement* v. *Jones*, (1880) 4 Lea, (Tenn.) 251; *Stevenson* v. *Superior Court*, (1882) 62 California, 60; *Perry* v. *St. Joseph & Western Railroad*, (1882) 29 Kansas, 420, 423; *Thomas* v. *People*, (1883) 107 Illinois, 517, in which the subject is fully and ably treated.

The only judicial opinions, cited at the bar, (except the judgment below in the present case,) which tend to support the validity of letters of administration upon the estate of a living person, were delivered in the courts of New York and New Jersey within the last twenty years.

In *Roderigas* v. *East River Savings Institution*, 63 N. Y. 460, in 1875, a bare majority of the Court of Appeals of New York decided that payment of a deposit in a savings institution to an administrator under letters of administration issued in the life time of the depositor was a good defence to an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his determination of that question was conclusive. That decision was much criticised as soon as it appeared, notably by Chief Justice Redfield in 15 Amer. Law. Reg. (N. S.) 212. And in a subsequent case between the same parties in 1879, the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof — thus making the validity of the letters of administration to depend

not upon the question whether the man was dead, but upon the question whether the surrogate thought so. *Roderigas* v. *East River Savings Institution*, 76 N. Y. 316.

In *Plume* v. *Howard Savings Institution*, 17 Vroom, (46 N. J. Law,) 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any part of the deposit, nor been heard from, for more than twenty years; an inferior court certified to the Supreme Court of New Jersey the questions whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover; and that court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that "in most, if not all, of such cases, it was affirmatively shown that the alleged decedent was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was "inclined to follow" the case of *Roderigas* v. *East River Savings Institution*, 63 N. Y. 460; and that, under the laws of the Territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate, the court saying: "Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Section 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before

said court or in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. St. 309, 317, 318.

After giving to the opinion of the Supreme Court of the State the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.

The Fourteenth Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains, "nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. *Virginia* v. *Rives*, 100 U. S. 313, 318, 319; *Ex parte Virginia*, 100 U. S. 339, 346; *Neal* v. *Delaware*, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492–495.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary*, 9 Cranch, 126, 144; *Hollingsworth* v. *Barbour*, 4 Pet. 466, 475; *Pennoyer* v. *Neff*, 95 U. S. 714, 727. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by Chief Justice Marshall, "unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose* v. *Himely*, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the

decree of condemnation recited that it was. *Thompson* v. *Whitman*, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. *Mutual Benefit Ins. Co.* v. *Tisdale*, 91 U. S. 238, 243.

The local law on the subject, contained in the Code of 1881 of the Territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, section 2, of the constitution of the State, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person, that he is dead, and his estate therefore subject to be administered and disposed of by the probate court.

On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts. By § 1, the common law of England, so far as not inconsistent with the Constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law, the exclusive original jurisdiction, conferred by § 1299 upon the probate court in the probate of wills and the granting of letters testamentary or of administration, is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on oath, as parties or witnesses, executors and administrators or other persons entrusted with or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said court or in the exercise of its jurisdiction," is equally limited. By § 1340, wills are to be proved and letters testamentary or of administration are to be granted in the county of

"which deceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the Territory." By § 1388, administration of the estate of "a person dying intestate" is to be granted to relatives, next of kin, or creditors, in a certain order, with a proviso in case the person so entitled or interested neglect "for more than forty days after the death of the intestate" to apply for administration. By § 1389, an application for administration must "set forth the facts essential to giving the court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without a will;" and by § 1391, notice of such application is to be given by posting in three public places in the county where the court is held a notice "containing the name of the decedent," the name of the applicant, and the time of hearing. And by §§ 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased;" and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction

in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate.

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question whether he is living or dead can in anywise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters, assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta.*

Next of kin or legatees have no rights in the estate of a living person. His creditors indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void; the receipt of money by the administrator is no discharge of a debt; and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and not heard from

for seven years may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the court had no jurisdiction, and the administrator no authority; and he is not bound, either by the order appointing the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the Circuit Court of the United States for the Southern District of New York in 1880, substantially like *Roderigas* v. *East River Savings Institution*, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defence to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. This court concurs in the proposition, there announced, "that it is not competent for a State, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel

by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." *Lavin* v. *Emigrant Industrial Savings Bank*, 18 Blatchford, 1, 24.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him, or to confer any authority upon him, as against the plaintiff.

Judgment reversed, and case remanded to the Supreme Court of the State of Washington for further proceedings not inconsistent with this opinion.

CONSTABLE *v.* NATIONAL STEAMSHIP COMPANY.

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

No. 21. Argued April 6, 9, 1894. — Decided May 26, 1894.

In the bill of lading of a quantity of cases and bales of goods delivered to the National Steamship Company at Liverpool, and addressed and consigned to C. in New York, it was provided as follows: "Shipped in good order and well conditioned . . . in and upon the steamship called the Egypt . . . bound for New York . . . forty-three cases merchandise . . . being marked and numbered as in the margin, and to be delivered subject to the following exceptions and conditions: . . . The National Steamship Company or its agents or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance . . . nor for any claims for loss . . . where the loss occurs while the goods are not actually in the possession of the company. . . . The goods to be taken alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at his risk of fire, loss, or injury in the warehouse provided for that purpose, or in the public store, as the collector of the port of New York shall direct. . . . The United States Treasury having given permission for goods to remain forty-eight hours on wharf

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at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury." The Egypt arrived January 31, 1883, was entered at the custom-house at 1.45 P.M. of that day, and, there being no room for her at the pier of the National Company, where the vessels of that company were usually unladen, was taken to the pier of the Inman Company. A collector's permit was given to unload the steamer and to allow the unpermitted cargo to remain on the wharf for forty-eight hours, upon an agreement by the steamship company, which was given, that the goods should be at the sole risk of that company, who would pay to the consignee or owner the value of such cargo respectively as might be stolen, burned, or otherwise lost. Notice of the time and place of the discharge was then posted upon the bulletin board of the custom-house, in accordance with custom, but no notice was sent to C., nor did he have any notice. The cases and bales consigned to him were on the same day landed on the Inman pier, but he had no knowledge of it, and had no opportunity to remove the goods on that day; and, if he had had such knowledge, there was not sufficient time for him to have entered, paid the duties, obtained the permits for their removal, and removed them. On the night of that day the goods were destroyed by fire, without any imputed negligence to the National Steamship Company. *Held*,

(1) That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid;

(2) That the discharge of the cargo at the Inman pier was not in the eye of the law a deviation such as to render the carrier an insurer of the goods so unladen;

(3) That if any notice of such unloading was required at all, the bulletin posted in the custom-house was sufficient under the practice and usages of the port of New York;

(4) That libellants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, were not prejudiced by the change;

(5) That the agreement of the respondent with the collector of customs to pay the consignee the value of the goods was not one of which the libellants could avail themselves as adding to the obligations of their contract with respondent.

THIS was a libel in admiralty by the firm of Arnold, Constable & Co. against the National Steamship Company, owner of the British steamship Egypt, to recover the value of thirty-six cases of merchandise carried by this steamer from Liverpool to New York, delivered on the pier of the Inman Steamship Company on January 31, 1883, and upon the same night destroyed by fire through the alleged negligence of the respondent. The answer admitted most of the material

allegations of the libel, but denied all charges of negligence, and also of liability for the loss of the merchandise.

Upon a hearing upon pleadings and proofs in the District Court, the libel was dismissed, (29 Fed. Rep. 184,) and upon appeal to the Circuit Court, the decree was affirmed.

Libellants thereupon appealed to this court.

The following is an abstract of the facts found by the Circuit Court, so far as the same are material to the questions involved:

"2. The Egypt was one of a line of steamers owned by the respondent, and plying regularly between Liverpool and New York as common carriers. The steamers of this line arrived as often as from three to eight times per month.

"3. Respondent has run a line of such steamers for over twenty years, and during that time has docked them at a dozen different piers in the city of New York. From 1872 to 1878 it leased the pier No. 36, (old No. 44,) North River, and usually docked its vessels there. Subsequently it leased pier No. 39, North River, about six hundred feet north of pier No. 36, and has since usually docked its vessels there, and not elsewhere. The piers between Nos. 35 and 41, North River, (excluding pier No. 37,) were in 1883 all used by regular English steamship lines. These lines usually dock at their own piers, but not always, and in case of any emergency dock elsewhere, and permit each other, when the necessity arises, to use the exclusive dock of each.

"4. That said goods were shipped at the port of Liverpool on board the Egypt, and were consigned to the libellants at New York under a bill of lading, the material portions of which are cited in the opinion. (A copy is also given in the margin.[1]) The Egypt also carried as a considerable portion

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[1] *Copy of bill of lading.*

National Steamship Company, Limited.

Head Office, 21 Water Street, Liverpool; New York Office, 69 Broadway.

Liverpool to New York every Wednesday.

[Stamp, six pence.]

Shipped in good order and well conditioned, by Moore & Pringle, in and upon the steamship called the Egypt, whereof —— —— is master for the

of her cargo goods shipped by the Inman Company, which had given respondent the option of discharging at its pier, No. 36.

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present voyage, or whoever else may go as master in the said ship, and now lying in the port of Liverpool and bound for New York via Queenstown, with liberty to sail with or without pilots, and to tow and assist vessels in all situations and to all ports —

Forty-three cases merchandise, (linens and cottons,) three cases and five bales (carpets and Dundees) being marked and numbered as in the margin, and to be delivered subject to the following exceptions and conditions, viz.: The act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or peoples, loss or damage resulting from vermin, rust, sweating, wastage, leakage, breakage, or from rain, spray, coal, or coal dust, insufficiency of strength of packages, inaccuracy, indistinctness, illegibility, or obliteration of marks, numbers, brands or addresses, or descriptions of goods, injury to wrappers, however caused, or from corruption, frost, decay, stowage, or contact with or smell or evaporation from other goods, or from loss or damage caused by heavy weather or pitching or rolling of the vessel, or from inherent deterioration, risk of lighterage to or from the vessel, transshipment, jettison, explosion, spontaneous combustion, fire before loading in the ship or after unloading, heat, boilers, steam, or steam machinery, including consequences of defects therein or damages thereto, collision, stranding, straining, or other perils of the seas, rivers, steam and steam navigation or land transit of whatsoever nature or kind, and all damage, loss, or injury, arising from the perils or matters above mentioned, and whether such perils or matters arise from negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the ship owner. Not accountable for weight, contents, value, length, measure, or quantities or condition of contents, nor for money, documents, gold, silver, bullion, specie, precious metals, jewelry, precious stones, or other highly-valued goods, or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor and the value therein expressed and freight paid accordingly. The National Steamship Company, Limited, or its agents or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for any claims for loss, damage, or detention to goods under through bill of lading where the loss or detention occurs or damage is done whilst the goods are not actually in the possession of the National Steamship Company (Limited) or shipped on board the National Steamship Company's (Limited) steamer, nor in any case for more than known or invoiced value of the goods, whichever shall be least. Goods of an inflammable, explosive, or otherwise dangerous character, shipped without permission and full disclosure of their nature and con-

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"5. The Egypt arrived on January 31, 1883, and was entered at the custom-house at 1.45 o'clock in the afternoon."

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tents, may be seized and confiscated or destroyed by the ship owner at any time before delivery without any compensation to the shipper or consignee. In case any part of the within goods cannot be found for delivery during the vessel's stay at the port of destination they are, when found, to be sent back by first steamer at ship's expense, the steamer not to be held liable for any claim for delay or sea risk.

The only condition upon which glass will be carried is that the ship owner shall not be held liable for any breakage which may occur from negligence or any other cause whatever.

The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose, or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship.

The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury.

In the event of the said steamer being prevented from any cause from commencing or pursuing this voyage or putting back to Liverpool or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to have liberty to transship the goods by any other steamer to call at any port or ports.

All fines, expenses, losses, or damage which the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or description of their contents shall be paid by the shippers or consignee, as may be required, and the ship owner shall have a lien upon the goods for the payment hereof.

In the case of all goods at through rates to the interior of the United States or Canada the shipper or consignee engages to supply the agent of the steamer at New York (F. W. J. Hurst) with the necessary papers for passing the goods through the custom-house by the time of steamer's arrival or to pay all extra expense incurred in default thereof.

Should any existing or future order or restriction of the English emigration commissioners or of the English board of trade authorities prevent the above goods from being conveyed in any passenger vessel, the National Steamship Company (Limited) or any of its servants or agents are to be free of any liability for non-fulfilment of their portion of this contract. In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions (whether written or printed) in the like good

"7. For a month or more respondent had been blocked at its own pier, No. 39, in consequence of heavy cargoes, delays of its vessels by westerly winds and ice in the slips, and had been obliged in consequence to discharge two of its vessels at outside uncovered piers.

"8. Respondent's manager had arranged to send the Holland, another ship of respondent's line, and due before the Egypt, to its own pier, No. 39, and to send the Egypt to the Inman pier, No. 36. This arrangement was carried out — the Holland sent to No. 39, and the Egypt to No. 36, there being no room for her at No. 39.

"9. Steamers of regular lines, on their arrival at New York, if their docks are blocked, are not kept in the stream longer than to enable them to get berthed elsewhere. If kept in the stream the consignees make great complaint. It was more costly to dock the Egypt at No. 36, but this was done to secure to the consignees a more prompt discharge and delivery of their goods.

"10. That the Egypt began at about 4.30 o'clock in the evening of said 31st of January, 1883, to discharge her cargo upon the dock, and the thirty-six cases of merchandise belonging to the libellants were landed and discharged there prior to the fire.

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order and well conditioned, from the ship's tackle, (where the ship's responsibility shall cease,) at the aforesaid port of New York, unto Messrs. Arnold, Constable & Co. or to his or their assigns. Freight and primage for the said goods to be paid at New York as per margin. General average, if any, payable according to York and Antwerp rules. Freight, if payable in Liverpool, to be paid on delivery of the bills of lading in cash, without deduction, vessels lost or not lost. Freight, if payable abroad, to be paid in currency or gold (at the current rate of exchange for banker's sight bills on the day of the steamer's arrival) at consignee's option and before delivery of any portion of the goods specified.

In witness whereof the master or agent of the said ship hath affirmed to two bills of lading, exclusive of the master's copy, all of this tenor and date, one of which bills being accomplished, the other to stand void.

A. TITHERINGTON.

Dated in Liverpool, 18 January, 1883.

(In the margin of the bill of lading appear the numbers of the various packages of merchandise.)

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"11. Upon the entry at the custom-house of the Egypt there was granted by the collector of customs a general order to unload the steamer, and to send packages to the public store. An application was also immediately made to the collector to allow the unpermitted cargo to remain upon the wharf for forty-eight hours from the time of the granting of the general order. This application was in the following form:

"To W. H. ROBERTSON, Esq., *Collector of Customs.*

"Request is hereby made to allow the cargo of the steamer Egypt, Sumner, from Liverpool, England, unladen but not permitted, to remain upon the wharf for forty-eight hours from the time of granting general order, at the sole risk of the owners of said steamer, who will pay to the consignee or owner the value of the such cargo respectively as may be stolen, burned or otherwise lost, and who will also pay all duties which may be in any way lost by so remaining.

"F. J. W. HURST, *Owner*,
"Per J. C. RYOR, *Attorney*."

"Such application was in the form required by the collector, without which permit would not be granted, and the entire cargo would be sent to public store. A permit was granted by the collector upon this application. A special license was also granted to unload the steamship after sunset, and a bond in $20,000 was given for such license, as required by law.

"12. The general order above stated, the special license, the applications and permits, and the agreements and engagements therein contained were the usual and customary ones ordinarily made and granted in such cases, and were made under and by the authority in the bill of lading conferred upon the respondent and upon the collector of the port, and in accordance with the provisions of law and the regulations of the Treasury Department in that behalf."

"14. Under these several orders and permits, a portion of the cargo of the Egypt, including libellants' merchandise, was discharged and landed upon the Inman dock, where the same was destroyed by fire about two o'clock the next morning. That said cargo, including said merchandise belonging to

libellants, was at the time of its destruction aforesaid, in the possession of the respondent, and had never been taken into the possession of the collector of the said port of New York. That said fire broke out without any imputed negligence, and that by it the steamer was also somewhat burned.

"15. That between the arrival of the steamer and the destruction of the merchandise there was not sufficient time in which to enter libellants' goods at the custom-house, pay the duties thereon, and obtain the requisite permits for the removal of the same. That, in fact, no duties were paid upon libellants' goods, and no permits obtained prior to the destruction of the goods by fire; that said goods were at the time of their destruction 'unpermitted' goods.

"16. That upon obtaining the permits referred to, the respondent's custom-house broker caused a notice of the time and place of discharge to be posted on the bulletin board of the custom-house. It is usual to so post such notices. It is not usual to publish them in the newspapers.

"17. No notice was ever sent to or received by the libellants, nor did they have any actual knowledge of the readiness to discharge, or of the time or place of discharge of the Egypt upon her arrival.

"18. Libellants never knew that the merchandise had been landed and deposited upon the Inman dock, and never had an opportunity of removing such merchandise."

The other facts, so far as they are material, are stated in the opinion of the court.

Upon such facts the Circuit Court found, as conclusions of law, that respondent had the right to dock and discharge the Egypt at the Inman pier; that it was exempt from liability for the goods destroyed by fire on such pier; and that there was, by reason of the application to the collector to allow the unpermitted cargo to remain on the wharf, no valid agreement or binding obligation to pay the libellants the value of the goods burned.

Mr. Joseph H. Choate for appellants. *Mr. William V. Rowe* and *Mr. Treadwell Cleveland* were with him on his brief.

Opinion of the Court.

Mr. James C. Carter for appellee. A brief for the same was also filed by *Mr. John Chetwood.*

Mr. Justice Brown delivered the opinion of the court.

This case involves the liability of a steamship company for the loss by fire of a consignment of goods unloaded without personal notice to the consignee upon the wharf of a company other than the one owning the vessel.

By the Limited Liability Act, Rev. Stat. § 4282, no ship owner is liable to answer for the loss of any merchandise shipped upon his vessel by reason of any fire "happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner," and in the case of *The Scotland*, 105 U. S. 24, the exemptions and limitations of this act were held to apply to foreign as well as domestic vessels. A similar exemption from fire happening without the "fault or privity" of the owner is contained in the British Merchants' Shipping Act of 1854, 17 and 18 Vict. c. 104, § 503. The bill of lading in this case also contains an exemption of liability from loss caused by fire "before loading in the ship or after unloading." There is no comma after the word "loading" or "ship," but obviously it should be read as if there were. In view of the fact that, under no aspect of the case would the owner of the vessel be liable for the consequence of any fire occurring on board of such vessel without his fault, and that an attempt is made in this case to impose the liability, not of a warehouseman, but of a common carrier and insurer against fire, after the contract of carriage had been fully performed, it would seem that such liability ought not to be raised out of the contract in this case except upon clear evidence, and for the most cogent reasons. The liability of the company for the goods while upon the wharf is a mere incident to its liability for them while upon the ship, and if the liability is more extensive under the incidental contract of storage than it was under the principal contract of carriage, it is an exception to the general rule that the incidental liability of a contracting party is not broader than his liability upon the principal contract.

Two facts are mainly relied upon in this case for holding the respondent company to the liabilities of an insurer:

1. That the Egypt did not unload at her usual wharf, but at what is known as the Inman pier, and that no actual notice was given to the libellants of such unloading.

2. In the application to the collector to allow the unpermitted cargo of the steamer to remain upon the wharf for forty-eight hours there was a stipulation that it should be "at the sole risk of owners of said steamer."

We shall proceed to dispose of these questions in their order.

1. As bearing upon the liability of the vessel after the cargo is unladen the following exemptions in the bill of lading are pertinent and necessary to be considered:

(1) "Fire before loading, in the ship, or after unloading."

(2) "The National Steamship Company, (Limited,) or its agents or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance."

(3) "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose, or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store, to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

It is admitted that, under what may be termed the common law of the sea, a delivery of the cargo, to discharge the carrier from his liability, must be made upon the usual wharf of the vessel and actual notice be given to the consignee, if he be known. This was the ruling of this court in the case of *The Tangier*, (*Richardson* v. *Goddard*,) 23 How. 28, 39, and *The Eddy*, 5 Wall. 481, and is in conformity with the great weight of English and American authority. *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *Gibson* v. *Culver*, 17 Wend. 305; 1 Parsons on Shipping, 222.

This rule, however, originated prior to the era of steam navigation, when a voyage from Liverpool to New York rarely consumed less than three weeks; when the time of the arrival of the vessel could not be forecast with any accuracy; when crews were discharged immediately upon her arrival; and the vessel was usually detained several weeks in the slow and laborious process of unloading, taking on cargo, and refitting before setting out upon another voyage. Such methods of delivery were found wholly inadequate to the necessities of modern commerce, and particularly to the comparatively short voyages of the large transatlantic passenger steamers, which are kept permanently equipped with large and expensive crews, at a cost of several hundred dollars per day, and in order to be profitably employed must be kept in almost constant motion. In such cases the consignees of the cargo may be numbered by the hundreds, and a requirement that each consignee shall have a personal notice of the unloading of the cargo, in order to relieve the carrier from responsibility, would necessitate delays which might consume the entire profits of the voyage. It is of the utmost importance that the discharge of the cargo shall begin as soon as possible after the vessel arrives at her wharf, and if the consignee may sometimes be spurred to greater diligence, or put to some inconvenience in removing his consignments, he receives a compensation in the lower rate of freight the vessel is thereby enabled to charge.

To obviate the difficulties attendant upon the ancient method of discharging, the regular steamship lines are in the habit of providing themselves with wharves having covered warehouses, into which the cargo is discharged, and of inserting in their bills of lading stipulations similar to those found in this case, viz., that the responsibility of the vessel shall cease after the goods are discharged, and thus of extending their statutory exemption from fire to such as may occur before loading or after unloading. In view of the fact that the piers of the regular steamship lines are well known to every importer, and the day of arrival of each steamer may be predicted almost to a certainty, we perceive nothing unreasonable in this stipulation. An importer, having reason to anticipate

the arrival of goods by a certain steamer, by putting himself in communication with the office of the company, may usually secure a notice of several hours of the actual arrival of the vessel at her wharf. It seems, too, by the sixteenth finding in this case, that, in lieu of a personal notice to each consignee or of publication through the papers, a custom has grown up in the port of New York of posting on a bulletin board in the custom-house a notice of the time and place of discharge. Taking all these facts into consideration, we see no impropriety in the company limiting itself to the liability of a warehouseman with respect to the goods so discharged into its own warehouse. Indeed, as applied to the usual wharf of the steamer, we do not understand it to be seriously questioned in this case. In fact, an argument appears to have been made in the District Court to the effect that the Limited Liability Act applied to this fire to exonerate the company, but the court held, and doubtless properly, that a fire originating upon the dock could not be said to have "happened to the ship" within the meaning of section 4282, even though the fire extended to and did some damage to the vessel. *Morewood* v. *Pollok*, 1 El. & Bl. 743. No good reason, however, is perceived why, if a wise policy requires the exemption of the carrier from a fire occurring without his fault, such exemption should not extend to any such fire while the goods are in his possession and under his control, or at any time before actual delivery to the consignee. But, however this may be, there can be no question of the power of the carrier to extend his statutory exemption from fire to such as occur after the discharge of the cargo, by special stipulation to that effect in the bill of lading. Thus in *York Co.* v. *Central Railroad*, 3 Wall. 107, it was held that the common law liability of a carrier might be limited by special contract with the owner, and that the exemption in a bill of lading from losses by fire was sufficient to protect the carrier, if the fire were not occasioned by any want of due care on his part. See also *The Lexington*, (*New Jersey Steam Navigation Co.* v. *Merchants' Bank*,) 6 How. 344, 382; *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S.

312. Indeed, a general exemption from the consequences of fire has been held to extend not only to fires happening on board the vessel, but to fires occurring to the goods while on the wharf awaiting transportation. *Scott* v. *Baltimore &c. Steamboat Co.*, 19 Fed. Rep. 56.

No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility. Thus in *Dickson* v. *Dunham*, 14 Illinois, 324, it was said that "it was competent for the defendant," the carrier, "to set up a custom or usage in the port of Chicago, that goods should be delivered at the wharf selected by the master of the vessel, and that consignees should receive their goods there, with the averment of knowledge of such a custom in the plaintiff, and that this contract was made in accordance with it." So also in *Gatliffe* v. *Bourne*, 4 Bing. (N. C.) 314, 329, Chief Justice Tindall said: "We know of no general rule of law which governs the delivery of a bill of goods under a bill of lading, where such delivery is not expressly according to the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery." See also *Farmers' and Mechanics' Bank* v. *Champlain Transportation Co.*, 23 Vermont, 186; *The Tangier*, 1 Cliff. 396; *Richmond* v. *Union Steamboat Co.*, 87 N. Y. 240; *Gibson* v. *Culver*, 17 Wend. 305; *The Boston*, 1 Lowell, 464. In *The Sultana* v. *Chapman*, 5 Wisconsin, 454, there was a delivery at a place where the court held the boat had no right to leave the goods, and they were there destroyed. Under such circumstances, notwithstanding the exception in the bill of lading, the carrier was held not to be exempted from liability for the loss. "He had no right," said the court, "to place these goods where he did; and having done so, and a loss having ensued, he must be held responsible for it, as being occasioned by his own negligence or misconduct."

While there is no express provision in the bill of lading in this case dispensing with notice to the consignee, the provision that the goods shall be taken from alongside by the consignee immediately the vessel is ready to discharge, is inconsistent

with the idea of personal notice, since such a notice would necessitate a delay of one or two days in the discharge of the cargo, while the notices were being given. If the goods were not taken by the consignee the carrier was authorized to deposit them at the risk of the consignee "in the warehouse provided for that purpose," meaning, of course, the warehouse upon the pier. His obligation to give notice, if any such existed, must, under the terms of the bill of lading allowing an immediate discharge of the cargo, be cotemporaneous with such discharge, and too late to be of any avail to the consignee. Such notice appears to have been given in this case, as the libellants' broker in his testimony, to which we have been referred, says: "The invoice and bills of lading were sent down to me on the 31st of January, and the entries made out, . . . and lodged in the custom-house at twenty-five minutes past two." In *Gleadell* v. *Thomson*, 56 N. Y. 194, 197, it was said of a similar stipulation in a bill of lading, that the goods should be taken from alongside the vessel is ready to discharge: "The landing of the goods upon the pier of the plaintiff, under the circumstances of this case, did not, we think, change his relation to the goods, and divest him of his custody of them as a carrier. The privilege to make this disposition of them was secured to him by the bill of lading, unless the consignee was ready to take the goods from the ship whenever it was ready to discharge. It was not incumbent upon the plaintiff to give notice of a readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier. They, however, remained after such deposit in his custody as carrier, subject to the modified responsibility, created by the contract, until after notice had been given to the consignees of their arrival, and a reasonable time had elapsed for their removal. Meanwhile the defendants assumed the risk of 'fire, loss, or injury' to the goods, according to the contract, but the language used did not exempt the plaintiff from liability for an injury resulting from his own negligence."

The cases relied upon by the libellants do not support their contention. In the case of *The Santee*, 7 Blatchford, 186, a

bill of lading covering a shipment of cotton, contained a clause that the cotton should be at the risk of the consignee as soon as delivered from the tackles of the vessel at the port of destination. It appeared that the consignee had proper notice of the arrival of the vessel, and of her discharge, and an opportunity by reasonable diligence to identify his cotton and receive it. The cotton was placed safely on the wharf, when discharged, and a portion of it, belonging to the libellants, was removed by some other person, but was not actually delivered by the agents of the vessel to such other party. It was held that the vessel was not liable for the loss. It is true that, in delivering the opinion, it was said the carrier was still bound to give suitable information to the consignees, to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. But notice in this case was admitted to have been given, and the only question was whether under the bill of lading the carrier was liable after the cotton was discharged, and it was held that he was not. Nor was he "bound to watch the property after it passed beyond the vessel's tackles, to see that it was kept safe or protected from removal through mistake or design, by third persons."

In *Collins* v. *Burns*, 63 N. Y. 1, the bill of lading contained a stipulation much like the one under consideration, and it was held that the clause providing for immediate discharge into the warehouse at the risk of the consignee of fire, loss, or injury, did not exonerate the carrier for delivering goods to the wrong party, or to a drayman who was not authorized to receive them. The Court of Appeals, however, held expressly that the liability of defendants was that of warehousemen, and, therefore, that they were responsible only for negligence.

So in *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170, the goods were discharged from the ship and deposited on a proper wharf, and after the consignees had had three full days to remove them, it was discovered that a part had been removed from the wharf by some one without the authority of the consignees. It was held that, as the loss occurred after the lapse of a reasonable time for removal of

the goods by the consignees, after notice of arrival, defendant was not liable as a common carrier, but that the defendant was negligent in omitting to take ordinary care of the goods, and allowing them to be removed without taking receipts. It was expressly held, however, that the liability of defendant as carrier terminated with the delivery of the goods upon the wharf, and that its liability arose from its negligence in delivering them to the wrong person.

It is claimed, however, that the berthing of this ship at a pier other than her own was in legal effect a deviation, which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a "voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the ship insured." 1 Bouvier's Law Dict. 417; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Davis* v. *Garrett*, 6 Bing. 716; *Williams* v. *Grant*, 1 Connecticut, 487; as, for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island, and lost her cargo in a storm, *Crosby* v. *Fitch*, 12 Conn. 410; or where a carrier is guilty of unnecessary delay in pursuing a voyage, or in the transportation of goods by rail. *Michaels* v. *N. Y. Central Railroad*, 30 N. Y. 564. But, if such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer. *Oliver* v. *Maryland Ins. Co.*, 7 Cranch, 487; *Columbian Ins. Co.* v. *Catlett*, 12 Wheat. 383. In *Hostetter* v. *Park*, 137 U. S. 30, it was held to be no deviation, in the Pittsburg and New Orleans barge trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo *en route*, and to tow the same to the several points where the cargo might be stored, it having been shown that such delays were within the general and established usage of the trade. So, in *Gracie* v. *Marine Ins. Co.*, 8 Cranch, 75, it was held to be no deviation to land goods at a lazaretto or quarantine station, if the usage of the trade permitted it, though by the bill of lading the goods were "to be safely

landed at Leghorn." See also *Phelps* v. *Hill*, 1 Q. B. D. (1891) 605.

In this connection the findings are:

(3) That the regular English steamship lines usually dock at their own piers, but not always, and, in case of any emergency, dock elsewhere, and permit each other, when the necessity arises, to use the exclusive dock of each. (7) That for a month or more before January 31, 1883, respondent had been blocked up at its own pier, No. 39, in consequence of heavy cargoes, delays of its vessels by westerly winds and ice in the slips, and had, in consequence, been obliged to discharge two of its vessels at outside uncovered piers. (9) That steamers of regular lines, on their arrival at the port of New York, if their docks are blocked, are not kept in the stream longer than to enable them to berth elsewhere. If kept in the stream consignors make great complaint. It was more costly to dock the Egypt at pier No. 36, but it was done to secure to the consignees a more prompt discharge and delivery of their goods. (26) That pier No. 36, North River, was a fit and proper place to discharge the steamship Egypt at the time in question and to discharge from her libellants' goods.

If it be true that the pier of the respondent company was so blocked that the Egypt could not obtain access to it to discharge her cargo, it was, so far from being a deviation, a matter of ordinary prudence to select a neighboring pier for that purpose. Had this cargo been discharged at a remote, unusual, or inaccessible spot, or upon an uncovered pier, so that it was exposed to the weather or to any unusual hazard, and a loss had been incurred, we should not have hesitated to hold the carrier liable, notwithstanding the stipulation against the consequence of negligence in its bill of lading. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 359; *The Aline*, 19 Fed. Rep. 875; *The Boskenna Bay*, 22 Fed. Rep. 662. No such question, however, is presented here. While the libel alleges that the loss occurred through the negligence of the respondent, no effort was made to prove this, and there is no finding that such was the case. Indeed, there is nothing to indicate that the Inman pier was not a perfectly proper place to

discharge a cargo, or that it was not equipped with the usual appliances for the extinguishment of fires.

It is insisted, however, that libellants had a right to suppose that the Egypt would discharge her cargo at her regular pier, and that, while they might be bound to take notice of that fact, they were entitled, if she selected another pier, to a personal notice of the time and place of delivery, that an opportunity might be given them to be present and receive their consignments. But if, under the usages of trade or the necessities of the particular case, it was allowable and proper for the respondent to select another pier for the discharge of its cargo, we do not understand that its obligation to its consignees was thereby increased or modified, at least unless the libellants can show that they were actually prejudiced by such change. Practically the same questions are involved, viz., whether if she had discharged at her own wharf, the company was bound to give notice before it could relieve itself of its responsibility. The real question still is whether, if she had gone to her own wharf, and the fire had occurred under the same circumstances, the vessel would have been liable for the loss. It was for the mutual advantage of the ship and the consignees that the cargo should be unloaded at the earliest possible moment — the ship, that she might discharge herself of responsibility and take on her return cargo — the consignees, that they might secure their goods as soon as possible. The North River piers in that neighborhood were all used by steamers engaged in the Liverpool trade. The pier selected was only six hundred feet from the regular pier of the line, and inquiry at that pier would doubtless have apprised libellants, or their agent, where the Egypt was actually discharging her cargo.

In addition to this there is a finding that, upon obtaining the permits for the immediate unloading of the cargo, the respondent's custom-house broker caused a notice of the time and place of discharge to be posted on a bulletin board in the custom-house; that it is usual to post such notices, and is not usual to publish them in the newspapers. It is true there was an exception taken to this finding upon the ground that there

was no evidence in support of it. The testimony, however, of the witness Ryor, the custom-house broker, was to the effect that he attended to getting out the usual papers for the respondent company to allow the discharge and to passing all their steamers through the custom-house; that, on the arrival of the Egypt, the captain brought the manifest, took the usual oath, and made out applications for the usual permits to land goods, discharge at night, and to allow the goods to remain on the wharf. "We get the permit taken out, signed by the naval officer and collector, and after the permits are all taken out, we usually post a notice where the vessel will discharge (giving copy of notice). I have no reason to suppose the notice was not posted in this case. It is done in every case. I am not positive whether it was done in this case, but it is a part of the routine of entering a vessel to do so. I have no doubt it was done." The witness evidently had no definite recollection of this particular notice, but he had no doubt that he pursued his usual course in posting it. Respondent's agent also testifies that it was always usual to put up such notice at the custom-house. The custom-house broker for the libellants, Arnold Constable & Company, testified in this connection that the invoice and bills of lading of the Egypt were sent down to him on January 31; that the entries were made and lodged in the custom-house at twenty-five minutes past two. "I knew where the board is where they put up notices of arrivals and the steamer's discharge. . . . That is around the corner going into the cashier's office. . . . It isn't any great distance. . . . I never look at that unless I want to find out where a vessel was discharged, a strange vessel; possibly I might look then; I have not looked there for years." While this testimony is not direct and positive to the fact sought to be proven, it creates, when aided by the ordinary presumption arising from the course of business, a strong probability that the notice was posted. The practice, even of a private office, if well established, is presumed to have been followed in individual cases, and is accepted as sufficient proof of the fact in question when primary evidence of such fact is wanting. 1 Greenl. Ev.

§ 40; *Nicholls* v. *Webb*, 8 Wheat. 326; *Price* v. *Torrington*, 1 Salk. 285; *Champneys* v. *Peck*, 1 Stark. 404; *Pritt* v. *Fairclough*, 3 Camp. 305; *Doe* v. *Turford*, 3 B. & Ad. 890, 895; *Dana* v. *Kemble*, 19 Pick. 112. We think the conclusion of the court was justified by the evidence in this particular.

But, even supposing that actual notice had been given, it could not have been given before the arrival of the ship, and the names of the consignees were known, and it would then have been too late for the libellants to take their goods away. The findings are that the Egypt was entered at the custom-house at forty-five minutes past one in the afternoon; that she began to discharge her cargo at half-past four, and that libellants' merchandise was discharged prior to the fire. (15) And that between the time of the arrival of the steamer and the destruction of the merchandise, there was not sufficient time in which to enter the libellants' goods at the custom-house, pay the duties thereon, and obtain the requisite permits for the removal of the same. If, then, it be true that libellants could not have removed their goods before the fire, it is difficult to see how the want of a notice could have contributed to the loss. We are clearly of the opinion that, under the custom of the port and exigencies of the service, there was no obligation to delay the discharge of the cargo until notice could be given, and a reasonable time had elapsed before the goods could be taken away. While the nineteenth finding is to the effect that libellants had, before this consignment, received from the respondent company six other consignments under bills of lading in the same form, all of which were landed and discharged on their own pier, there is nothing to indicate that libellants took any steps whatever upon the faith of such previous practice, made any inquiries as to when the Egypt was expected, or at what pier she would discharge her cargo. Indeed, while their own broker was at the custom-house attending to the entry of these goods, he did not even take the trouble to look at the bulletin to see where the Egypt was being discharged. If libellants had shown that, relying upon the previous practice, they were ready at pier No. 36 to receive the cargo, or were misled by

the discharge at pier No. 39, they would have shown a much stronger title to recover. The inference is irresistible that, even if the Egypt had discharged at her own wharf, they would not have been there to receive, and could not have received their consignments, which would have been stored in the company's warehouse, and exposed to the same danger of fire — in other words, the delivery at the Inman dock did not in any legal sense contribute to the loss. There was no stipulation in the bill of lading that the Egypt would unload at No. 36, from which a duty to give notice might be implied, if she were compelled to select another pier.

Upon the facts of this case exhibiting a necessity for a discharge elsewhere than at her own pier, and in the absence of any evidence that libellants were prejudiced by the failure of the Egypt to discharge at her usual wharf, we think there was no breach of duty on the part of respondent in this particular.

2. Another serious question, however, is presented by the proviso in the application to allow the unpermitted cargo to remain upon the wharf, viz., that it should remain "at the sole risk of owners of said steamer, who will pay the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost, and who will also pay all duties on cargo which may be in any way lost by so remaining."

It seems that, upon the arrival of a transatlantic steamer, it is usual to apply for and obtain a general order to allow to be landed and sent to the public store (not the warehouse on the wharf) all packages for which no special permit or order shall have been received; also, a permit to allow such portion of the cargo as is unladen, but not permitted, to remain upon the wharf for forty-eight hours from the time of the granting of the above general order, at the expiration of which time they are sent to the proper general order store; and also a special license to permit the cargo to be unladen at night. These orders, licenses, and permits are granted in pursuance of the general regulations of the Treasury Department.

Granting that the request made by the company is, upon

its face, broad enough to impose upon the company the responsibility for goods lost by fire, it must be construed in connection with the following stipulation upon the same subject in the bill of lading, viz.: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge. . . . The collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury."

Some criticism is made upon the words "so left by consignee," libellants insisting that the word "left" implies a voluntary leaving of the cargo upon the wharf after notice of the discharge of the same has been received by the consignee. We are not inclined, however, to affix to it such a technical meaning. In view of the fact that the object of the stipulation was evidently to exempt the carrier from responsibility for fire occurring at any time after the discharge of the cargo, and particularly during the forty-eight hours they were permitted to remain upon the wharf, which forty-eight hours, under the terms of the permit, began to run from the time of the general order to unload was granted, we think it clear that it was intended to apply during this time, whether the goods were technically "left" by the consignee or not, and that the proviso should be interpreted as if it read: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at consignee's risk of fire, loss, or injury." This permission, though granted at the request of the ship owner and primarily for his benefit, is really of more value to the consignees, since a convenient opportunity is there afforded them to examine their goods, and they are saved the expense of cartage to a bonded warehouse and storage therein.

The question presented then is substantially this: A and B agree that in a certain contingency A shall assume the risk of the loss of his goods by fire. Subsequently B agrees with C

that, in precisely the same contingency, he shall be responsible to A for the loss of the same goods. Waiving the question whether this means any more than that he shall be responsible so far as C is concerned, does the latter contract supersede the earlier? Unquestionably it would, if it were between the same parties. In this case, however, the first contract was made by B (the respondent) in full contemplation of the fact that it would be obliged to enter into the second, and for the special purpose of providing against it. Now, to say that, having entered into the first contract, knowing that it would have to enter into a second one wholly inconsistent with the first and intending to be bound by it, is scarcely creditable to the intelligence of its agent. Libellants, too, though parties, or rather privies to the first contract, were not parties to the second, and so far as it appears did not even know that it was or would be entered into, except as they may have known a general usage to protect officers in this manner. The position of the parties had not changed in the interval; no new consideration moved from the libellants; and while the contract was nominally made for their benefit, this gift of the collector was purely a voluntary one. Indeed, the contract seems really to have been for the protection of the collector himself. Under these circumstances it is clearly the duty of this court to harmonize these contracts, if it be possible to do so. It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party. *Hendrick* v. *Lindsay*, 93 U. S. 143; *National Bank* v. *Grand Lodge*, 98 U. S. 123; *Keller* v. *Ashford*, 133 U. S. 610; *Cragin* v. *Lovell*, 109 U. S. 194; *Willard* v. *Wood*, 135 U. S. 309. No case has gone so far as to hold that, where the person for whose benefit the contract is made, has himself or by his privy in estate entered into a contract inconsistent with this, he may repudiate such prior contract, and claim the benefit of the second simply because it has become for his interest to do so. We know of no principle which authorizes one party to an agreement to vary it, even against his own interest, without the consent of the other. As observed by the Court of Appeals of New York, in *Simpson* v. *Brown*, 68 N. Y. 355: "It is not

every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit *as its object* and he must be the party intended to be benefited." See also *National Bank* v. *Grand Lodge*, 98 U. S. 123; *Garnsey* v. *Rogers*, 47 N. Y. 233.

The principle above announced was still further limited by the Court of Appeals in *Vrooman* v. *Turner*, 69 N. Y. 280, in which it was said that, to give a third party, who may derive a benefit from the performance of a promise an action, there must be—*first*, an intent by the promisor to secure some benefit to the third party; and, *second*, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally.

It is necessary to a correct understanding of this contract to examine somewhat in detail the circumstances under which it was entered into, and the authority under which the collector acted in prescribing its terms. By Revised Statutes, sections 2867 and 2869, general authority is given to the collector to authorize the unloading of vessels arriving within the limits of their collection districts, and to grant a permit to land the merchandise. By section 2966 the collector is authorized to take possession of such merchandise, and deposit the same in bonded warehouses, and by section 2969 all merchandise of which the collector shall take possession under these provisions shall be kept with due and reasonable care at the charge and risk of the owner. By section 2871 the collector, "upon or after the issuing of a general order," (for the unloading of the cargo,) "shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is to say, between sunset and sunrise," upon a bond of indemnity being given, etc., "and any liability of the master or owner of any such steamship to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license or of any general order, but such liability

shall continue until the merchandise is properly removed from the dock whereon the same may be landed." There is certainly nothing here which contemplates that the owner of the vessel shall enter into any independent obligation, assuming new liabilities or expanding in any way existing liabilities, to the consignee. The object of the statute is clearly to preserve the *status quo;* to continue such liability as already exists and to preclude the ship owner from claiming that, by the action of the collector, his liability to the owner of the merchandise is impaired or restricted. In the language of the statute, any previous liability "shall not be affected," "but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed." It is true that no mention is here made of the power of the collector to allow the unpermitted cargo to remain forty-eight hours upon the wharf, and no such power is expressly given; but by section 2989 "the Secretary of the Treasury may from time to time establish such rules and regulations, *not inconsistent with law*, for the due execution of the provisions of this chapter, and to secure a just accountability under the same as he may deem to be expedient and necessary." While there is nothing in the statute allowing any fixed time to elapse between the unlading of the goods and their removal to a bonded warehouse, the statute does not prohibit such time being allowed, and as some interval must necessarily elapse for the examination and appraisement of the goods designed for immediate delivery to the importer — duties which can most readily be performed while the goods are yet upon the wharf — and as it is for the mutual benefit of the government and consignee to allow some such interval of time to elapse, the Secretary of the Treasury is doubtless vested with a certain discretion in that particular, under the power given him by section 2989, and also by section 251, which authorizes him to make rules and regulations not inconsistent with law in carrying out the provisions of law relating to raising revenue from imports.

In pursuance of this authority the Secretary of the Treasury, on May 5, 1877, adopted certain regulations concerning the discharge of steamships, of which the following only is mate-

rial: "Goods will be delivered from the docks by the inspector as fast as permits therefor are presented, and such as are discharged for which no delivery permit has been received will be sent to the general-order store. The collector may, at the request of the master, agent, or owner of the vessel, allow goods landed but not 'permitted' to remain on the docks, at the sole risk of the owner of the vessel, not longer than forty-eight hours from the time of their discharge, upon the production of evidence that the owner of the vessel assumes the risk of the goods allowed to remain and agrees to pay the duties on any goods which may be lost by so remaining. This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods that may be lost, and must be signed by the owner of the vessel or his agent duly authorized. The consent of the collector thereto must also be granted in writing. At the expiration of the forty-eight hours, no permit having been received for their delivery by the inspector, the collector shall send the goods to the general-order store to have the same weighed or gauged, if required."

In this connection it must be borne in mind that the Secretary of the Treasury is an officer of the government; that his powers are limited by law; that his duty is to protect the revenues of the government and to prevent smuggling or other illegal practices, whereby the government may be defrauded of its revenue; and that he owes no duty to individuals beyond seeing that their rights are not prejudiced any further than is necessary by the action of the customs officers. He is neither the agent of the vessel nor of the importer, but stands between them, representing only the government and charged only with the collection of its revenue. The above regulation, when carefully examined, is consistent with this view. It requires the collector to allow the goods to remain upon the docks "at the sole risk of the owner of the vessel," and requires the latter to assume "the risk of the goods allowed to remain," and to agree "to pay the duty on any goods which may be lost by so remaining." It is obvious

from the context that the risk referred to is the risk as between the owner of the vessel and the government, viz., the risk of paying duties upon such goods as may be lost during the forty-eight hours. The permit is granted primarily for the benefit and at the request of the vessel, which retains its lien for freight for the goods so long as they remain on the dock. The government has as yet no claim for duties against the consignee of the goods, and it is just that the owner of the vessel should assume the liability for duties. There is nothing here indicating an intention of imposing any liability upon the ship owner for the goods themselves, except so far as to protect the government from loss. The loss referred to is probably a loss by theft, to which these warehouses are peculiarly subject, since, if the goods were destroyed by fire, the consignee would, under section 2984, be entitled to an abatement or refund of duties. This construction of the ship owner's obligation is rather emphasized than otherwise by the subsequent clause of the regulation: "This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods which may be lost," etc. The risk he thus assumes is the risk of paying the duties upon goods which may be lost. There is nothing in these instructions, interpreted in the light of the statute and of the powers of the collector, to justify the inference that it was intended to impose any new or different obligation upon the owner of the vessel, with respect to the consignees of the merchandise.

In the forms prescribed, probably by the department, to carry out these regulations, however, there is an apparent departure both from the language of the statute and the Treasury regulations, in the obligation the owner of the vessel is required to assume, "to pay to the consignee or owner the value of such cargo respectively as may be stolen, *burned*, or otherwise lost, and also pay all duties on cargo which may be in any way lost by so remaining." Here the obligation to indemnify the consignee first appears and occupies the most prominent place, and is extended to goods stolen, burned, or

otherwise lost, while the obligation to pay duties is mentioned rather incidentally than otherwise. Wherever, or by whomsoever these forms were prepared, we must, for the purposes of this case, treat them as the act of the collector, who, if this contract be construed as intended for the protection of any one but the collector himself, clearly exceeded his authority in requiring the owner of the vessel to assume, as against the consignee, the risk of their being burned while upon the wharf. As the Circuit Court finds that "such application was in the form required by said collector, without which permit would not be granted, and the entire cargo would be sent to the public store," it cannot be treated as the voluntary act of the ship owner any further than this contract or obligation conformed to the requirements of the statute or the Treasury regulations, which were designed, as we have already stated, only to preserve the previous rights of the consignee against the owner of the steamship unimpaired by the action of the collector. Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties *inter sese* as to be of no avail to the consignee.

It is a familiar doctrine in this court that a bond or other obligation extorted by a public officer, under color of his office, cannot be enforced, and the remarks of this court in the case of *United States* v. *Tingey*, 5 Pet. 115, 129, are pertinent in this connection. In this case the Navy Department caused a form of bond, not prescribed by law, to be prepared and transmitted to one Deblois, a person to whom the disbursement of public moneys was entrusted as purser, to secure fidelity in his official duties, with a condition that it should be executed by him with sufficient sureties before he should be permitted to remain in office, or to receive the pay or emoluments attached to the office. "The substance of this plea," said the court, "is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its

emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly then an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law."

A distinction is drawn in this class of cases between a bond compulsorily executed, as in the case under consideration, and a bond or other obligation voluntarily given to the government for which there is no statutory authority. In this latter case the bond has been held to be valid. *United States* v. *Bradley*, 10 Pet. 343, 358; *United States* v. *Hodson*, 10 Wall. 395.

Upon the whole case we are of opinion:

1. That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid.

2. That the discharge of the cargo at the Inman pier was not in the eye of the law a deviation such as to render the carrier an insurer of the goods so unladen.

3. That if any notice of such unloading was required at all, the bulletin posted in the custom-house was sufficient under the practice and usages of the port of New York.

4. That libellants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, were not prejudiced by the change.

5. That the agreement of the respondent with the collector of customs to pay the consignees the value of the goods was not one of which the libellants could avail themselves as adding to the obligations of their contract with respondent.

The decree of the Circuit Court is therefore

Affirmed.

Dissenting Opinion: Jackson, Field, Gray, JJ.

MR. JUSTICE JACKSON, with whom concurred MR. JUSTICE FIELD and MR. JUSTICE GRAY, dissenting.

I dissent from the judgment and opinion of the court in this case.

The liability of the respondent is not relieved by the provisions of section 4282 of the Revised Statutes, reënacting the first section of the act of Congress of March 3, 1851, as the fire by which the goods were destroyed did not happen "to or on board the vessel." *Morewood* v. *Pollok*, 1 El. & Bl. 743; *Salmon Falls Mfg. Co.* v. *Bark Tangier*, 21 Law Reporter, 6. Nor is the question of the carrier's liability for loss of the goods controlled by any supposed policy of that enactment.

The National Steamship Company, by the contract of affreightment embodied in the bill of lading, undertook not merely to carry, but to *deliver* the thirty-six cases of merchandise in question at the port of New York *unto* the libellants in like good order and condition as received, subject to certain exceptions and conditions, designed to lessen or limit its liability and modify its duty as a common carrier.

The goods were not delivered, either actually or constructively, to the consignees, but were destroyed by fire while still in the custody and possession of the steamship company as carrier, after being landed and deposited on the Inman pier, No. 36, under a special order or permit which the steamship company applied for and obtained from the collector of the port, allowing the goods to remain upon the wharf for forty-eight hours from the time of granting the general order to discharge.

The steamship company, as a common carrier, is, upon well-settled principles, responsible for this loss, unless it is relieved from liability by some special exception or express stipulation in the bill of lading, or by reason of some established or known usage at the port of New York.

The conditions and provisions contained in the bill of lading, so far as the same are material to the present controversy, are as follows:

1. "Fire before loading in the ship, or after unloading."

2. "The National Steamship Company, or its agents, or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance."

3. "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury, in the warehouse provided for that purpose or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

4. "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury."

These provisions of the affreightment contract, modifying and qualifying the carrier's common law liability, must, in accordance with the well-settled rule, be construed strictly. Their meaning is not to be extended by presumption so as to give the carrier protection beyond what has been stipulated for in clear and unmistakable terms. In so far as they are ambiguous or leave the intention of the parties in doubt, they are to be construed against the steamship company. *Edsall* v. *Camden and Amboy Railroad*, 50 N. Y. 661; *Taylor* v. *Liverpool & Gt. Western Steam Co.*, L. R. 9 Q. B. 546; Bishop on Contracts, 411; Carver on Carriers, § 77.

Now, subjecting the terms and stipulations of the bill of lading to the test of this established rule of construction, did they clearly and expressly confer upon the steamship company the right to discharge and deposit the goods upon the Inman wharf at the risk of the consignees, without previous notice to them, or any knowledge on their part, as to when and where the steamer would be docked and its cargo landed?

It is settled by the authorities that it is the duty of the carrier, unless specially relieved from so doing by the contract of affreightment, to give due and reasonable notice to the con-

signee of the time and place of discharging the goods, and to properly separate the different consignments, so as to afford the consignee a fair opportunity to remove the goods, or to put them under proper care and custody.

In *The Eddy*, 5 Wall. 481, 495, the general rule is thus stated by this court: "Delivery on the wharf, in the case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment." This statement of the law is reaffirmed in *Ex parte Easton*, 95 U. S. 68, 75, and is fully supported by the authorities both in this country and in England.

Thus in *McAndrew* v. *Whitlock*, 52 N. Y. 40, it was held that a carrier of goods, by water, may land them at a wharf at the port of destination, but not until after he has given the consignee due notice of their arrival and unlading, and afforded him a reasonable time to take charge of and secure them. In the meantime, instead of leaving them on the wharf, it is his duty to take care of them for the owners. See also to the same effect *Zinn* v. *N. J. Steamboat Co.*, 49 N. Y. 442; *The Mary Washington*, Chase, 125; *The Santee*, 7 Blatchford, 186; *Kohn* v. *Packard*, 3 La. 224; *The Tybee*, 1 Woods,

358, 361; Angell on Carriers, § 310, and Redfield on Carriers, § 129.

In the present case, as shown by the seventeenth and eighteenth findings of fact, the carrier did not comply with the requirement of the law in giving notice of the time and place the steamer would discharge her cargo, nor did the consignees have any knowledge either of the vessel's readiness to discharge or that their merchandise would be or had been landed and deposited upon the Inman dock; and the question is whether the special conditions and stipulations of the bill of lading were intended to dispense with such notice, or can be reasonably construed to mean that the carrier was authorized to deposit the goods on the wharf at the risk of the consignees without giving them previous notice, and a reasonable opportunity to take charge of the same.

The only clauses of the bill of lading bearing upon this question are the first, third, and fourth, as above quoted.

The exemption from liability for loss by "fire after unloading," does not, by its terms, confer any authority to deposit the goods upon the wharf without notice to and at the risk of the consignees. The words, "fire after unloading," must receive a reasonable construction. They manifestly do not confer upon the carrier an unqualified discretion as to when and where the cargo may be unloaded. The steamship company could not, for instance, under that provision of the bill of lading, have discharged the goods of the consignee at Brooklyn or Jersey City, and claimed exemption from liability in the event of their destruction by fire while so landed. The clause clearly contemplates, and should be confined to, a lawful unloading, made in the proper execution of the contract to deliver — such an unloading as will conform to the law or usage of the port of destination, or to the special contract of the parties. The generality of its language in this case is to be restricted and interpreted by the subsequent and more particular provision found in the third of the above clauses, directing the disposition to be made of the goods, if the same are not taken from alongside of the vessel when it is ready to discharge. These clauses do not operate to limit the carrier's

duty and obligation as prescribed by law, beyond what is clearly expressed in the terms thereof, or may be fairly implied therefrom. They do not, either singly or collectively, relieve the carrier from its duty to notify the consignees of the time and place of discharging the merchandise; nor do they authorize the carrier to deposit the goods on the wharf at the risk of the consignees without such notice.

In *The Santee*, 7 Blatchford, 186, the bill of lading contained the special clause that the articles named therein should be at the risk of the consignee or owner thereof, as soon as delivered from the tackles of the steamer at her port of destination, and that they should be received by the consignee, package by package, as so delivered. If not taken away the same day they might be sent to a store or permitted to lie where landed, at the expense and risk of the owner or consignee. It was held by the court that, notwithstanding such special contract, it was the duty of the carrier to give reasonable notice to the consignees of the arrival and discharge of the vessel, so as to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. The same rule is laid down in *Collins* v. *Burns*, 63 N. Y. 1; *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170; and Wheeler on Carriers, 333.

In *Tarbell* v. *Royal Exchange Shipping Co.*, 110 N. Y. 170, 180, the bill of lading on merchandise from a foreign port contained the provision that the goods were to be delivered from the ship's deck (when the ship owner's responsibility should cease) at the port of New York, and "were to be received by the consignees immediately the vessel is ready to discharge, or otherwise they will be landed and stored, at the sole expense and risk of the consignees, in the warehouses provided for that purpose, or in the public store, as the collector of the port of New York shall direct." The Court of Appeals of New York held that the carrier must, if practicable, give notice to the consignee of the arrival of the goods, and that when this had been done, and the goods had been discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the

carrier as such would terminate, and, in respect to the clauses in question, the court said: "The general duty of a carrier to deliver, and of a consignee to receive, as defined in the authorities to which we have referred, is not, we think, essentially changed by the clause in the bill of lading that the goods are to be delivered from the ship's deck, (when the ship owner's responsibility shall cease,) or by the clause that the goods are to be received by the consignee 'immediately the vessel is ready to discharge.'"

The position taken in the opinion of the court that the clauses in the bill of lading under consideration are inconsistent with the idea of personal notice to the consignees, is not supported by the authorities, but is in direct conflict therewith.

The case of *Gleadell* v. *Thomson*, 56 N. Y. 194, cited in the opinion, is, when analyzed, essentially different from the case at bar. In that case the bill of lading contained the provision that the goods should be taken from alongside by the consignees "immediately the vessel is ready to discharge, or otherwise the privilege is reserved to the vessel *to land them on the pier*, or put them into craft, or deposit them in the warehouse designated by the collector of the port of New York, all at the expense of the consignee, and at his risk of fire, loss, or injury." It was held by the court that it was not incumbent on the carrier to give notice of readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier, and that while so deposited they were, by the terms of the contract, at the consignee's risk of fire, loss, or injury.

This decision means nothing more than that under the alternative privilege reserved to the vessel the carrier had the right to land the goods on the pier at the consignees' expense and risk of fire, loss, or injury, without giving the consignees previous notice or opportunity to take the goods from alongside the ship. The bill of lading in the case at bar contains no stipulation reserving to the vessel the privilege of landing the goods on the pier at the expense and risk of the consignees, as in *Gleadell* v. *Thomson*. The provision of the bill of lading in the present case is that the goods are to be taken from

alongside by the consignees "immediately the vessel is ready to discharge, or otherwise they will be *landed by the master and deposited* at the expense of the consignees, and at their risk of fire, loss, or injury, in the *warehouse provided for that purpose or in the public store*, as the collector of the port of New York shall direct," and when deposited in the warehouse or store to be subject to storage.

If the rule laid down in *Gleadell* v. *Thomson* is sound and applicable to the case under consideration, then, upon its failure or neglect to give the consignees notice of the time and place of discharging the cargo so as to enable them to take their goods from alongside the vessel, the steamship company was bound to *land* and *deposit* the goods in the warehouse provided for that purpose or in a public store, as the collector of the port of New York might direct. If it failed to give the consignees proper notice and opportunity to take the goods from alongside when the vessel was ready to discharge, then the alternative obligation, by the express terms of the contract, was that the master of the steamer should *land* and *deposit* the goods in a warehouse or public store as the collector might direct. No right whatever was reserved in this stipulation to deposit the merchandise upon the pier at the risk of the consignees. On the contrary, the express undertaking on the part of the carrier, by this provision of the contract, was that if the goods were not taken from alongside, the master should land and deposit them in one or the other of the designated places.

The duty on the part of the consignees to take the goods from alongside the vessel necessarily depended upon their having notice of the time and place, when and where, the vessel would discharge her cargo, and be ready to make delivery. When, therefore, the carrier proceeded with the discharge without giving such notice, the alternative stipulation of the contract, as well as its legal obligation under the law, required that the goods should be "landed and deposited" in the manner specified; and the fact that the place for depositing the consignment was specially designated and provided for in event it was not taken from alongside the vessel,

clearly negatives the right of the carrier to deposit it on the wharf at the risk of the consignees. If the steamship company had, without notice to the consignees, landed and deposited the goods in a bonded warehouse, or, as directed by the general order of the collector, in public store 502–510 Washington Street, then the case would have come within the rule laid down in *Gleadell* v. *Thomson*.

There is no finding of fact in this case, supporting the suggestion that the "warehouse," referred to in the third of the above quoted clauses of the bill of lading, was the covered pier or wharf on which the goods were landed. The word "warehouse," wherever used in the bill of lading, is coupled with the words "public store," and it is plainly evident that they have the same meaning. That these words are synonymous, and that "warehouse," when used alone, means a "bonded warehouse" clearly appears in the sections of the Revised Statutes relating to the collection of customs duties. Sections 2954, *et seq.* That no different meaning is given to the word "warehouse," when used in connection with the customs laws, further appears from the definition given it in the standard dictionaries.

It appears by the sixteenth finding of fact that the respondent on the afternoon of January 31, 1883, soon after the entry of the vessel, caused a notice of the time and place of discharge to be posted on a bulletin board in the custom-house; that it was usual to post such notice there, but that it was not usual to publish it in the newspapers; and the conclusion reached by this court is "that if any notice of such unloading was required at all, the bulletin posted in the custom-house was sufficient under the practice and usage of the port of New York."

This conclusion of the court cannot, for several reasons, be sustained. There is no finding of the court below of any practice or usage at the port of New York dispensing with personal notice to the consignees, nor that notice posted at the custom-house would, by any well-established or known usage, charge or affect the consignees with notice. The authorities clearly establish that notice, such as that posted

upon the bulletin board, must be shown to have come to the actual knowledge of the consignees in order to bind them, or relieve the carrier from the duty of giving personal notice.

In *The Middlesex*, 21 Law Rep. 14, 15; *S. C.* Brunner, 605, 606, it was said by Curtis, J.: "Mere knowledge that the vessel has arrived and is discharging, at a particular wharf, gained in some casual manner by the consignee, without any act on the part of the master, to indicate a readiness to deliver, is not within the usage, which is for the master, or some agent for the vessel, to give notice to the consignees. And I do not think such casual knowledge is sufficient to impose on the consignee the duty of attending to the discharge of the vessel, and being in readiness to receive his goods as soon as they are ready for delivery. . . . It must be remembered that it is not knowledge of the arrival of the vessel and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact."

In *Kohn* v. *Packard*, 3 La. 224, 229, the question whether notice of the arrival of a vessel published in the newspapers was binding upon the consignees, was clearly and convincingly treated by Porter, J., who said: "If we understand correctly the usage as proved in evidence, it is this: that notice in the newspapers of the time and place of the landing goods from a vessel, is such notice as places the goods at the risk of the consignee. In other words, that constructive notice binds the party as effectually as personal notice would. If this be the custom, then it is one which this court is prepared to say it cannot sanction. Authorities have been read to show that the goods are to be delivered according to the usage of the port to which they are shipped. The principle may be admitted without at all affecting the conclusion to which we have come, for though the custom may regulate the delivery, it cannot dispense with it. Such would be the effect, however, of the usage relied on in numerous instances. We understand that it is of the essence of the contract of affreightment that there be an engagement to deliver the goods to the consignee.

He consequently must be informed of the time and place the delivery is to be made, to enable him to receive them, and if he has not that information, the other party to the contract cannot dissolve it. Yet the custom relied on assumes that he may; for if notice in the newspapers is to bind the consignee of the goods, though he never hears of it or sees it, and if such notice confers on the master of the vessel the right to land the goods on the levee, where they are destroyed or stolen, then it follows that the custom dispenses with delivery, or anything equivalent to it. This we think custom cannot do. There must be the act of both parties to terminate the contract, or the default of one of them to authorize the other to do so."

In Parsons on Shipping, vol. 1, p. 224, it is laid down as a general proposition that "in all cases the master is required to give notice to the consignee of the arrival of the vessel, and of his readiness to discharge the cargo, and knowledge, therefore, acquired that the vessel has arrived and will discharge her cargo at a particular wharf, is not enough. Generally if a notice in the newspapers is relied on, it must be shown that the consignee read the notice." This same rule is approved in Leggett on Bills of Lading, p. 279.

There is not only no finding by the court below that the deposit of the goods on the Inman pier, No. 36, without previous notice to the consignees, was in accordance with any general usage of the port of New York, but, on the contrary, the court found a state of facts which established a *course of dealing* between the parties inconsistent with any such usage.

Thus, by the nineteenth finding, it appears that during the five years preceding the consignment in question the libellants had received six consignments of merchandise in steamships belonging to the respondent, under bills of lading substantially in the same form as the bill of lading herein, all of which were landed and discharged on pier No. 39; that during the same period the freight bills for these six consignments were sent to the libellants, each containing a reference to that pier, and that pier only, as the pier of the respondent company where the goods would be found upon their arrival and dis-

charge; that this was true of the consignment to the libellants in this case, the freight bill of which was the same in form as the preceding six, and which was not received by the libellants until February 1, 1883, the day after the goods had been destroyed by fire.

It was further found by the court below:

"(20) That during the said five years preceding the time of the arrival of the steamship Egypt in this case, that being the period during which the libellants had been receiving goods by the respondent's line from time to time as aforesaid, there have been two hundred and forty-one arrivals of the respondent's steamships at said port of New York coming from said port of Liverpool, and in only eight instances does it appear that the said steamships or any of them discharged at any dock other than that known as the National dock, exclusively occupied and controlled by the respondent as aforesaid, and no evidence was offered with reference to the circumstances attending the discharge of said eight vessels. As to forty-one of said steamships, evidence of the place of their discharge was not produced.

"(22) That prior to the arrival and discharge of said steamship Egypt at said Inman dock as aforesaid no steamship belonging to the respondent from said port of Liverpool or elsewhere had ever been discharged at said dock owned and controlled by the Inman Steamship Company, Limited, as aforesaid.

"(23) That said dock known as the National dock, being pier No. 39, North River, in the city of New York, is and was at the time of the arrival of the steamship Egypt as aforesaid the usual and a proper place at said port of New York for the discharge of cargoes coming from said port of Liverpool in steamships belonging to the respondent company, and is and was at such time a proper place at said port of New York for the discharge of the said thirty-six packages of merchandise belonging to the libellants, and destroyed as aforesaid.

"(24) That said dock known as the National dock, being said pier No. 39, North River, in the city of New York, was

the dock and place ordinarily and generally, but not invariably, used at said port of New York for the discharge of cargoes coming from said port of Liverpool in steamships belonging to the respondent company.

"(25) That the National dock, being pier No. 39, North River, in said city of New York, is and was at the time of the discharge of the steamship Egypt as aforesaid, the dock or wharf to which consignees of cargo coming from said port of Liverpool to said port of New York in steamships belonging to the respondent company would naturally and usually go for the purpose of caring for and receiving a delivery of their consignments."

It is also admitted in the amended answer of the respondent that "there is nothing in the bills of lading which led the libellants to believe that the goods in said bills of lading were not to be landed on said National dock, (No. 39,) and there delivered" to the libellants.

It is not set up or claimed in the answer of the respondent that in discharging and depositing the goods, without notice to the consignees, at a different pier from that at which it was in the habit of landing and delivering other consignments to the libellants, the carrier was acting in pursuance of any established custom or usage of the port of New York. No such justification is set up; on the contrary, the answer alleges that the consignees had due and proper notice that the goods would be landed or discharged at pier No. 36. It denied the libellants' allegation that they did not have notice that the goods were not to be landed and delivered at the National dock, No. 39, and averred that the libellants did have notice that the goods carried by the Egypt were to be landed at pier No. 36, at which they were actually landed. The seventeenth finding of fact contradicts this denial and averment of the answer.

The carrier having landed and deposited the goods, not at its usual and customary place of discharge, where the consignees would naturally expect to receive their consignment, as they had always previously done, and there being an implied undertaking on the part of the carriers to discharge

at the usual wharf according to the established course of dealing between the parties, the duty of giving notice that the discharge and delivery of the goods would be made at another and different place became the more imperative upon the carrier.

In Story on Bailments, § 545, it is said: "In America the rule adopted in regard to foreign voyages, although it has been matter of some controversy, seems to be that in such cases the carrier is not bound to make a personal delivery of the goods to the consignee, but it will be sufficient that he lands them at *the usual wharf or proper place of landing*, and gives due and reasonable notice thereof to the consignee. . . . But it is of the very essence of the rule that due and reasonable notice should be given to the consignee before or at the time of the landing, and that he should have a fair opportunity of providing suitable means to take care of the goods and to carry them away."

So, in Addison on Contracts, § 961: "If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from further liability by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them."

The rule thus laid down is supported by *Salmon Falls Mfg. Co.* v. *Bark Tangier*, 21 Law Rep. 6; *Gibson* v. *Culver*, 17 Wend. 305; 2 Kent, 604; Maclachlan on Merchant Shipping, (4th ed.,) 453, 454; *Hyde* v. *Trent & Mersey Navigation Co.*, 5 T. R. 389; *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314.

In *Gatliffe* v. *Bourne*, to a declaration on a contract by a master of a steam vessel to convey goods from Dublin to London, and to deliver the same at the port of London to the

plaintiff or his assigns, a plea was filed to the effect that after the arrival of the vessel at London defendant caused the goods to be unshipped and safely and securely landed and deposited in and upon a certain wharf, called Fenning's wharf, at the port of London, there to remain until they could be delivered to the plaintiff, said wharf being a place where goods from Dublin were customarily landed and deposited for the use of consignees, and a place fit and proper for such purposes; that while the goods were thus deposited upon said wharf and before a reasonable time for delivery had elapsed, they were destroyed by an accidental fire. This plea was held to be bad, and the carrier was charged with the loss of the goods accidently burned while deposited on the wharf. This decision was affirmed in the Exchequer Chamber, *Bourne* v. *Gatliffe*, 3 Man. & Gr. 643, and in the House of Lords, *Bourne* v. *Gatliffe*, 11 Cl. & Fin. 45; *S. C.* 7 Man. & Gr. 850, and *S. C.* 8 Scott, (N. R.,) 604. In the report of the case before the House of Lords it is stated that no notice was given to the plaintiff that the goods were landed upon the wharf.

This case, in principle, controls the present case, unless the special clauses of the bill of lading authorize the deposit of the goods upon the Inman wharf without notice to the consignees and at their risk. The provisions of the bill of lading already considered do not confer such authority, and if it exists it must be found in the remaining clause, viz.: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so *left by consignee* will be at his or their risk of fire, loss, or injury."

This is the only clause in the bill of lading which in any way refers to a deposit of the goods upon the wharf. The court in its opinion construes this language to mean "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at the consignee's risk of fire, loss, or injury." This construction not only gives no effect to the words "left by the consignee," but substitutes the act of the master for

that of the consignee. It makes the master's act of depositing a leaving by the consignees. The words "left by the consignee" clearly contemplate the voluntary leaving, not by the master, but by the consignee, which could only occur after due notice that the goods were so deposited, and a reasonable opportunity afforded for removing them. The words import a voluntary act of leaving on the part of the consignee, that is to say, the consignee must suffer or permit the goods to remain, or omit to remove them after it has become his or their duty so to do. The consignees' duty of positive and affirmative action is not called into exercise until after they have had notice that their goods will be or have been deposited on the wharf. Until such notice and an opportunity to take charge of the goods is given to the consignees, it is a perversion of language to say that the goods are *left* by them.

Reading this clause in connection with the former, it clearly appears that what the parties meant and provided for was that if the consignees were not ready to receive their goods immediately upon their discharge from the vessel, the master was to deposit them, not on the *dock* or *wharf*, but in the *warehouse* or *public store* at the expense and risk of the consignees; but that if the carrier availed itself of the Treasury regulations to deposit the goods on the wharf under the forty-eight hour clause, the consignees' risk and liability for loss, while so deposited, would not commence until after they had notice of such deposit and a reasonable opportunity to remove the goods. It cannot be properly said that there was or could be, on their part, any leaving of the goods so deposited until the consignees were put upon the duty of accepting delivery, or taking charge of the consignment, which would not arise until they had received notice.

This interpretation of the clause is sustained by the well-considered case of *McKinney* v. *Jewett*, 90 N. Y. 267, 270, 272, where the contract provided that the carrier should not be liable as such, while the goods were "at any of their stations awaiting delivery."

But, conceding that the clause is ambiguous, the settled rules of construction do not sanction a liberal interpretation thereof

in favor of the carrier, but directly the reverse. Especially is this so when, as in the present case, the steamship company has, by its action in procuring the forty-eight hour permit, itself placed a different construction upon the clause. It is well settled that the practical construction placed by parties interested upon doubtful or ambiguous terms in a contract will exercise great and sometimes controlling influence in determining its proper meaning. *Topliff* v. *Topliff*, 122 U. S. 121; *District of Columbia* v. *Gallaher*, 124 U. S. 505.

The general order for discharge, obtained upon the entry of the vessel, directed that the cargo, except certain perishable articles, gunpowder, neat cattle, etc., should be landed and sent to public store 502–510 Washington Street. This general order was not acted on by the steamship company, but as shown by the eleventh finding of fact, after securing the general order the respondent obtained from the collector of the port a special license, under the provisions of section 2871 of the Revised Statutes, to unload at night, and gave bond to indemnify and save the collector harmless from any loss or liability which might occur, or be occasioned by reason of the granting of that special license. The carrier furthermore voluntarily applied to the collector and obtained a permit for the goods to remain upon the wharf for forty-eight hours from the time of granting the general order, at the risk of the owners of the steamer, and upon the agreement that they would pay to the consignees or owners the value of such cargo respectively as might be stolen, burned, or otherwise lost while so deposited.

The permit to unload at night was manifestly for the benefit and convenience of the carrier. The same is true in respect to the permit for the goods to remain on the wharf for forty-eight hours. The unloading commenced in the afternoon of January 31, after business hours, and was continued through the night; and even if notice had been given to the consignees, there was no reasonable time and opportunity afforded them to remove or take charge of the goods before they were destroyed by fire.

In the execution of its undertaking to deliver the goods to

the consignees at the port of New York, the carrier had no right to change or increase the risk by any departure from the express stipulations of the contract. In unloading at night for its own benefit, and in depositing the goods upon the wharf for its own convenience, the risk and liability of loss was manifestly increased; and the goods having been destroyed while subjected, by the voluntary act of the carrier to this increased risk, it is liable for the loss, unless expressly exempted by some provision of the affreightment contract. It must be borne in mind, as Lord Lyndhurst expressed it in *Gatliffe* v. *Bourne*, before the House of Lords, that the contract was "to deliver the goods to the consignees" at the port of destination. Instead of making, or attempting to make, such delivery, either actually or constructively, the carrier, on a permit from the collector, deposited the goods on the wharf, thereby changing, if not increasing, the risk of loss, in a way not provided for by any stipulation of the contract.

Again, it was found by the Circuit Court (12) "That said general order and special license and said applications and permits and the agreements and engagements therein contained were the usual and customary ones ordinarily made and granted in such cases, and that they were made and granted under and by the authority in and by said bill of lading conferred upon the respondent and upon said collector of the port of New York by the libellants herein, and under and in accordance with the provisions of law in that behalf and the regulations of the United States Treasury Department on that subject." And further, (13) "That said applications were made and said general order and special license and permits were obtained on behalf of the respondent under the instructions and by direction of the respondent's agent in the city of New York, and all of the agreements and engagements made and entered into therein or thereby and on behalf of the respondent or the libellants were made and entered into under and pursuant to the same instructions and directions of said agent."

In the light of these findings the contract of the parties should be interpreted as though the clause in question had

read as follows: "The United States Treasury having given permission for goods to remain forty-eight hours on the wharf at New York, at the sole risk of the steamship company, and upon its undertaking to pay to the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost while so remaining, now it is understood that if the steamship company avails itself of this regulation, and obtains permission for the consignment to remain on the wharf for forty-eight hours upon said terms, its risk and liability for losses shall only continue and remain in force until the consignee has had due notice and opportunity to remove or take charge of the goods; and if, thereafter, they are left by the consignee, it will be at his risk of fire, loss, or injury." This harmonizes all the clauses, and is alone consistent with the correlative duties and obligations of the parties.

It is not material to the present case to determine whether the regulations of the Treasury Department, set out in the eleventh finding of the court below, have the force of law, and imposed upon the steamship company the duty of entering into the stipulation to pay the consignees for the loss of the goods deposited on the wharf under the forty-eight hour permit. That stipulation was entered into voluntarily by the steamship company. There was no requirement in the contract of affreightment that it should obtain any such permit, and it cannot be properly said that the stipulation which it entered into in order to secure permission for the goods to remain forty-eight hours on the wharf, was inconsistent with any provision of the law or regulations of the Treasury Department. No provision of the bill of lading exempted the carrier from liability for loss by fire that might happen while the goods were deposited on the wharf under the forty-eight hour permit, and no reason appears why the carrier might not expressly undertake a liability which the law would otherwise impose upon it, until by proper notice the duty of taking care of the goods was shifted or transferred to the consignees.

But, it is said, the consignees cannot avail themselves of this promise made by the steamship company to the collector

because they are not privies thereto. This, however, ignores the above findings of fact by the court, which make the consignees parties to the arrangement. Aside from this, while it is undoubtedly the general rule that a person who is not a party to a simple contract, cannot enforce such contract at law, and that a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter, *National Bank* v. *Grand Lodge*, 98 U. S. 123, there are many exceptions to the rule, one of which, according to the New York decisions, is where the party seeking to enforce the contract was intended to be the beneficiary of the promise. *Lawrence* v. *Fox*, 20 N. Y. 268; *Coster* v. *Albany*, 43 N. Y. 399, 410, 412; *Garnsey* v. *Rogers*, 47 N. Y. 233; *Vrooman* v. *Turner*, 69 N. Y. 280.

The promise made by the steamship company in the present case falls directly within the rule announced in *Vrooman* v. *Turner*, 69 N. Y. 280, there being, first, a clear intent by the promisor to secure a benefit to the consignees; second, a privity between the two in respect to the protection of the goods, the risk of which the carrier assumed; and, third, an obligation or duty owing by the steamship company to the consignees to properly care for the goods until delivery could be made, which gave to the consignees a legal and equitable claim to the benefit of the promise. The decisions in other States are conflicting on this question.

But if an action at law would not lie upon the promise made by the respondent in obtaining the forty-eight hour permit, it by no means follows that the consignees could not successfully invoke the aid of a court of equity in enforcing the agreement. The legal rule invoked is not so rigidly or so strictly adhered to by courts of equity as by courts of law. Thus, in *Keller* v. *Ashford*, 133 U. S. 610, 625, the mortgagee was permitted to enforce in equity a contract between the mortgagor and his grantee, by the terms of which the grantee assumed the payment of the mortgaged debt. See also *Willard* v. *Wood*, 135 U. S. 309, 314; *Norwood* v. *De Hart*, 3 Stewart, (30 N. J. Eq.,) 412.

Now the broad principles of equity are recognized and applied by the admiralty courts, and the steamship company's agreement being, as properly held by the court below, an admiralty contract, and the consignees being the parties intended to be benefited thereby, and it being one contemplated by the parties at the time of entering into the contract of affreightment, no valid reason is seen why the consignees should not have, by this libel, the right to enforce the stipulation, voluntarily entered into by the steamship company, which agreement is not in conflict with any provision in the bill of lading.

It is true that the court below found (twenty-seventh finding) that it was the intention of the parties to the bill of lading that goods remaining for forty-eight hours on the wharf, under the permit obtained on the application of the steamship company, should be at the risk of the consignee of fire, notwithstanding the agreement of the steamship company to assume such risk. This is not a good finding of fact, but is a mere conclusion of law based upon the court's construction of the clauses of the contract, above referred to, and is not binding upon this court.

The opinion of this court seems to proceed largely upon the idea that the consignees, if they had received notice, could not have removed the goods before they were destroyed; and, further, that inasmuch as they took no steps on the faith of the cargo being discharged at the usual place, they were not prejudiced by the change. These are considerations that do not control or change the rights and liabilities of the parties. The real question in cases like this is, whether the carrier has brought itself within any exemption from liability by showing that the loss was caused by the act of God, or by the public enemy, or by the shipper, or was within some excepted clause in the contract of affreightment. If this is not shown, the carrier is liable for the loss. *Clark* v. *Barnwell*, 12 How. 272, 280.

While not controverting the legal principles governing the liabilities and duties of carriers, the opinion of the court seems to imply that to some extent they should be modified

or suspended to meet the improved modern methods of rapid transportation. But I submit that long established legal principles, founded upon a wise public policy, are not to be either ignored or disregarded to meet a supposed public convenience, especially in a case like the present, where the resident managing agent of the carrier knew for at least six days before the arrival of the vessel that she would land and discharge her cargo, not at the usual place, but at the Inman pier, and thus had ample opportunity to give to the consignees, who were known to the steamship company, notice of the change. The true rule on this question is well stated by Judge Porter in *Kohn* v. *Packard*, 3 La. 230, as follows: "There are inconveniences in whichever way the question is viewed. On the part of the owners of the ship, that of giving such notice of the time and place of discharge, as will enable them to bring knowledge of the fact home to the persons who are to receive the goods, or in default thereof, imposing on the former the obligation of sending the merchandise to some place of safety. But this inconvenience we think is not to be compared with that to which the latter would be subject if their property could be landed without their knowledge and be thereby lost or damaged. On the one side there is additional trouble; on the other, probably, a total loss. After the best consideration in our power, we think the conclusion we have come to is most consonant to law and will tend to promote public convenience."

The opinion of the court does not deal with that clause in the bill of lading which provides that the steamship company, or its "agents, or any of its servants, are not to be liable for any damage to any goods which is capable of being covered by insurance." The court below held that this clause relieved the steamship company from liability. This condition or provision of the bill of lading is expressed in terms so general and comprehensive as to require the shipper or consignee to insure, not only against the enumerated perils and exceptions, but against any and all malfeasance or misfeasance on the part of the carrier. It admits of grave doubt whether this provision is not so unreasonable as to be void under the principle

laid down by this court in *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 380, 382; *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331; *Phœnix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 322, 323; *Inman* v. *South Carolina Railway*, 129 U. S. 128, 139; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 455; Carver on Carriers, (2d. ed.,) § 110; *Peek* v. *North Staffordshire Railway*, 10 H. L. Cas. 473. In this last case the condition was that the company "shall not be responsible for loss of or injury to any marble . . . unless declared and insured according to its value," and it was held, upon full consideration, that the condition, as a whole, was unreasonable and void.

In the present case it is not necessary to determine that this clause is so unreasonable as to be void. So far as it has been considered by the courts, it has been restricted in its application. Thus, in *Taylor* v. *Liv. & Gt. Western Steam Co.*, L. R. 9 Q. B. 546, it was held not to cover a loss of the goods by theft, committed while they were on board, either during the voyage, or after arrival; and in *The Titania*, 19 Fed. Rep. 101, while the provision was considered valid, it was held by the court that it must be construed to refer to insurance which might be obtained in the usual course of business from the ordinary insurance companies, either in the usual form, or in the customary course of business upon special application. In that case injury from the breaking loose of a spare propeller was held not to be within the exemption.

Giving to the clause this reasonable construction, the loss in question would not have been covered by the ordinary marine policy on the cargo, which generally covers the goods while being carried aboard ship, during the voyage, and *until safely landed, and no longer.* The clause did not impose upon the consignees the duty of anticipating that the carrier would land the goods at an unusual place, and it would have been out of the usual course of business for the consignees to have sought to insure against what they did not, and could not, know would take place.

So, in reference to fire insurance. While it was shown by one of the witnesses that fire insurance could have been

procured on "goods lying on the wharf by the side of the ship, before they were actually taken away," the clause in question did not require that the consignees should have anticipated that their goods would be unloaded at night and deposited on the wharf. Aside from this, it is ordinarily essential in a fire insurance policy that the locality of the risk should be specified. The consignees in the present case could not have complied with this general rule without having some knowledge or information as to where their goods would be landed. The local agent of the steamship company had six days' notice of the fact that the cargo of the vessel would be landed at the Inman pier, No. 36, but that fact was not communicated to the consignees, and they had not, therefore, the data to procure ordinary fire insurance upon the goods after being landed.

It would be unreasonable, and contrary to sound principle, to allow the carrier to assert exemption under such an insurance clause without affording the consignees, by proper notice, an opportunity to effect insurance in the usual way upon their goods while deposited on the wharf. If, after being notified that their goods were deposited on a particular wharf, other than that at which their consignments were usually received, the consignees had failed and neglected to take out insurance, the clause, if valid, might have been invoked for the protection of the carrier. But under the facts of this case, to give the carrier the benefit of the clause would be to allow it to take advantage of its own neglect of a legal requirement.

I am of opinion that the decree appealed from should be reversed, and the court below directed to enter a decree in favor of the libellants; and I am authorized to state that Mr. Justice Field and Mr. Justice Gray concur in this opinion.

DUNHAM *v.* DENNISON MANUFACTURING COMPANY.

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

No. 294. Argued March 16, 19, 1894. — Decided May 26, 1894.

The reissue of June 10, 1884, by which the patent of May 8, 1883, to Joseph T. Dunham, for a combined tag and envelope, with an end flap covering the side of the envelope, was so enlarged as to include an envelope with a flap of any size or shape, is void.

The patent of November 24, 1885, to Joseph T. Dunham, for an improvement in tag envelopes, with a flap so constructed that it can be opened and the contents taken out without tearing the envelope or removing or breaking the fastenings, is not infringed by an envelope in which the flap is fastened down so that it cannot be opened without injury, and the contents are taken out by opening a flap at the opposite end of the envelope.

This was a bill in equity for the infringement of two patents for inventions, granted by the United States to the plaintiff; the one a reissue, dated June 10, 1884, of a patent issued May 8, 1883, for "a new and improved combined tag and envelope;" and the other an original patent, dated November 24, 1885, "for certain improvements in envelopes." Upon a hearing in the Circuit Court on pleadings and proofs, the bill was dismissed, for the reasons stated in the opinion of Judge Coxe, which was as follows:

"This is an equity action, founded upon two letters patent granted to the complainant. The first, a reissue patent, No. 10,488, dated June 10, 1884, is for a combined tag and envelope; and the second, No. 331,118, dated November 24, 1885, is for an improvement in envelopes.

"The reissued patent will be first considered. The defences are lack of novelty and invention, non-infringement, and that the reissue is void because of an unwarrantable expansion of its claims. The original patent, No. 277,245, was dated May 8, 1883. The application for the reissue was filed March 18, 1884, ten months and ten days thereafter.

"The invention of the original was limited, as clearly as the drawings and the language of the description and claims could limit it, to an envelope having at one end a flap of sufficient size to cover one side of the envelope. The inventor says: 'The object of the invention is to form an envelope with an end flap covering its side, as hereinafter described. . . . An envelope, A, preferably made of strong water-proof paper, is provided with an end flap, B, of sufficient size to cover the entire envelope. An eyelet, C, is secured in that end of the envelope opposite to the one to which the flap B is attached; and the flap B is provided on its free end with an eyelet, D, which, when the flap B is folded over the envelope, rests upon the eyelet C.' He then describes the manner in which the name of the consignee is concealed by writing it on the inside of the flap, so that dealers engaged in the same business cannot ascertain the names of their rivals' customers. The name of the consignor is printed on the outer surface of the flap, where also appears the name of the city or town to which the goods are destined; and a notice to carriers that the full name of the consignee may be found on the inner surface.

"It is evident that the patentee considered this peculiar form of flap the main feature of his invention. It is also clear that an envelope which does not include a flap large enough to cover its side does not infringe the claims, which are as follows:

"'1. A combined tag and envelope, made substantially as herein shown and described, and consisting of an envelope having at one end a flap of sufficient size to cover one side of the envelope, as set forth.

"'2. In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end, of the eyelet D in the free end of the flap, and the eyelet C in that end of the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth.'

"The specification is perfectly plain. There is no ambiguity about the description, and the claims, in language equally clear, cover what is said to be the invention, and the whole thereof.

Statement of the Case.

"Soon after the patent was granted, the defendant, in the summer of 1883, commenced manufacturing tag envelopes, which the complainant insists are infringements of the reissue, but frankly admits that they do not infringe the original patent, for the reason that they do not have the flap B.

"The reason for the reissue is thus stated in the complainant's brief: 'Soon after putting the patented article on the market, complainant was informed that defendant, a corporation that had for some time manufactured in Boston and made extensive sales throughout the country of a shipping tag, was manufacturing and selling a tag envelope similar to complainant's. Complainant immediately applied to counsel for the purpose of commencing suit against defendant, and was advised by such counsel, after an examination of his letters patent and a statement of his invention and application, that his patent was defective, indefinite and ambiguous in its claims, so as to render it practically inoperative, and that he had better apply for a reissue.'

"The patentee himself states that the alleged infringing envelope of the defendant was one of the forms 'invented by him, but not shown in his patent,' and he therefore sought a reissue which would cover it.

"Turning now to the reissue, it is manifest that the effort was to discard the flap B as an element of the invention, and expand the claims sufficiently to cover an envelope, no matter what the size or shape of its flap. The invention no longer consists in 'an envelope with an end flap covering its side,' as in the original, but 'in a tag provided with means for attaching it to the merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise.' The drawings are referred to as showing the invention 'in its preferred form.' The end flap is no longer 'of sufficient size to cover the entire envelope,' but it must cover it 'substantially.' The claims of the reissue are as follows:

"'1. A combined tag and envelope, substantially as described, wherein the flap which closes the mouth of the envelope is fastened down by the cord or other device which secures the tag to the merchandise, as set forth.

"'2. A combined tag and envelope, substantially as described, the flap having an eyelet hole which, when the flap is folded down on the envelope, coincides with an eyelet hole in the envelope, whereby the cord or hook for attaching the tag may be passed through both holes, substantially as set forth.

"'3. In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end, of the eyelet D in the free end of the flap, and the eyelet C in that end of the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth.'

"The third claim of the reissue is the same as the second of the original, but it is not contended that this claim is infringed. Claims one and two of the reissue are unquestionably broadened. They are no longer limited to a flap of sufficient size to cover the entire envelope. Should the court hold that they are so limited, it is admitted that they are not infringed.

"It is thought that these expanded claims cannot escape the force of the repeated decisions of the Supreme Court relating to reissued patents.

"The patentee made no move until the defendant had produced its envelope, which could be sold without infringing the original patent. If he had been the first inventor of this new and improved form, he might have described and claimed it in the original patent. He did neither. He now seeks by the reissue to include structures and improvements which were neither described nor claimed in the original. This he cannot do. The defendant has acquired valuable rights which cannot be trampled upon in this manner.

"The law upon this subject is too well settled to require a citation of authorities; but the case of *Coon* v. *Wilson*, 113 U. S. 268, seems peculiarly applicable and controlling. Substitute the nomenclature pertaining to envelopes for that relating to collars, and the opinion in *Coon* v. *Wilson* is as applicable to this controversy as if written for the purposes of this action only: 'Although this reissue was applied for

a little over *ten* months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is shown, so far as the *extended flap* is concerned; where the patentee waited until the defendant produced *its short-flapped envelope*, and then applied for such enlarged claims as to embrace the defendant's *envelope*, which was not covered by the claim of the original patent, and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn* v. *Harwood*, 112 U. S. 354, a patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted. But a clear mistake, inadvertently committed, in the wording of the claim is necessary, without reference to the length of time. In the present case there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering *an envelope not provided with the flap B.*'

"The second patent in controversy, No. 331,118, dated November 24, 1885, is for an improvement in envelopes intended for mailing samples and similar matter, and for use as tags for marking goods to be shipped. The defences are abandonment, lack of novelty and invention, and non-infringement.

"The principal object of the invention, as stated in the specification, was to obviate the difficulty which existed in prior devices, which were so constructed that, in order to get at the contents of the envelope, it was necessary to untie the string or remove the fastening which secured the flap. The envelope of the patent is so constructed that the flap can be opened, when desired, and the contents inspected, without tearing the envelope, or removing or breaking the fastenings. The claims are as follows:

"'1. An envelope having a flap, C, provided with a reinforced hole, *c'*, and having a similar hole, *c*, in the front ply of its body, and the said holes constructed to register or coincide when the flap C is folded down, whereby the end of the back ply, *b*, of the envelope body, which extends entirely across the latter, is clamped and removably secured, substantially as shown and described.

"'2. A mailing and tag envelope having a flap, C, folded over and secured down to the inner face of the front ply of the body, the said flap being also constructed to take over the free end of the back ply of the body, as shown, whereby the mouth of the envelope covered by the said flap C is secured against accidental opening, substantially as and for the purposes set forth.'

"In view of what was known when the patent was applied for, a broad construction of these claims is out of the question. A construction which would include the defendant's envelope would render the claims void for lack of novelty, for the general features of the patented envelope are shown in the patent No. 81,962, September 8, 1868, to Sigmund Ullman, and in other prior structures. If the claims are limited to the peculiar construction shown in the specification and drawings, the defendant does not infringe. In the defendant's envelope one eyelet is used, which aids the gum in fastening the flap down permanently upon the back ply of the envelope.

"A large number of exhibits have been introduced, showing the defendant's envelope. These have been changed and mutilated by the witnesses in illustrating opposing theories. But both sides apparently agree that the envelopes made by the defendant since the date of this patent are constructed with the eyeletted flap securely fastened. The complainant's brief contains this statement: 'After defendant put its tag envelope on the market, it changed the construction several times, until it finally adopted the form introduced in evidence as the infringing specimen. See complainant's Exhibit Taylor and Mayo, which was received in 1883, and also has the eyelet-holes, with washers only; also complainant's Exhibit John S.

Smith, which was received in 1884, and has the washers reinforced with a short metallic eyelet, with the eyeletted end tightly gummed down; also Exhibit Alonzo B. Smith, received in 1886, with printed advertisement on front, which had the eyeletted end tightly gummed, with washers reinforced by short metallic eyelets.'

"Evidently it is not intended that the defendant's envelope shall be opened and the contents removed at the end thus securely fastened. The bill or invoice is inserted at the opposite end; the flap at that end is then fastened down, in the well-known manner, by moistening the gum by which it is provided, or the flap may be tucked in between the plies. In other words, the defendant takes an ordinary envelope with the opening at one end; and at the other end, which is never intended to be opened, he puts an eyelet reinforced by washers through the front ply, a portion of the back ply, and the flap of the envelope. The sole object of the eyelet is to provide a suitable hole into which the cord or hook which fastens the envelope to the merchandise may be introduced. The effect of the eyelet and washers is to prevent the back ply from being left free at this end. The defendant has not the object of the patent in view, and does not adopt the patented device.

"In complainant's envelope, according to the theory of his expert witness, 'the leading idea or principle of the invention is the holding down of the back ply of the envelope by the overlapping of the flap thereon, and the omission of any permanent or secure attachment of the flap to said back ply. . . . The claims are limited to this end of the back ply being left free.' This feature is entirely wanting in defendant's envelope. Instead of omitting the secure attachment, he has added the metallic eyelet and washers to the gum of the ordinary envelope. The claims must be restricted to the form and description of the patent, and thus construed they are not infringed.

"It is unnecessary to examine the other defences presented. The bill is dismissed." 40 Fed. Rep. 667.

From the decree of the Circuit Court dismissing the bill the plaintiff appealed to this court.

Mr. Charles G. Coe, (with whom was *Mr. Arthur S. Browne* on the brief,) for appellant.

Mr. W. W. Swan for appellee.

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

The facts of this case, and the reasons against maintaining the suit, are so clearly and fully stated in the opinion delivered in the Circuit Court, that there is no occasion for extended discussion.

The patent of May 8, 1883, was expressly and distinctly, both in the specification and in the claims, limited to an envelope, with an opening at one end; with a flap, attached to the envelope at that end, of sufficient size to cover the whole of that side of the envelope in which the opening was; and with an eyelet in the flap, resting on an eyelet in the opposite end of the envelope, through which eyelets the flap could be secured to the envelope, and both flap and envelope be fastened to the object to be carried. The patentee thus gave the public to understand that an envelope, the flap of which did not cover its whole length, would not come within his patent, and might rightfully be made by any one. After the defendant had made envelopes with a short flap of semi-circular shape and covering little more than the opening of the envelope, (which, it is admitted, did not infringe the plaintiff's patent as originally issued,) the plaintiff obtained a reissue, enlarging the claims, and altering the specification throughout, so as to include an envelope with a flap of any size or shape, and to make the invention consist, not, as in the leading words of the description in the original patent, of "an envelope with an end flap covering its side," but in "a tag provided with means for attaching it to the merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise." The words of the description in the original patent were neither technical nor complicated; but they were of the simplest kind, and their meaning and scope could

not have been misunderstood by any one who read them with the slightest attention, least of all by the patentee. To uphold such a reissue under such circumstances would be to grant a new and distinct privilege to the patentee at the expense of innocent parties, and would be inconsistent with the whole course of recent decisions in this court. *Miller* v. *Brass Co.*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354; *Coon* v. *Wilson*, 113 U. S. 268; *Topliff* v. *Topliff*, 145 U. S. 156; *Huber* v. *Nelson Co.*, 148 U. S. 270; *Leggett* v. *Standard Oil Co.*, 149 U. S. 287; *Corbin Co.* v. *Eagle Co.*, 150 U. S. 38.

The patent of November 24, 1885, has clearly not been infringed by the defendant; for the peculiar feature of this patent consists in the flap being constructed so that it can be opened, and the contents taken out, without tearing the envelope or removing or breaking the fastenings; whereas in the defendant's envelope that flap is fastened down so that it cannot be opened without injury to it or to the envelope, and the contents are taken out by opening a flap, no more firmly secured than with gum, at the opposite end of the envelope.

Upon these grounds, without considering the questions of lack of novelty and invention in the several patents, the entry must be

Decree affirmed.

MORRISON v. WATSON.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 177. Argued December 20, 1893. — Decided May 26, 1894.

This court has no jurisdiction to review by writ of error a judgment of the highest court of a State, as against a right under the Constitution of the United States, if the right was not claimed in any form before judgment in that court.

THIS was an action, in the nature of ejectment, brought April 11, 1883, in the superior court of Richmond county in

the State of North Carolina, to recover one hundred acres of land in that county.

The case certified by that court to the Supreme Court of the State began as follows:

"The plaintiff claimed title to the land described in the complaint by virtue of an execution sale and sheriff's deed made pursuant thereto. The defendant denied that the plaintiff was the owner of the land or that he wrongfully withheld possession thereof. He admitted being in the possession.

"The following issues were, without objection, submitted to the jury: 1st. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint? 2nd. Did the defendant at the time of the bringing of this action unlawfully withhold possession thereof? 3rd. What damages is the plaintiff entitled to recover?"

The case then stated that the plaintiff gave in evidence a deed of the land from the sheriff to himself, pursuant to a sale thereof, for the price of $40, on June 9, 1879, under an execution duly issued April 5, 1879, upon a judgment rendered May 17, 1870, against the defendant, for $35, and interest from November 13, 1864, and costs, on a promissory note shown by the judgment roll to have been payable at the date last mentioned; and that the plaintiff also gave in evidence the execution, and the officer's return thereon, stating that he levied it upon this land. The case also stated that "no homestead was ever allotted to the defendant."

The case then stated that "the plaintiff, for the purpose of showing that the lands of the defendant were, in June, 1879, worth less than $1000 and the amount of the judgment," introduced, "after objection by defendant and exception to its admission," evidence tending to show that fact; that the defendant also introduced evidence upon the question of the value of the land; and set forth the testimony introduced by either party; did not show that any evidence admitted was objected to by the plaintiff; and continued and concluded as follows:

"The defendant duly objected to all of the testimony in regard to the value of the land, when it was offered, for that the defendant's right to a homestead and the value of his land

could only be ascertained and determined in the manner provided by law, and not in the first instance by a jury empanneled to try the question of title. The court, in deference to the opinion of the Supreme Court in this case, admitted the testimony. *Morrison* v. *Watson*, 95 No. Car. 479.

"The counsel for the plaintiff requested the court to charge the jury: 1st. That there was no evidence that the defendants were worth in June, 1879, $1000 and the judgment, interest and costs, amounting to $83; 2d. That upon the whole evidence the plaintiff was entitled to recover. The court declined to so instruct the jury, and the plaintiff excepted.

"The court then instructed the jury that they could consider the whole evidence, and, after ascertaining the value of the land per acre in June, 1879, they should make a calculation as to its total value. The court then explained to the jury the issues, and the way in which the testimony should be considered with respect to them; and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed; and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than $1000, and the amount of the judgment, interest, and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment. *Miller* v. *Miller*, 89 No. Car. 402.

"The jury found the first and second issues in the negative. Motion for a new trial for reception of the evidence objected to, and for refusing the instruction asked, and for error in the instruction given. Motion denied. Judgment in accordance with the verdict. Appeal by plaintiff."

The Supreme Court of the State, on November 12, 1888, affirmed the judgment. 101 No. Car. 332. The plaintiff, on September 4, 1890, sued out this writ of error.

Mr. Frederic D. McKenney, (with whom was *Mr. S. F. Phillips* on the brief,) for plaintiff in error.

Mr. W. W. Flemming for defendant in error.

Opinion of the Court.

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

The ground on which it was argued in this court that the judgment of the Supreme Court of North Carolina should be reversed was that, the debt, in execution of the judgment upon which the land was sold to the plaintiff, having been contracted before the constitution and laws of the State exempted a homestead from execution, the obligation of the contract was impaired by the statute of North Carolina, by which, as construed by the Supreme Court of the State, such a creditor is obliged to levy his execution, first, by sale of so much of the debtor's land as is not within the homestead exemption, and afterwards, if necessary, by separate sale of the rest of the land.

But the difficulty is that it does not appear that any objection to the constitutionality of the statute was taken by the plaintiff in the courts of the State. On the contrary, he appears to have assumed that the statute was constitutional and valid; and that, if the land, at the time of the sale on execution in June, 1879, was not worth the sum of $1083, made up of $1000 for the homestead, and $83 for the amount of the judgment, he could not recover.

At the trial, after proving his title under the sale on execution, he himself introduced, against the objection and exception of the defendant, evidence that the lands were worth less than that sum. The only instructions which the plaintiff asked, and to the refusal of which he excepted, were the specific one "that there was no evidence that the defendants" (apparently meaning the defendant's lands) "were worth" that sum, and the general one "that upon the whole evidence the plaintiff was entitled to recover." The instructions given were not excepted to, and it does not appear for what supposed error in them a new trial was moved for and refused. The plaintiff, therefore, up to the time of judgment in the trial court, does not appear to have insisted that the levy under which he claimed was valid if the estate was worth more than the sum aforesaid, as the jury found that it was.

Opinion of the Court.

Nor does it appear that he brought any constitutional question before the Supreme Court of the State. No reasons of his appeal to that court are stated in the record; and the official report of its opinion shows that no counsel for the plaintiff argued the case before that court. 101 No. Car. 332, 335. Under these circumstances, the fact that in that opinion the construction and validity of the statute were treated as settled by the ruling in the earlier case of *McCanless* v. *Flinchum*, 98 No. Car. 358, and were restated by way of explanation of the defence at the trial of the present case, falls short of showing that there was any real contest at any stage of this case upon the point.

In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege, or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege, or immunity must have been "specially set up or claimed" at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the State, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the State; it cannot be asserted in this court. Rev. Stat. § 709; *Spies* v. *Illinois*, 123 U. S. 131, 181; *Brooks* v. *Missouri*, 124 U. S. 394; *Chappell* v. *Bradshaw*, 128 U. S. 132, 134; *Brown* v. *Massachusetts*, 144 U. S. 573; *Schuyler National Bank* v. *Bollong*, 150 U. S. 85; *Miller* v. *Texas*, 153 U. S. 535.

The judgment of the Supreme Court of North Carolina in this case appears by the record to have been rendered on November 14, 1888; and it is perhaps significant that this writ of error was not sued out until September 4, 1890, after that court in *Long* v. *Walker*, 105 No. Car. 90, had changed its opinion as to the validity and effect of the statute.

Writ of error dismissed for want of jurisdiction.

Mr. Justice White, not having been a member of the court when this case was argued, took no part in its decision.

In re LOCKWOOD, Petitioner.

ORIGINAL.

No number. Submitted April 24, 1894. — Decided May 26, 1894.

It is for the Supreme Court of the State of Virginia to construe the statute of that State which provides that "any person duly authorized and practising as counsel or attorney at law in any State or Territory of the United States, or in the District of Columbia, may practise as such in the courts of this State," and to determine whether the word "person," as therein used, is confined to males, and whether women are admitted to practise law in that Commonwealth.

THE case is stated in the opinion.

Mr. Joseph Christian for the petitioner.

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

This is an application by Belva A. Lockwood for leave to file a petition for a mandamus requiring the Supreme Court of Appeals of Virginia to admit her to practise law in that court. Mrs. Lockwood has been for many years a member of the bar of this court and of the Supreme Court of the District of Columbia, and also, she avers, of the bars of several States of the Union. Her complaint is that she recently applied to the Supreme Court of Appeals of Virginia to be admitted to the practice of law in that court, and the court denied her application, notwithstanding it is provided by a statute of that State that "any person duly authorized and practising as counsel or attorney at law in any State or Territory of the United States, or in the District of Columbia, may practise as such in the courts of this State." Code Va. 1887, § 3192; and she alleges that the only reason for the rejection of her application was that she is a woman. It appears that no record was made of the refusal complained of, but she

presents a certificate of the clerk of that court to the effect that the application was made and rejected, though "no order was made at the time." Nothing is stated in the papers before us as to the residence of the petitioner, whether in the District of Columbia or in some other State than the State of Virginia. Our interposition seems to be invoked upon the ground that petitioner has been denied a privilege or immunity belonging to her as a citizen of the United States, and enjoyed by the women of Virginia, in contravention of the second section of Article IV of the Constitution and of the Fourteenth Amendment.

In *Miner* v. *Happersett*, 21 Wall. 162, this court held that the word "citizen" is often used to convey the idea of membership in a nation, and in that sense, women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of the Fourteenth Amendment of the Constitution as since; but that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that amendment did not add to these privileges and immunities. Hence, that a provision in a state constitution which confined the right of voting to male citizens of the United States was no violation of the Federal Constitution.

In *Bradwell* v. *The State*, 16 Wall. 130, it was held that the right to practise law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practise law in the courts of a State is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Section 3192 of the Code of Virginia quoted in this application is one of twelve sections constituting chap. 154 of that Code, entitled, "Of Attorneys-at-Law Generally." Section 3193 reads: "Every such person shall produce, before each court in which he intends to practise, satisfactory evidence

of his being so licensed or authorized, and take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney-at-law; and also, when he is licensed in this State, take the oath of fidelity to the Commonwealth."

It was for the Supreme Court of Appeals to construe the statute of Virginia in question, and to determine whether the word "person" as therein used is confined to males, and whether women are admitted to practise law in that Commonwealth.

Leave denied.

THE HAYTIAN REPUBLIC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1136. Argued April 27, 1894. — Decided May 26, 1894.

When a vessel, libelled for smuggling and for violations of the Chinese Exclusion Act, is discharged on giving the bond required by law, it may be again libelled in another district for similar offences, alleged to have been committed prior to the offences charged in the first libel; but, if both suits proceed to judgment, there can be but one forfeiture of the vessel.

On June 7, 1893, in the District Court of the United States for the District of Washington, the United States libelled the steamship Haytian Republic for violations of the "Chinese Exclusion Act," and for smuggling opium. It was averred that the violations of the Exclusion Act occurred at the following dates: 1st, September 20, 1892; 2d, October 8, 1892; 3d, October 12, 1892; 4th, October 15 and 16, 1892; 5th, November 1, 1892; 6th, November 26, 1892; 7th, December 12, 1892; 8th, December 13, 1892; 9th, January 2, 1893; 10th, January 26, 1893; 11th, February 2, 1893; 12th, March 28, 1893; 13th, May 11, 1893.

The offences of opium smuggling, according to the libel, were committed as follows:

Statement of the Case.

November 21, 1892, at Portland, Oregon, 2000 pounds, of the value of $22,000; December 7, 1892, at St. Johns, on the Columbia River, 1000 pounds, of the value of $11,000.

The prayer was for the forfeiture of the vessel on account of the violations of the Exclusion Act, and for judgment for $32,000, the value of the opium, with recognition of a lien on the ship for that amount.

The Northwest Loan and Trust Company claimed the vessel, and, after due appraisement, she was bonded.

On the 6th day of July, 1893, in the District Court of the United States for the District of Oregon, the United States again libelled the same steamship for violations of the Chinese Exclusion Act and for smuggling opium. In this libel it was alleged that the violations of the act were committed at the following dates: 1st, October 29, 1892; 2d, June 14, 1893; and 3d, June 28, 1893, all at the port of Portland, Oregon. And the opium smuggling was charged as follows:

1st, October 29, 1892, at Portland, Oregon, 1640 cans, containing 820 pounds, of the value of $9840; 2d, December 27, 1892, at St. Johns, Oregon, 1000 pounds, valued at $12,000.

The prayer of this second libel was for forfeiture of the vessel for the violations of the Exclusion Act and for judgment for $28,840, the value of the opium, with recognition of a lien on the vessel for that amount.

On the 14th of July, 1893, an amended libel was filed, charging the smuggling of opium, 1st, on July 28, 1892, Willamette River, 300 pounds of opium, of the value of $3300; 2d, on August 30, 1892, on the Columbia River, near the mouth of the Willamette River, of 800 pounds, of the value of $8800; 3d, on the 2d of September, 1892, near Swan Island, 1400 pounds, worth $15,400; 4th, on the 27th of January, 1893, at Portland, Oregon, 1200 pounds, worth $11,220; and 5th, on the 22d of February, 1893, at Portland, Oregon, 900 pounds, value $9900.

The prayer of the amended libel was also for the forfeiture of the vessel, and for a decree for the penalty to the value of the opium, which was $48,620, with lien upon the vessel.

The original and amended libel claimed, therefore, the for-

feiture of the vessel for three violations of the Chinese Exclusion Act, the first occurring in October, 1892, and the two last after June 7, 1893; and also sought to enforce against the vessel an aggregate penalty of $77,460 for seven acts of opium smuggling, which, they charged, had taken place at various dates between the 28th of July, 1892, and the 22d of February, 1893.

Thus, all the offences against the Chinese Exclusion Act, charged by these libels, except the two last, occurred prior to June 7, 1893, the date of the filing of the libel in the District Court of Washington, and all the offences of opium smuggling therein charged occurred prior to the filing of the suit in Washington.

The Northwest Loan and Trust Company appeared as claimant in the new suit. It excepted to all the averments as to violations of the Exclusion Act and smuggling which, according to the allegations, were committed before the filing of the suit in the District of Washington. Its exception, therefore, covered all the charges of smuggling opium and one of the charges of violation of the Chinese Exclusion Act. To the two averments of violation of the act, which were not excepted to, an answer was filed.

The court sustained the exception and dismissed the libels, except as to the two charges of violation of the Exclusion Act subsequent to the filing of the suit in the Washington District. As to these, it held that the averments of the libel stated no violation of the laws of the United States.

The case was taken by appeal to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the District Court was affirmed. This action of the Circuit Court of Appeals was brought up for review under a writ of certiorari.

Mr. Solicitor General for the United States.

Mr. John H. Mitchell for the steamship Haytian Republic and for The Northwest Loan and Trust Company.

The well-settled rule, which requires the boundaries of the jurisdictions of courts of equal jurisdiction in different States or

districts, both as to persons and subject-matter, to be clearly defined and recognized, to the end that proceedings in one shall not in any respect, or in the slightest degree, be obstructed or delayed by proceedings in the other, will not permit a second seizure and libel *in rem* against a vessel, pending seizure and proceedings thereunder in another jurisdiction, or even in the same jurisdiction, and for alleged cause or causes of forfeiture existing at the date of the first seizure. If there can, under such circumstances, be a second seizure, then there may be a third, and a fourth, or even more, in as many other districts, or even in the same district.

The right of the claimant to give bond and have the vessel released is a statutory right, — one which attaches as often as a seizure occurs, but he must give bond conditioned for the payment of the full appraised value of the vessel in the event of condemnation. If there can be two or more seizures of the same vessel in as many different districts and as many different bonds given for the value of the vessel, and a decision in each case be entered in favor of the government, may not the claimant, nay, will he not, be compelled to respond on these several bonds to an amount double or treble, as the case may be, of the value of the vessel?

The Solicitor General suggests in his brief that "If various libels filed by the government be pending in different jurisdictions, each involving a forfeiture, and a bond has been given, in a proper case a stay may be obtained, pending a speedy determination in one suit, and if a judgment of forfeiture is rendered in that suit, it would seem proper to allow it to be pleaded in bar of the other suits."

It is respectfully submitted that any rule which makes the progress of the proceedings in one district court depend on the progress or delay of similar proceedings in another district court, ought not to be regarded with favor by this court.

This being a proceeding *in rem* not *in personam*, it is clear the case does not come within the category of cases permitting separate suits as upon separate and distinct demands; on the contrary, this proceeding *in rem* comes clearly within the doctrine laid down by this court, speaking through

Mr. Justice Field, in *Stark* v. *Starr*, 94 U. S. 477, 485, where it is said: "It is undoubtedly a settled principle that a party seeking to enforce a claim legal or equitable must present to the court, either by the pleadings or proofs, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

What was the special relief sought by the government in the proceeding in the Washington court? Simply the confiscation of the vessel. This being so, the government was "not at liberty to split up its demand and prosecute it by piecemeal."

What would be the result of a final decision either way by the Washington court as a bar to future seizures and suits for antecedent causes of forfeiture, whether such causes were or were not included in the libel in that case? The answer to this query is a proper test as to whether the Oregon court could acquire jurisdiction pending the suit in the Washington court, or if jurisdiction could attach, whether it could stand against a plea of *lis pendens* in the Washington court.

It is respectfully insisted such final decree in the Washington court, either condemning the vessel on the one hand, or exonerating the owner against all charges preferred on the other, would be an absolute bar to any future suit against the same vessel, either on account of the causes of forfeiture alleged in the bill or any similar antecedent causes, not included in the bill. If this be true, then a plea in abatement or bar, or exceptions filed, which amount to the same thing in effect, to the bill in the Oregon court, must abate the proceedings in that suit.

Chief Justice Marshall, in *Osborn* v. *Bank of the United States*, 9 Wheat. 738, held that, to ascertain what is embraced in a cause it is necessary to consider what will be concluded by the judgment, and a judgment is confessedly conclusive of every point which might have been raised in pleading, whether

it is or is not actually put at issue and determined. See also *Beloit* v. *Morgan*, 7 Wall. 619.

A former judgment between the same parties in which a claim was decided or was properly involved and might have been decided is a bar to another action or suit as to such claim. *Stockton* v. *Ford*, 18 How. 418.

"The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule in relation to estoppel, whether the second action is at law or in equity."

"An adjudication is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defence."

"If either party omits to set forth and prove all the grounds of his right or his adversary's want of it, he cannot correct his error by bringing another suit upon the portion or fragment of the case omitted." Freeman on Judgments.

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

All question as to the correctness of the rulings below, that the two alleged violations of the Exclusion Act after June, 1893, constituted no offence against the laws of the United States, was waived in the discussion at bar.

The first question, then, for consideration is, was the action of the court correct in dismissing all the charges, both as to the introduction of Chinese and as to the importation of opium prior to June 7, 1893, because of the pendency of the suit in the District of Washington?

Pretermitting all question as to whether the pendency of suits in District Courts of the United States sitting in different States, is a subject-matter of the defence "other suit pending" — the issue is, "Did the suit in Washington prevent the

bringing of suit in Oregon?" Both the introductions of Chinese and the importations of opium which were averred in the suit in Oregon were distinct and different acts from those charged in the libel filed in the District Court of Washington. The elementary principle which governs the availability of the plea of "other suit pending" was thus stated in *Watson* v. *Jones*, 13 Wall. 679, 715:

"When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interest, there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title, or essential basis of the relief sought, must be the same."

Tested by these principles, it is obvious that the plea of pendency of the suit in Washington was not available here. There were the same parties, but not the same rights asserted; and the claim of relief was not founded upon the same facts. In the case just cited it was said that the true test of the sufficiency of a plea of "other suit pending" in another forum was the legal efficacy of the first suit, when finally disposed of, as "the thing adjudged," regarding the matters at issue in the second suit. *Dick* v. *Gilmer*, 4 La. Ann. 520; *Bischoff* v. *Theurer*, 8 La. Ann. 15.

The efficiency of the test, thus applied, results from the fact that the elements constituting the thing adjudged, and those necessary for the plea of "other suit pending," are identical.

It is obvious that the decision of the suit in Washington would not have constituted the thing adjudged as to the matters averred in the suit in the District of Oregon. The charges were different. If the court in Washington had found that, at the times and places named, the vessel had not smuggled opium and had not illegally imported Chinese, and adjudged accordingly, such judgment would not have affected the question of whether or not similar offences had been committed at other times and places.

It is contended, however, that, although the two suits involved the assertion of different rights, as the rights asserted

in the last suit were in existence at the time the first suit was brought, therefore they should have been asserted in that suit, and could not be afterwards relied upon in a separate suit, in a different forum. In support of this proposition we are referred to the case of *Stark* v. *Starr*, 94 U. S. 477, 485, and this language is quoted from the opinion in that case:

"It is undoubtedly a settled question that a party seeking to enforce a claim legal or equitable must present to the court, either by the pleadings or proofs, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible."

This statement, however, is qualified by the following, which is not included in the citation: "But this principle does not require distinct causes of action — that is to say, distinct matters — each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together." p. 485.

The qualification states the elementary rule. One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other. *Cripps* v. *Talvande*, 4 McCord, 20.

It is evident that proof showing that a particular lot of opium had been smuggled on a particular day, or a particular number of Chinese had been imported at a particular time, would have no relevancy or tendency to prove the smuggling of a different lot of opium at a different time, or the importation of a different number of Chinese at a different date.

It was conceded, in argument, that where a vessel had been bonded and then committed an offence — which made her liable to forfeiture — she could be proceeded against in a court other than where the bond was given. This admission practically involves the whole point at issue here. If the

vessel, after the bond had been given, was not in the custody of the court of first resort to the extent of preventing a second libel from being filed against her in another court for a subsequently arising offence, she was not in the custody of the court so as to prevent a seizure for an offence which existed at the time of the first libel, and which the libellants were under no legal necessity to join therein. The attempted distinction rests upon the theory that, after bonding, the vessel was in the custody of the court for the purposes of all claims existing at the time of the bonding, and out of the custody of the court as to all claims arising subsequent thereto. But if the vessel was in the custody of the court at all, it was there for all purposes, and the admission that it was not so in the custody of the first court as to preclude proceedings against it in another forum under certain circumstances carries with it the concession that it was not in that custody to such an extent as to affect the question of proceedings elsewhere under any circumstances whatever.

It is true that, where a fraudulent appraisement has been had, or a fraudulent or illegal bond has been given, in an Admiralty proceeding, the court has the power to recall the vessel for the purpose of requiring an honest appraisement and of exacting a legal bond. *United States* v. *Ames*, 99 U. S. 35; *The Union*, 4 Blatchford, 90; *The Favorite*, 2 Flippin, 86; *The Thales*, 3 Ben. 327; 2 Parsons on Shipping, 411. This special power, however, to meet a particular contingency does not affect the general rule, or imply that the vessel, after a legal bond has been given, remains in the exclusive custody and jurisdiction of the court. *The Union*, *supra*.

It is urged that, as in the first case the issue was the forfeiture of the vessel, and this involved her entire value, and as the bond given represented that entirety, the existence of the bond in the Washington court precluded the raising of any question concerning the liability of the vessel to forfeiture elsewhere. The fallacy here lies in supposing that the bond took the place of the entire value of the vessel for any other purpose than the subject-matter of the suit in which the bond

was given. The claim for forfeiture alleged in the cause wherein the bond was given was alone covered by the bond, and therefore, the assertion of a right to forfeiture for another and distinct cause was not embraced in its condition, although its penalty was the full value of the vessel. The authorities are clear upon this point. In *The Wild Ranger*, decided by Dr. Lushington, the facts were these: A collision occurred between the Wild Ranger and the Coleroon. The Wild Ranger was libelled by the owners of the other vessel, who claimed £3500, and was released under bond. Subsequently she was libelled by the owners of the cargo of the Coleroon. In this last proceeding a decree of condemnation was rendered, the vessel was sold, and the proceeds of sale were paid into court. The price of the sale exceeded the sum of the damages awarded to the owners of the cargo. Pending these proceedings under the second libel, the damages due to the owners of the Coleroon were ascertained to be greater than the sum of the bond given in their case. The owners of the Coleroon thereupon claimed the balance realized by the sale of the Wild Ranger, over and above the amount which had been decreed to the owners of the cargo. Upon this state of facts Dr. Lushington thus ruled:

"In order to justify me in directing these proceeds to be paid to the owners of the 'Coleroon' it is not sufficient that they should show that a debt is due them from the owners of the 'Wild Ranger'; they must either prove that they have a lien upon the proceeds or produce a statute authorizing me to apply these proceeds in satisfaction of the judgment they have obtained. Now, there is no lien on these proceeds, by reason of the action being in the nature of an action *in rem*. The proceeds of the ship sold are, in legal consideration, the same as the ship itself; and the ship was wholly released from all claim by the owners of the 'Coleroon' from the moment that they took bail." *The Wild Ranger*, 2 New Rep. 402, 403.

In the *T. W. Snook*, 51 Fed. Rep. 244, 245, the Snook had been libelled by the Georgia and released under bond for $4000, double the amount of the Georgia's claim. After the

release of the Snook the Continental Insurance Company, which had paid for a loss on the cargo of the Georgia, intervened and asserted its right to be reimbursed for its expenditure out of the balance of the bond over and above the claim of the Georgia. The court (Blodgett, J.), said: "I do not think this application on the part of the insurance company should prevail, my reasons being briefly that at the time the bond was given on which the Snook was released no claim was made in the proceedings except for damage to the hull of the Georgia, and, in fact, it was not until about two months after this bond had been given that the insurance company paid the loss on the cargo, and thereby acquired any right of intervention or subrogation. The sureties on the bond must be presumed to have signed it on the understanding that their liability was only to satisfy the cause of action set out in the libel, which was for the damages to the hull of the Georgia." (See also *The Union*, 4 Blatchford, 90.)

There is no force in the argument that, as the suit in Washington claimed the forfeiture of the vessel and the suit in Oregon claimed the same thing, there was a practical identity between them. The fallacy results from a failure to distinguish between the right and the remedy. True, the remedy sought in Washington was the forfeiture of the vessel, and the same remedy was invoked in Oregon, but the causes of action upon which the remedy was prayed in the two cases were entirely different. As we have seen, not only identity of relief, but identity of cause of action, is essential to the plea of pending suit, and both are also necessary to the efficacy of the plea of the thing adjudged.

It is urged that, as the matters could have been joined in the Washington suit, therefore they would have been concluded by a decree rendered therein, the argument being that a judgment concludes not only the matters actually in controversy, but all those which might have been adjudged.

In support of this contention we are referred to *Osborn* v. *Bank of the United States*, 9 Wheat. 738; to *Beloit* v. *Morgan*, 7 Wall. 619, and other authorities. It is unnecessary to examine these in detail. The proposition which they support

is well stated in an excerpt from Freeman on Judgments, quoted in the brief of counsel: "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defence."

If the deduction drawn by counsel from this and similar language were true, then a judgment upon one cause of action would be conclusive as to every other existing at the time, although not embraced in the suit, and although the parties were not obliged to join it therein. This would destroy the right of parties to sue separately upon distinct causes of action, and would be subversive of the entire theory of the thing adjudged. The mistake lies in construing the words "which might have been raised," as applying to a cause of action other than the cause of action embraced in the suit. In other words, the doctrine is that the thing adjudged includes not only the direct results of the cause of action which the judgment concludes, but also all things necessarily incident to and growing out of that cause which the parties might have joined in the suit. *Dowell* v. *Applegate*, 152 U. S. 327, 343. Of course, whilst concluding that the separate causes of the action here under consideration need not have been joined in one suit, and that the suit in Washington was no bar to the suit in Oregon, we must not be considered as intimating that there could be more than one forfeiture of the vessel. The distinct charges give rise to distinct causes of action, but the forfeiture for either would have consummated the proceedings.

Judgment reversed and case remanded for further proceedings in accordance with this opinion.

NORTHERN PACIFIC RAILROAD COMPANY *v.* PATTERSON.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 357. Argued and submitted April 12, 1894. — Decided May 26, 1894.

When the laws of a State create a tribunal for the correction and equalization of assessments, and provide that persons feeling aggrieved by a valuation may apply to such board for its correction, and confer upon the board power so to do, it is for the Supreme Court of the State to determine whether the statute remedy is exclusive or whether it is only cumulative; and its action in that respect raises no Federal question.

This was an action commenced by the Northern Pacific Railroad Company against J. L. Patterson, county treasurer of Gallatin County, Montana, for an injunction to restrain the defendant from selling certain lands, blocks, and lots for taxes which had been levied thereon in the year 1889, or collecting the same, and also for a decree adjudging said taxes to be void. The complaint set out three separate and distinct causes of action, but it is not claimed that any Federal question was presented by the allegations in respect of the second and third causes, and no error as to the ruling of the state court thereon was assigned in this court. The complaint asserted an interest in the lands in question under the act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast on the northern route;" but insisted that the lands were not so segregated from the public domain and identified as a part of the lands granted by said act as to extinguish all interest of the United States therein and render them taxable. And the grounds set up are thus stated in the brief of counsel: "That a grant was made to the plaintiff by said act of July 2, 1864; that plaintiff definitely fixed the line of its road and filed a plat thereof in the office of the Commissioner of the General Land Office; that the road

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was duly constructed and was accepted by the president. That the lands involved are on and within 40 miles of the line of the road as definitely fixed; and that plaintiff has performed all the things and conditions upon its part to be done and performed to entitle it to the lands inuring to it under the grant; except that it has not repaid to the United States the cost of surveying these lands; that it is now, and has been at all times, ready and willing to pay such costs, and has so advised the United States, but is unable to repay such costs until the United States shall determine what lands are granted to it. That the lands have not been certified or patented to plaintiff, and that the United States have failed and refused to certify said lands, or to certify any lands in Gallatin County to plaintiff, for the reason that it is claimed that said lands are mineral, and are excepted from the grant, and that the question whether the title to said lands passed to plaintiff under said grant, and plaintiff's compliance therewith, is now in controversy and pending before the Commissioner of the General Land Office and Secretary of the Interior. That this failure to certify or patent these lands is solely because of their non-identification as granted lands. That the lands granted by said act of Congress to plaintiff in said county have never been segregated from the public lands, or identified, and the boundaries of the specific lands granted have never been ascertained or determined.

"That plaintiff has no other right, title, claim, interest, property or possession of, in or to said lands described in the complaint, than such right, title, claim, interest, property or possession, as it obtained under said act of July 2, 1864.

"That in 1889, the county officers of Gallatin County assessed these lands to plaintiff and proceeded to levy taxes thereon, and defendant, the county treasurer, having advertised the same for sale in satisfaction of these taxes, is about to sell them."

The complaint alleged that a sale would greatly impair the rights of the plaintiff in and to the lands, and cloud its title thereto, and cause a multiplicity of suits with reference to such title, etc. The defendant demurred on the ground that

the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained, and, plaintiff electing to stand on the complaint, judgment was entered in favor of defendant. From this judgment plaintiff appealed to the Supreme Court of the State, by which it was affirmed. 10 Montana, 90. Thereupon plaintiff sued out this writ of error.

Mr. James McNaught for plaintiff in error. *Mr. F. M. Dudley* filed a brief for same.

Mr. W. W. Dixon for defendant in error, submitted on his brief; on which were also *Mr. H. J. Haskell*, Attorney General of the State of Montana, *Mr. H. C. Cockrill*, and *Mr. Ella L. Knowles.*

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

The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them, and held them suspended "for the reason that it is claimed that such lands are mineral and are excepted from the grant to the plaintiff." It was said in *Wisconsin Central Railroad* v. *Price*, 133 U. S. 496, 505, that "he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation," and plaintiff does not state whether all or any part of the lands are mineral or non-mineral. If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not; but the ground upon which the decision of the Supreme Court of Montana proceeded was this: The 22d section of the statute of Montana,

entitled "An act to provide for the levy of taxes and assessment of property," (Laws Mont., Ex. Sess. 15th Leg. Ass., 1887, 82, 92,) provided:

"The board of county commissioners of each county shall constitute a board for the correction of the assessment roll and the equalization of assessed value of property, and on the third Monday in the month of September, of each year, said board shall meet at the office of the county clerk, at the county seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said board shall be given by the county clerk by publication for at least two successive weeks, in a newspaper published in said county, if there be one, otherwise by notices posted in five public places immediately prior to the meeting of said board of equalization; but no notice of an adjourned meeting of said board shall be required. Any person feeling aggrieved by any valuation, or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof, and if, in the opinion of said board, any valuation is too high or too low, as compared with other valuations, by the assessor, of similar classes of property, it may equalize the same; but if such equalization results in any increase, the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid. If any person returned as refusing to render a list or to be sworn thereto can show good cause therefor, the penalty provided may be remitted."

The court held that under this section plaintiff had an ample legal remedy which it was obliged to exhaust before the equitable powers of the court could be resorted to, and, as upon the face of the bill it appeared that the plaintiff had not applied to the board of equalization of Gallatin County for the correction or abatement of the assessment, that no jurisdiction existed under the complaint to grant the injunction. It is contended, on the other hand, that where taxes are levied upon property which is by law exempt from taxation, the statutory remedy by application to a board of review is only

cumulative and that the taxpayer may at his election seek his remedy by injunction in the first instance. But it was for the Supreme Court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration. It is argued that the opinion in effect decides that, under the statute, the State of Montana has a right to assess and levy taxes upon the lands of the United States, and that if no application is made to the board of equalization, the sale of such public lands cannot be restrained. The plaintiff, however, in no respect represented the United States, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not.

The writ of error must be

Dismissed.

ST. CLAIR *v.* UNITED STATES.

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

No. 1062. Submitted March 5, 1894. — Decided May 26, 1894.

An indictment for murder which charges that the offence was committed on board of an American vessel on the high seas, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States, sufficiently avers the locality of the offence.

An indictment which charges that A, B, and C, acting jointly, killed and murdered D, is sufficient to authorize the conviction of one, though the others may be acquitted.

A charge in an indictment that the accused did then and there, piratically, wilfully, feloniously, and with malice aforethought, strike and beat the said D, then and there giving to said D several grievous, damaging, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him, the said D, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said D, in the sea aforesaid, sufficiently charges that the throwing into the sea was done wilfully, feloniously, and with malice aforethought.

An indictment being found after the trial jury had been properly discharged,

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the court may order a *venire* to issue for persons to serve as jurors, and may further direct the marshal to summon talesmen.

Rule 63 of the court below is not inconsistent with any settled principle of criminal law, and does not interfere with the selection of impartial juries.

Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal facts that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.

On the trial under an indictment charging that A, B, and C, acting jointly, killed and murdered D, without charging that they were co-conspirators, evidence of the acts of B and C are admissible against A, if part of the *res gestæ*.

A party may show that the testimony of one of his witnesses has taken him by surprise, and that it is contrary to the examination of him preparatory to the trial, or to what the party had reason to believe that the witness would testify; or that the witness had been recently brought under the influence of the other party and had deceived the party calling him.

The certificate of the vessel's registry and proof that she carried the flag of the United States were properly admitted on the trial of this case, and established a *prima facie* case of proper registry under the laws of the United States, and of the nationality of the vessel and its owners.

When no exception is taken on the trial of a person accused of crime to the action of the court below on a particular matter, that action is not subject to review here, although the statutes and practice of the State in which the trial takes place provide otherwise.

In criminal proceedings all parts of the record must be interpreted together, so as to give effect to every part, if possible, and a deficiency in one part may be supplied by what appears elsewhere in the record.

In February, 1893, the grand jury, empanelled in the District Court of the United States for the Northern District of California, returned into that court an indictment charging that Thomas St. Clair, Herman Sparf, and Hans Hansen, mariners, late of that district, on the 13th day of January, 1893, with force and arms, on the high seas, and within the jurisdiction of the court, and within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the United States, in and on board of an American vessel, the bark Hesper, belonging to a citizen or citizens of the United States, whose name or names are or were to the grand jurors unknown, did, with a certain instru-

ment or weapon, (the character and name of which were to the grand jury unknown,) then and there held in the hands of one of the defendants, (but of which particular one was to the grand jurors unknown,) "then and there piratically, wilfully, feloniously, and with malice aforethought strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him the said Maurice Fitzgerald cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said Maurice Fitzgerald in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said Maurice Fitzgerald in the sea as aforesaid, they cannot describe the said mortal wounds or the character and nature of said weapon or instrument. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Thomas St. Clair, Herman Sparf, and Hans Hansen, him the said Maurice Fitzgerald at the time and place as aforesaid, upon the high seas as aforesaid, out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided."

It was also averred that the Northern District of California was the district into which St. Clair, Sparf, and Hansen were first brought after committing said offence.

The indictment was based upon section 5339 of the Revised

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Statutes, providing among other things that "every person who commits murder . . . upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

On motion of the district attorney the indictment was remitted for trial to the Circuit Court, where the defendants were arraigned and severally pleaded not guilty. Rev. Stat. § 1039.

Subsequently the pleas of not guilty were withdrawn and the defendants jointly demurred to the indictment upon these grounds: 1. That it did not state facts constituting a public offence. 2. That it was uncertain in not showing upon what portion of the high seas the alleged offence was committed or which one of the defendants committed the alleged assault, or whether one or more of the defendants committed any of the acts alleged against them.

The demurrer was overruled, and the defendants being again arraigned pleaded not guilty.

A motion for a separate trial of the defendants was made and granted, and the trial of St. Clair was had separately.

At the beginning of the trial the accused challenged the panel of the trial jurors and the challenge was denied.

The facts in reference to the challenging of jurors are as follows:

On the 1st day of February, 1893, a day of the term of the Circuit Court, commencing November 28, 1892, an order was made and entered directing a venire to issue summoning fifty persons to serve as trial jurors, returnable February 14, 1893. Pursuant to that order a venire containing fifty names drawn from the regular jury box of the court was issued for those persons to act as petit or trial jurors. At the time of the drawing there were at least three hundred names in the jury

box, but of those a part were names remaining after previous drawings at former terms of the court, and the others were names placed therein by the proper officers just previous to the drawing of said venire to make the whole number of names up to and including the full number of three hundred. The persons whose names were contained in that venire were duly summoned and appeared on the 14th day of February, 1893, with the exception of three, who had in the meantime been excused by the court. Thereafter, on the 2d day of March, 1893, a day of the term commencing on the 1st Monday of February, 1893, the following order was made and caused to be entered: "There being no further business to be brought before them it is ordered that the trial jury of said Circuit Court, for the present February term thereof, be discharged and paid for their attendance." On the 6th day of May, 1893, the indictment against St. Clair, Sparf, and Hansen was, as already stated, remitted to the Circuit Court from the District Court.

On the 29th day of May, 1893, a day of the February term, after the discharge of the regular jury for the term, the court entered an order directing a venire to issue for fifty persons to serve as trial jurors, and returnable on Wednesday, June 7, 1893. Pursuant to that order a venire containing the names of fifty persons drawn from the regular jury box of the court was issued for those persons to serve as trial jurors in the Circuit Court, and to appear on the 7th day of June, 1893. At the time of the drawing last mentioned there were at least three hundred names in the jury box, but of those a part were names remaining after the last drawing, and the others were names placed therein by the proper officers just previous to the drawing of the last-mentioned venire to bring the whole number in the jury box up to three hundred. The persons whose names were contained in the last-mentioned venire (such as were summoned and not excused) appeared and attended the court in obedience to its summons. Thereafter on June 14, 1893, a day in the February term, the circuit judge presiding, the case against St. Clair was called for trial.

The defendant challenged and objected to the general

venire and panel of jurors on the ground that the regular venire of jurors for the term had been discharged, and that the court had exhausted its powers to summon a jury to act during the term after the order for a jury of February 1, 1893, and the order discharging the jury of the 2d of March, 1893; and on the further ground that the statutes had not been complied with in summoning jurors, and that at the time of the drawing of the names of jurors the jury box had not been refilled with three hundred new names, but a portion of the names therein were names remaining after previous drawings. The court overruled the objection and denied the challenge, to which rulings of the court the defendant objected.

Thereupon twelve persons who had been drawn and summoned as aforesaid were regularly called into the jury box, but before being sworn to answer questions touching their qualifications, the attorneys for the defendant objected to and challenged the panel thus called on the ground urged against the general venire. The court overruled the objection and denied the challenge, to which the defendant excepted.

The jurors were then sworn to answer questions touching their qualifications to serve as jurors. After the first juror had been examined as to his qualifications and passed by the United States and the defendant for cause, the court announced that the juror must be sworn to try the case, unless challenged by the United States or the defendant, and that this rule would be enforced as to each subsequent juror. The defendant claimed the right to examine all of the jurors as to their qualifications before exercising the peremptory challenge, and excepted to the ruling announced by the court.

The defendant challenged each separate juror after he entered the box on the ground that the jury had not been properly drawn as hereinbefore stated, which challenge was denied by the court, and the several rulings of the court were excepted to by him.

The names of jurors summoned having become exhausted, after only eight had been examined, accepted, and sworn, the court ordered 25 talesmen to be summoned for June 15, 1893, to serve as trial jurors in the cause. On that day the defend-

ants objected to the last-mentioned venire, and to the talesmen, on the grounds offered to the original general venire or panel. This objection and challenge were overruled by the court, and the defendant excepted.

The defendant also objected and challenged the talesmen on the ground that there was no jury regularly summoned to be filled by talesmen, and that the talesmen had not been summoned in conformity to law. This objection was overruled, and he excepted.

The defendant also objected to each separate talesman after he entered the box and was sworn, upon the grounds last mentioned, and the objection was overruled, to which he excepted.

After a jury of twelve had been empanelled and sworn to try the case, the same objection was repeated to the entire panel sworn to try the case, and the objection having been overruled, an exception was taken.

The material facts disclosed by the evidence are so fully and accurately stated in the brief on behalf of the government that we adopt the statement of the Assistant Attorney General, as follows:

"The Hesper was making the voyage from Australia to Honolulu. It left Newcastle on the 22d of December, 1892, with a crew consisting of fourteen persons. The ship's crew was divided into two watches, one called the starboard watch, which is the captain's watch; the other called the port watch, which is the mate's watch. The watches consisted of four hours at a time, except the afternoon watch, from 4 to 8 o'clock, which is divided into two watches of two hours each. The watches relieve each other every four hours. The man at the wheel strikes a bell for the watch to come on deck at 12, 4, and 8 o'clock. A watch is always called before 8 bells, which means 12 o'clock, 8 o'clock, and 4 o'clock. Every half hour is one bell. The seamen call each other and the officers call the officers. When one watch is performing duty the other watch is supposed to be sleeping during the day or night. On the 13th day of January, 1893, the starboard watch consisted of Maurice Fitzgerald, the second mate;

Thomas St. Clair, Herman Sparf, Hans Hansen, and Edwin Larsen. The port watch consisted of John Lucas, first mate; Thomas Green, Jens Olsen, Henry Westerlind, and Pandy Secaria.

"On the night of the 13th of January, 1893, John Lucas, the first mate, was called out at about five minutes to 12 o'clock, by Herman Sparf. He dressed, and as he was going on deck eight bells struck for 12 o'clock. He walked rapidly to the man at the wheel and asked where the second mate was. He called for him and received no answer. He went to the captain's cabin and reported that he could not find the second mate. The captain came on deck and inquired of the starboard watch, which had been on duty from 8 to 12 o'clock, if they knew where the second mate was who had charge of their watch; to his inquiry he received no reply. The carpenter was called on deck, and the search for the second mate was continued. The starboard watch, which had gone off duty at 12 o'clock, had gone below and was called again to the deck by the mate, and was not permitted to go to their bunks to sleep, but was required to remain on deck and go aft. The deck of the vessel was loaded with coal about ten or twelve feet high. The top of it was floored over with some hard wood and on top of that a deck was laid of two-inch planking.

"About twenty minutes past 12 o'clock the captain discovered blood on the deck; about seven or eight feet from the mainmast one spot of blood was about two and a half feet long. The next morning there was found on the edge of the gangway a narrow strip of scalp with a small piece of hair stuck together by blood attached to it. The hair was black, tinged with gray, and was recognized by the captain as the hair of the second mate who was missing. There was also found a broom covered with blood alongside the ladder; and beneath the bunk of St. Clair, the plaintiff in error, there was found a hatchet, which was greasy; and on the deck, near to where the blood was seen, there was found a wooden bludgeon. After the captain discovered the blood he called the starboard watch into the cabin. He saw blood on one of

the cheeks of Herman Sparf. The men all said they could not account for the blood on the deck; that they had heard nothing during their watch from 8 to 12. Herman Sparf said that he had seen the second mate go up the fore rigging, but had not seen him come down. The captain sent them to their bunks to go to sleep.

"Edward Larsen, a member of the starboard watch, relieved St. Clair at the wheel at 10 o'clock; the second mate was then close by the wheel when relieved by Larsen. St. Clair went forward on the deck. At that time the mate was aft. St. Clair returned and told the mate that something was carried away, and he went forward and the mate followed him. It was very dark at the time and that was the last Larsen saw of the second mate. Shortly after St. Clair and the second mate went forward Larsen heard a dog bark and a man 'holler.' At half-past 10 Captain Sodergren and his wife, who were together in the cabin, heard the dog bark and two sounds like a human voice in distress. The barking of the dog and the sound of the voice were heard also by John Langlais, the ship's carpenter, and M. P. Luck, the steward, but they only fix it between 8 and 12 o'clock. Herman Sparf, who was of the starboard watch and whose place was on deck, came to the forecastle, where the port watch were sleeping, and called Jens Olsen at a quarter to 11 o'clock to give them a hand to throw the captain overboard. And about the same time he woke up Thomas Green and said something to him which Green could not understand. Green went on deck in his underclothing; as he was going on the starboard side he saw Hansen with a broom in his hand, and when he went on the deck-load he found St. Clair, Hansen, and Herman Sparf standing there. He said to St. Clair: 'What's the matter, what's the news?' St. Clair said: 'We want you to give us a hand to throw the old man overboard,' referring to the captain. So I says: 'How are you going to get him on deck?' and he says: 'One of us will let go the peak halyards and one of us will go around to the wheel, and when he comes on deck then will be the time to do away with him.' So I says: 'Where's the second mate?'

He says: 'He has gone overboard; can't you see the blood on the deck?' So St. Clair says: 'What do you say?' and I says: 'Wait until I go and put a pair of pants on.'

"Jens Olsen did not go on deck when called by Sparf at a quarter to 11, and did not see St. Clair until he went on deck at 12 o'clock, when he saw him walking on the deck-load on the starboard side, aft of the mainmast.

"The hatchet, which was found under the bunk of St. Clair, was identified by Hong, the cook, as the one which St. Clair had borrowed from him at half-past 6 o'clock the evening before, to cut wood with.

"At half-past 10 o'clock, on the night of the homicide, St. Clair had on a blue serge coat, buttoned up, at the time he came back to the wheel and told the mate that something had been carried away, and he and the mate went forward together. When Captain Sodergren saw St. Clair on the deck, helping the mate to light the lamp, about a quarter after 12 o'clock, he had only a shirt on — a gray shirt; the captain saw no blood on it, and he went into the forecastle to discover whether there was blood on the men's clothing. Pandy Secaria had left St. Clair at the wheel about 9 o'clock that night; he saw him next after 12 o'clock, when the first mate was inquiring: Where is the second mate? He saw him again a few minutes later, after the starboard watch had gone below, coming out of the forecastle; he had changed his clothes; he had got a shirt on and no pants; he jumped inside the forecastle; he had a bundle of clothes in his hand and he chucked them overboard.

"Thomas Green saw St. Clair about 12 o'clock that night, or a little after, have some clothes and throw some clothes overboard. He had some clothes rolled up in a bundle and threw them overboard in front of Green. St. Clair's hands had blood on them at that time.

"After the mate had disappeared that night, and after St. Clair, Sparf, and Hansen were placed in irons, Sparf said to Edward Larsen, in Swedish, not to say anything about it. And the same night the plaintiff in error, St. Clair, had said to Thomas Green, in the forecastle, 'Say nothing about it, Tom.'"

In the progress of the trial there were numerous exceptions by the accused in respect to the admission of evidence.

The defendant asked but one instruction, which was in these words: "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. The jury are instructed that under the indictment in this case the defendant, St. Clair, may be found guilty of manslaughter, and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendant is guilty of manslaughter you may so find your verdict." This instruction was refused, but no exception was taken at the time to this action of the court. The court charged the jury upon the law of the case, saying among other things: "Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder." No exception was taken to the charge of the court or to any part of it.

The jury returned the following verdict: "We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty." Upon that verdict the defendant, after motions for new trial and in arrest of judgment had been overruled, was sentenced to suffer death.

Mr. J. F. Smith and *Mr. F. J. Kierce* 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.

I. The objection, upon demurrer, that the indictment did not sufficiently show on what part of the high seas the offence charged was committed, is met by the averment that the offence was committed on board of an American vessel, on the

high seas, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular State of the Union. Nothing more was required to show the locality of the offence. In *United States* v. *Gibert*, 2 Sumner, 19, 86, which was an indictment for robbery on the high seas — a capital offence and piracy under the act of 1790, 1 Stat. 113, c. 9 — the point was made that the indictment was defective in not stating the particular place on the high seas at which the robbery was committed. Mr. Justice Story overruled the objection, observing that "the averment in the indictment that the offence was committed on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, is sufficient certainty for all the purposes of the indictment and trial, without any other particular designation or averment of the locality of the offence. . . . The doctrine of *venue* in indictments at the common law is inapplicable to cases of this sort. . . . The reason of the common law for laying the *venue* so particularly in offences on land does not in any manner apply to offences on the high seas; for no jury ever did or could come from the *visne* or *visinage* on the high seas to try the cause; and no summons could issue for such a purpose."

Equally without merit is the objection that the indictment does not show which one or more of the defendants committed the alleged assault. The indictment charged that the defendants St. Clair, Sparf, and Hansen, acting jointly, killed and murdered Fitzgerald. The offence was one which in its nature might be committed by one or more of the defendants. Proof of the guilt of either one would have authorized his conviction and the acquittal of the others. Archbold's Cr. Pr. & Pl. 176; 2 State Trials, 526; *Young* v. *McKay*, 8 T. R. 98, 105.

The only question that could arise as to the sufficiency of the indictment is suggested by the words, "and did then and there, to wit, at the time and place last above mentioned, him, the said Maurice Fitzgerald, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown

him, the said Maurice Fitzgerald, in the sea aforesaid." These words, it is said, do not necessarily import that the casting and throwing the deceased into the sea was done wilfully, feloniously, and with malice aforethought. But they cannot properly be separated from those which show the nature and effect of the assault. The words immediately preceding show that the accused did "then and there piratically, wilfully, feloniously, and with malice aforethought, strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and *mortal* wounds." The latter words and those first above quoted are connected by the conjunctive "and," and should be construed together; and, so construed, it is clear that the words "piratically, wilfully, feloniously, and with malice aforethought" refer not only to the striking and beating of the deceased, whereby mortal wounds were inflicted upon him, but to the casting and throwing of him into the sea, whereby he was drowned. Any other rule of construction would compel the pleader to indulge in too much repetition. *Heydon's Case*, 3 Rep. 7.

II. The objections made to the jury were also properly overruled. It was clearly competent for the Circuit Court to make the order of March 2, 1893, discharging the trial jury for that term, there being no further business to be brought before the court. The indictment having been found after the regular trial jury had been discharged, the order of May 29, 1893, directing a venire returnable June 7, 1893, for fifty persons to serve as jurors was entirely proper. The names of the persons thus summoned to appear and who appeared were drawn from the regular jury box, in which at the time were at least three hundred names. But the list of the whole body of jurors was exhausted when only eight jurors had been accepted. Thereupon the marshal was directed to summon, and did summon, twenty-five talesmen. All this was in conformity to law. By section 804 of Revised Statutes of the United States, it is provided that "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his

deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel." And this section was neither expressly, nor by implication, repealed by the act of June 30, 1879, c. 52, § 2, 21 Stat. 43; nor did that act "touch the power of the court whenever, at the time of forming a jury to try a particular case, the panel of jurors previously summoned according to law is found for any reason to have been exhausted, call in talesmen from the bystanders to supply the deficiency." *Lovejoy* v. *United States*, 128 U. S. 171, 173.

III. By Rule 63 of the court below, it is provided that "in all criminal trials the designation, empanelling, and challenging of jurors shall conform to the laws of this State existing at the time, except as otherwise provided by acts of Congress or the rules of this court; but a juror shall be challenged, or accepted and sworn, in the case as soon as his examination is completed, and before the examination of another juror."

This rule was enforced at the trial of this case. After the first juror was examined as to his qualifications, the court announced that he must be sworn to try the case, unless challenged by one party or the other — the accused claiming the right to examine all the jurors as to their qualifications before being required to exercise his privilege of peremptory challenge as to any of them.

This general subject was carefully considered in *Lewis* v. *United States*, 146 U. S. 379, and in *Pointer* v. *United States*, 151 U. S. 396, 407, 410, 411. Referring to section 800 of the Revised Statutes, and the act of June 30, 1879, c. 52, 21 Stat. 43, 44, we said in the latter case: "There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in

a particular case adopt the state practice in that regard. *United States* v. *Shackleford*, 18 How. 588; *United States* v. *Richardson*, 28 Fed. Rep. 61, 69." "In the absence of such rule or order," it was further said, "the mode of designating and empanelling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offences. . . . In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted." Referring to certain observations of Chief Justice Tindal in *Regina* v. *Frost*, 9 Car. & P. 129, 137, it was further said: "At most in connection with the report of the case, they tend to show that the practice in England, as in some of the States, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire*, and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in *Frost's case* that that mode was the only mode that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the Circuit Courts of the United States to deal with the subject of empanelling juries in criminal cases was recognized in *Lewis* v. *United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 378."

Adhering to what was said in *Pointer's case*, that any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge, must be condemned, we hold that the rule adopted by the court below is not inconsistent with any settled principle of criminal law, nor does it interfere with the selection of impartial juries.

IV. Exceptions were taken, at different stages of the trial, to the admission, against the objection of the accused, of evidence as to the acts, appearance, and declarations of Sparf and Hansen. These objections seem to rest upon the general ground that the indictment did not charge St. Clair, Sparf, and Hansen as co-conspirators. The evidence was not, for that reason, to be rejected. St. Clair, Sparf, and Hansen were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of the *res gestæ*, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence. "These surrounding circumstances constituting part of the *res gestæ*," Greenleaf says, "may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." 1 Greenleaf, 12th ed. § 108. See also 1 Bishop's Cr. Pro. §§ 1083 to 1086. "The *res gestæ*," Wharton said, "may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate casual relation to the

act — a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." 1 Wharton Ev. § 259, 2d ed. 1879.

V. An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the government. The attorney announced that the answers of the witness had taken him by surprise, and asked that he be permitted to put leading questions to him. This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In *Bastin* v. *Carew*, Ryan & Mood. 127, Lord Chief Justice Abbott well said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice." The rule is correctly indicated by Greenleaf, when he says: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party." 1 Greenl. Ev. 12th ed. § 444; Taylor on Ev. 6th ed. § 1262 A; *Regina* v. *Chapman*, 8 Car. & P. 558, 559; *Regina* v. *Ball*, 8 Car. & P. 745; *Clarke* v. *Saffery*, Ryan & Mood. 126.

VI. At the trial below the government, after identifying

by the proper officer the original register of the Hesper, which disclosed the names of its owners, but not their nationality, introduced the same in evidence, and also proved that the vessel carried the American flag. There was no direct proof as to the citizenship or nationality of the owners, and the accused objected to this evidence as immaterial and incompetent. The objection was overruled and an exception taken. The court held the certificate of registration, and the proof as to the flag carried by the vessel, to be competent evidence in the case.

The statutes of the United States provide that vessels built in the United States, and belonging wholly to citizens thereof, may be registered; that no vessel shall be entitled to be registered, or, if registered, to the benefits of registry, if owned in whole or in part by any citizen of the United States who usually resides in a foreign country, during the continuance of such residence, unless he be a consul of the United States, or an agent for and partner in some house of trade, or copartnership consisting of citizens of the United States actually carrying on trade within the United States; and that no vessel shall be entitled to be registered as a vessel of the United States, or, if registered, to the benefits of registry, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless such person be a consul or other public agent of the United States. Rev. Stat. §§ 4132, 4133, 4134.

We are of opinion that the court below did not err in holding that the certificate of the vessel's registry, and its carrying the American flag, was admissible in evidence, and that such evidence made, at least, a *prima facie* case of proper registry under the laws of the United States and of the nationality of the vessel and its owners. "The purpose of a register," this court has said, "is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found." *The Mohawk*, 3 Wall. 566, 571. The object of the above evidence was, no

doubt, to meet any question that might arise as to the jurisdiction of a court of the United States to punish the particular offence charged. If the proof was unnecessary for that purpose, it could not have prejudiced the accused. If necessary, it was *prima facie* sufficient to establish the nationality of the vessel. A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and "persons on board are protected and governed by the laws of the country to which the vessel belongs." 1 Kent Com. 26.

VII. One of the assignments of error questions the competency of the statement of the captain of the vessel — admitted in evidence against the objections of the accused — that during the voyage, and particularly on and for several days before and after the night Fitzgerald was missing, he saw no vessels. This evidence was clearly competent. It bore upon the inquiry whether Fitzgerald was actually drowned or was alive. If vessels were shown to have been in sight, at or near the time of the alleged murder, the jury might have been left in doubt as to whether he was rescued after being thrown into the sea. Direct and positive evidence as to the *corpus delicti* was not required. Wills on Cir. Ev. 179. When the strict rule, here claimed, was insisted upon in *United States* v. *Williams*, 1 Cliff. 5, 20, the court expressed its approval of what was said by Mr. Justice Story in 2 Sumner, 19, 27 — where counsel contended that there should be no conviction for murder, unless the body was actually found — namely, that "in cases of murder upon the high seas the body is rarely, if ever, found, and a more complete encouragement and protection for the worst offences of this kind could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." The rule is illustrated by *Hindmarsh's Case*, 2 Leach's Crown Cases, 3d ed. 648, which was an indictment for murder upon the high seas. The counsel for the prisoner in that case contended that he should be acquitted on the evidence, because it was not proved that the captain, the person alleged to have been murdered, was dead, and "as there were many ships

and vessels near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them and was then alive." It was left to the jury to say whether, upon the evidence, the deceased was not killed before his body was cast into the sea.

VIII. It is assigned for error that the court refused to give the instruction asked by the accused upon the subject of manslaughter, and said to the jury that if a felonious homicide had been committed, of which they were to be the judges from the proof, there was nothing in the case to reduce it below murder.

As there was no exception taken to the action of the court in these particulars, the error alleged is not subject to review, *Tucker* v. *United States*, 151 U. S. 164, 170, unless, as the accused contends, we are to be controlled, in such matters, by section 1176 of the Penal Code of California. That section provides: "When written charges have been presented, given, or refused, or when charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the endorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner, as if presented in a bill of exceptions." They also, by the same code, form part of the judgment roll. § 1207.

These provisions of the Penal Code of California do not control the proceedings in the Circuit Court of the United States sitting in that State. What is necessary to be done in a Circuit Court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice. Such is the result of our decisions. Rev. Stat. § 914; Act of June 1, 1872, c. 255, § 5, 17 Stat. 197; *Nudd* v. *Burrows*, 91 U. S. 426; *Indianapolis and St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 553; *Southern Pacific Co.* v. *Denton*,

146 U. S. 202, 208; *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 338; *Lincoln* v. *Power*, 151 U. S. 436, 442. See also *Logan* v. *United States*, 144 U. S. 263, 303.

IX. By the Revised Statutes of the United States, it is provided that "in all criminal cases the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; *Provided*, that such attempt be itself a separate offence." § 1035. It is, therefore, contended that, as the verdict was, generally "guilty," and did not, in terms, indicate of what particular offence the accused was found guilty, the judgment should have been arrested.

This contention cannot be sustained. We said in *Pointer's case* that, while the record of a criminal case must state what will affimatively show the offence, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted together, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. 151 U. S. 396, 419. The indictment contained but one charge, that of murder. The accused was arraigned and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lesser crime necessarily included in the one charged, or of an attempt to commit the offence so charged, if such attempt was a separate offence, the law will support the verdict with every fair intendment, and, therefore, will by construction supply the words "as charged in the indictment." The verdict of "guilty" in this case will be interpreted as referring to the single offence specified in the indictment. 1 Bishop's Cr. Pro. § 1005 *a*, and authorities there cited; Wharton's Cr. Pl. & Pr. § 747; *Bond* v. *People*, 39 Illinois, 26. And this principle has been incorporated into the statute law of some of the States; as in California, whose Penal Code declares that a general verdict upon a plea of not guilty, of "guilty," or "not guilty," shall import a conviction or acquittal of the offence charged in the indictment. § 1151.

What has been said disposes of the objection to the form of

the sentence, which, of course, had reference only to the offence of which the accused was found guilty.

There are other assignments of error, but no one of them requires notice.

Upon a careful examination of the record, we do not find that any error was committed to the prejudice of the accused.

The judgment is affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* McFADDEN.

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

No. 318. Argued and submitted March 22, 1894. — Decided May 26, 1894.

If a railroad company, for its own convenience and the convenience of its customers, is in the habit of issuing bills of lading for cotton delivered to a compress company, to be compressed before actual delivery to the railroad company, with no intention on the part of the shipper or of the carrier that the liability of the carrier shall attach before delivery on its cars, and the cotton is destroyed by fire while in the hands of the compress company, the railroad company is not liable for the value of the cotton, so destroyed, to an assignee of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier.

The defendants in error (plaintiffs below) sued in the Circuit Court of Hunt County, Texas, to recover the value of two hundred bales of cotton, alleged to have been shipped from Greenville, Texas, to Liverpool, England, the shipments having been evidenced by two bills of lading, each for one hundred bales of cotton.

On application of the defendant below, the case was removed to the Circuit Court of the United States for the Northern District of Texas. After filing the record in that court, the pleadings were amended. The amended answer set up the following, among other special defences, on behalf of the company:

"First. That while it is true that it had issued certain bills

of lading for said cotton, said cotton had not yet in deed and in truth been delivered to it. It was the habit and the custom of defendant, and well known to plaintiffs to be such, after cottons were placed on the platforms at the compress in Greenville, before the same was compressed, it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that at the time they were so delivered to it the superintendent of the compress or the agent of the compress would check out such cottons intended and the shipper would make out a bill of lading, which would be O. K.'d by the superintendent of the compress or its agent, and afterwards it would be brought to the agent of the defendant and by him signed up, and defendant would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended by either the shipper or the defendant that the liability of the defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, George H. McFadden & Bro. and to A. Fulton & Co., and the bills of lading were made out according to this custom by A. Fulton & Co. as herein shown, and accepted by A. Fulton and Co. according to such custom. At the time said bills of lading were made the cotton was in the hands of the compress according to the custom aforesaid, and had never been delivered to defendant, the defendant's liability as a common carrier had never attached, nor had any liability attached, but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire and never came to the hands of defendant. Defendant says said cotton was placed on said platform at said compress for the purpose of being compressed by A. Fulton & Co.; that they well knew, intended, and expected said cotton should be compressed before it was shipped. Said cotton while at the compress was under the control of A. Fulton & Co. or their agent the compress company."

The answer thereupon proceeded to set out other matters to which it is unnecessary to refer.

Argument for Defendants in Error.

The plaintiff replied to the amended answer and excepted to the first count, as follows:

"And they specially except to the first count in defendant's special answer, in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing."

The reply then proceeded to except to other parts of the defendant's answer.

The court sustained the plaintiffs' exception to the first count of the amended answer, to which ruling exception was reserved. Thereupon the facts were stated to be, 1st, that the bills of lading had been issued to Fulton & Co.; 2d, that they were assigned to the plaintiffs; 3d, that the value of the cotton was $8647.83 at the time it was destroyed, and that the defendant had never paid therefor.

Upon this evidence, the case was submitted to the court without a jury, and the court found for the plaintiffs and gave judgment for the value of the cotton. The case was brought here by writ of error.

Mr. James Hagerman and *Mr. Joseph M. Bryson*, for plaintiff in error, submitted on their brief.

Mr. George Wharton Pepper, (who, on motion of *Mr. George F. Edmunds*, had been granted leave to appear for the purpose of arguing this case orally), for defendants in error. *Mr. J. Bayard Henry* was with him on his brief. To the point on which the case was decided he said:

The liability of the defendant as carrier attached upon the execution and delivery of the bills of lading, and prior to the destruction of the cotton by fire.

Upon this point the finding of the learned judge in the court below was as follows: "After the signing of said bills by the defendant, its duty and liability as a common carrier commenced."

Argument for Defendants in Error.

In a case before the Supreme Court of Texas, which grew out of much the same facts as those upon which this case depends, *Missouri Pacific Railway* v. *Sherwood*, 19 S. W. Rep. 455 (1892), the defendant company does not appear to have thought it worth while to contend that its liability as carrier had not attached at the time of the fire. The state court, following the decision of Judge McCormick, seems to have considered it too clear for argument that when the shipper had parted with all control and custody of the goods, and the carrier, by its bill of lading, had acknowledged the receipt of them, the liability of the carrier, whether limited or unlimited, attached *eo instanti*.

Now, however, the learned counsel for the plaintiff in error strenuously contend that the liability of the carrier had not accrued at the time of the fire, and they cite in support of the proposition several decisions, which, upon examination, are found (it is submitted) to have no bearing upon the case in hand.

Considering the case first upon principle, it will, of course, be admitted that the giving of the bill of lading for the goods raises a *prima facies* that the carrier has received them. Such a *prima facies* may be set aside by proof that the issuing of the bill was due to mistake, or fraud, or misrepresentation. But the delivery of the bill "is said to be very high and authentic evidence" not only of the receipt of the goods, but "of both the quantity and condition of the goods when they were received, though not an estoppel to show the truth." Hutchinson on Carriers, 2d. ed. § 122.

How is it sought in this case to set the presumption aside? No error, or fraud, or mistake is even averred. The railway company places its whole reliance upon an alleged "custom" in force at Greenville, according to which all cotton to be shipped over the defendant's road was by public invitation of the defendant, deposited upon a platform controlled by a compress company, which company is admitted by the defendant to have been a party to an agreement with the carrier, according to which the carrier issued a bill of lading immediately upon receiving notice of the deposit of the cotton. It

is almost preposterous to contend that there is in such a custom any feature which in any respect varies the carrier's liability. Either the custom is consistent with the unqualified acceptance of which the bill of lading is evidence, or it is a custom which, by the making of the bill, the parties have excluded by their contract.

These considerations, deduced from principle, are in nowise inconsistent with the cases cited by the plaintiff in error. For example: in *Iron Mountain Railway* v. *Knight*, 122 U. S. 79 (1886), the question was whether the recital in a bill was conclusive as to the quality of cotton shipped. The cotton had been shipped to Texarkana, to be there made up into bales at a compress-house by the carrier under the direction of the shipper, who, from time to time, selected bales of different quality for shipment, but the bills were often issued before the particular bales were separated from the mass. Obviously, therefore, the liability of the defendant as a carrier could not begin until the property which it was to carry was identified. But, more than this, the case is actually favorable to our contention, for Mr. Justice Matthews could not have used language more applicable to the present case than that which is found on page 93: "It may be said that the defendant's liability as a common carrier commenced at a time antecedent to the delivery of the cotton to be loaded on the cars; that it might have arisen upon a prior delivery of the cotton in question in the warehouse to be compressed, and then transported, the duty of compressing it, in order to prepare it for transportation, having been undertaken by the defendant. This, however, could only be where the specific goods, as the property of the plaintiffs, were delivered for that purpose into the exclusive possession and control of the defendant." It will be perceived at a glance that the condition of the carrier's liability, in conformity with the view of the learned justice, is entirely satisfied by the facts of this case.

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

Many questions were discussed at bar which we deem it unnecessary to notice, as we consider that the whole case depends upon the correctness of the judgment of the court below in sustaining the exception to the first defence in the amended answer. That defence averred that the cotton for which the bills of lading were issued was never delivered to the carrier; that by a custom or course of dealing between the carrier and the shipper it was understood by both parties that the cotton was not to be delivered at the time the bills of lading were issued, but was then in the hands of a compress company, which compress company was the agent of the shipper; and that it was the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed, and that this custom was known to the plaintiffs and transferees of the bills of lading; and that, whilst the cotton was so in the hands of the compress company, the agent of the shipper, and before delivery to the carrier, it was destroyed by fire.

All of these allegations in the answer were, of course, admitted by the exception, and, therefore, the case presents the simple question of whether a carrier is liable on a bill of lading for property which at the time of the signing of the bill remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: "The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." Redfield on Carriers, 80. "The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it

has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them." Hutchinson on Carriers, 82.

This doctrine is sanctioned by a unanimons course of English and American decisions. *Schooner Freeman* v. *Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 Wall. 579; *Pollard* v. *Vinton*, 105 U. S. 7; *Iron Mountain Railway* v. *Knight*, 122 U. S. 79; *Friedlander* v. *Texas & Pacific Railway*, 130 U. S. 423; *St. Louis, Iron Mountain &c. Railway* v. *Commercial Union Ins. Co.*, 139 U. S. 233; *Barron* v. *Eldredge*, 100 Mass. 455; *Moses* v. *Boston & Maine Railroad*, 4 Foster, (24 N. H.) 71; *Brind* v. *Dale*, 8 Car. & P. 207; *Selway* v. *Holloway*, 1 Ld. Raym. 46; *Buckman* v. *Levi*, 3 Camp. 414; *Leigh* v. *Smith*, 1 Car. & P. 638; *Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 8 Exch. 330; *Coleman* v. *Riches*, 16 C. B. 104. Indeed, the citations might be multiplied indefinitely.

Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.

Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper. Does the fact that the plaintiffs claim to be assignees of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier confer upon them greater rights as against the carrier than those which attach under the bill of lading in the hands of the parties to whom it was originally issued and who made the agreement?

It is to be remarked, in considering this question, that the averment of the answer, which was admitted by the exception, charged that the course of dealing between the parties

in accordance with which the goods were not delivered at the time of the issuance of the bills of lading, but remained in the hands of the compress company, which was the agent of the shipper, was known to the plaintiffs, the holders of the bills of lading. It is clear that, whatever may be the effect of custom and course of dealing upon the question of legal liability, proof of such custom and course of dealing would have been admissible, not in order to change the law, but for the purpose of charging the plaintiffs, as holders of the bills of lading, with knowledge of the relations between the parties.

That a bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof the rights of the holder of such paper, is well settled. Said this court in *Pollard* v. *Vinton*, 105 U. S. 7, 8:

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." See also *The Lady Franklin*, 8 Wall. 325.

Syllabus.

The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. These views coincide with the rulings of the English courts. The cases of *Grant* v. *Norway*, 10 C. B. 665, and *Hubbersty* v. *Ward*, 8 Exch. 330, were both cases where bills of lading were issued and held by third parties. The rule was uniform in England until the passage of the Bills of Lading Act, 18, 19, Vict. c. 111, § 3, making bills of lading in the hands of consignees or endorsees for value conclusive as to shipment.

Under these elementary principles we think there was manifest error below in maintaining the exception to the first count in the amended answer. Of course, in so concluding we proceed solely upon the admission which the exception to the answer necessarily imported, and express no opinion as to what would be the rule of law if the compress company had not been the agent of the shipper, or if the goods had been constructively delivered to the carrier through the compress company, who held them in the carrier's behalf.

The judgment is

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

Mr. Justice Jackson, not having heard the argument, took no part in the decision of this cause.

PRENTICE *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 319. Argued and submitted March 22, 1894. — Decided May 26, 1894.

When a deed contains a specific description of the land conveyed, by metes and bounds, and a general description referring to the land as the same land set off to B, and by B afterwards disposed of to A, the second de-

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scription is intended to describe generally what had been before described by metes and bounds; and if, in an action of ejectment brought by a grantee of A, as plaintiff, the description by metes and bounds does not include the land sued for, it cannot be claimed under the general description.

THIS action of ejectment was brought September 7, 1883, to recover an undivided half of certain lands in the city of Duluth, county of St. Louis, Minnesota. Pursuant to a written stipulation of the parties the case was tried without a jury and upon the question of title alone, and resulted — Mr. Justice Miller and Judge Nelson concurring — in a judgment for the defendants. 43 Fed. Rep. 270.

The case made by the special finding of facts is substantially as follows:

The sixth section of article two of the treaty of the 30th day of September, A.D. 1854, 10 Stat. 1109, between the United States and the Chippewa Indians of Lake Superior and the Mississippi — ratified pursuant to a resolution of the United States Senate, passed on the 10th day of January, 1855, by the President on the 29th day of January, 1855 — whereby those Indians ceded to the United States certain territory lying adjacent to the headwaters of Lake Superior, contained the following provision, viz.: "And being desirous to provide for some of his connections who have rendered his people important services it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct." p. 1110.

Under the provisions of the treaty and on the day of its date, Chief Buffalo, by an instrument of writing executed by him and filed in the office of the United States Commissioner of Indian Affairs at Washington, selected the land to be conveyed by the United States and appointed the persons to whom it was to be conveyed, indicating the selection and appointment, as follows: "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are made, lying on the west shore of St.

Louis Bay, Minnesota Territory, immediately above and adjoining Minnesota Point, and I direct that patents be issued for the same, according to the above-recited provision, to Shaw-Bwaw-Skung or Benjamin G. Armstrong, my adopted son; to Matthew May-Dway-Gwon, my nephew; to Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, his sons, one quarter section to each."

Matthew, Joseph, and Antoine, under date of September 17, 1855, executed and delivered to Armstrong an instrument, assigning to him their right, title, and interest under the appointment and selection of Chief Buffalo. That assignment, after referring to the treaty and the above instrument of selection and appointment, provided:

"In consideration of the premises and of one dollar to us in hand paid by the said Benjamin G. Armstrong, the receipt whereof is hereby acknowledged, we do hereby sell, assign, and transfer, jointly and severally, all our right, title, interest, equity, claim, and property in and to the said land, and all our right and equity in and to the said instrument so made by the said Buffalo, jointly and severally, and our and each of our right and equity to have patents issued to us, according to the above-cited directions of the said Buffalo, and we hereby direct, jointly and severally, that patents issue to said Benjamin G. Armstrong accordingly."

This instrument of assignment was executed by Matthew, Joseph, and Antoine in the presence of and before the United States agent, and the United States interpreter.

Armstrong and wife, September 11, 1856, made, executed, and delivered to the plaintiff herein a deed of conveyance, the recited consideration being eight thousand dollars. The land so conveyed is thus described in the deed: "One undivided half of all the following-described piece or parcel of land, situate in the county of St. Louis and Territory of Minnesota, and known and described as follows, to wit: Beginning at a large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, commencing at said rock and running east one mile, north one mile, west one mile, south one mile to the place of beginning, and being the

land set off to the Indian chief Buffalo at the Indian treaty of September 30, A.D. 1854, and was afterwards disposed of by said Buffalo to said Armstrong, and is now recorded with the government documents, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof," etc. This deed, sealed and delivered in the presence of a justice of the peace of Wisconsin, was acknowledged by the grantors on the day of its execution before that officer, whose official character was certified by the clerk of the Circuit Court of the county where the acknowledgment was made. It was not certified to have been acknowledged in accordance with the laws of Wisconsin. The deed was duly recorded in the county of St. Louis, Territory of Minnesota, on the 4th day of November, A.D. 1856.

Armstrong and wife, on the 27th day of August, 1872, executed and delivered to the plaintiff a confirmatory deed, which was duly recorded in the county of St. Louis, State of Minnesota, September 2, 1872. That deed was in these words:

"Whereas on the eleventh day of September, in the year one thousand eight hundred and fifty-six, we, Benjamin G. Armstrong and Charlotte Armstrong, wife of aforesaid Benjamin G. Armstrong, conveyed by a quitclaim deed to Frederick Prentice, of Toledo, Ohio, the undivided one-half part of all our interest in certain lands situated at or near the head of St. Louis Bay, and intended to describe our interest in what is known as the Chief Buffalo tract, at the head of St. Louis Bay, Minnesota Territory, and then believing that the description in said deed would cover or was the tract that would be patented to us by the United States of America, according to said Buffalo's wishes and a contract we held from the heirs of said Buffalo, but, to definitely fix upon the lands designed to be conveyed, it was stated in said deed to be the land set off to the Indian chief Buffalo at the Indian treaty of September thirtieth, in the year one thousand eight hundred and fifty-four; and, further, I, the said Armstrong, gave a contract on the tenth day of September, in the year

one thousand eight hundred and fifty-six, to the said Frederick Prentice, binding ourselves and heirs to give said Frederick Prentice any further writing or instrument he might require.

"And on the first day of July, in the year one thousand eight hundred and fifty-seven, I, Benjamin G. Armstrong, and Charlotte Armstrong agreed to and did sell to Frederick Prentice the other one-half of said Buffalo tract, for which said Frederick Prentice paid us something over two thousand ($2000) dollars, and since that time has paid us to our full satisfaction for the whole property, and we agreed to and do by these presents confess payment in full for the whole of the above tract, in compliance of the first deed for the one undivided half and the carrying out of the contract to sell the balance July first, in the year one thousand eight hundred and fifty-seven, this is intended to cover the land deeded by us to the said Prentice in the deed given on the eleventh day of September, one thousand eight hundred and fifty-six, and recorded in liber A of deeds, page 106, at Duluth, State of Minnesota, and the land included in the contract of the first of July, eighteen hundred and fifty-seven, and intended to cover the lands as described in patents from the United States of America to Benjamin G. Armstrong, Matthew May-Dway-Gwon, Joseph May-Dway-Gwon, and Antoine May-Dway-Gwon, and described as follows: To Benjamin G. Armstrong the west half of the southwest quarter and the lot number five (5) of section twenty-seven, and lot No. three (3) of section thirty-four, containing together (182.62) one hundred and eighty-two and sixty-two one-hundredths acres; and to Joseph May-Dway-Gwon the southeast quarter of section twenty-eight, containing one hundred and sixty acres; and Antoine May-Dway-Gwon the east half of the northeast quarter of section twenty-eight and the west half of the northwest quarter of section twenty-seven, containing one hundred and sixty acres.

"And to Matthew May-Dway-Gwon the southwest quarter of section twenty-two, containing one hundred and sixty acres, all of the above being in township fifty north of range fourteen west of the fourth principal meridian, State of Minnesota, and

the three last-named pieces of land have since been deeded by the said Matthew, Joseph, and Antoine May-Dway-Gwon to Charlotte Armstrong, but previous to the date of said deeds the above-named Joseph, Matthew, and Antoine May-Dway-Gwon had assigned or transferred all their right, title, and interest therein to the said Benjamin Armstrong. I, the aforesaid Benjamin G. Armstrong, did sell by deed and contract to Frederick Prentice, which I, the said Charlotte Armstrong, knew at the time, but did not know but that by getting another deed or conveyance after the patents were issued we could sell the property, but am now satisfied that we had sold and assigned all our right, title, and interest to Frederick Prentice previous to our deeding to any other person or persons, and that we had no right to deed or convey to any other person or persons, as the title to the lands above described was then virtually and by right vested in the said Frederick Prentice, and that the first deed for the one-half and the contract for the remaining half of said land, with the payment thereon made at the time by the said Frederick Prentice, bound us to give him good and sufficient deeds to said property whenever so demanded; and we do hereby assign and quitclaim all our right, title, and interest now or at any time held by us to all the above-described property in fulfilment of our agreement with the said Frederick Prentice."

The tract of land which Chief Buffalo had designated as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections, and part of it was found to be occupied and claimed by certain Indian traders under the treaty. After a lengthy correspondence and investigation in the Department of the Interior, the relatives of Buffalo, entitled to the land reserved for them, conceded the validity of the claims of these Indian traders, and, in lieu of the lands thus held by them, received other lands adjacent to that selected by Buffalo to make up the quantity of six hundred and forty acres, but not in the form of a parallelogram, though maintaining a continuous connection.

A report of the Secretary of the Interior to the President,

under the date of September 21, 1858, and made part of the findings, contained, among other things, the following:

"Now, therefore, under all the circumstances of the case, it having been fully proved that these relatives of the Chief Buffalo acquiesce in the selection made for them by Agent Gilbert, and desire that patents should issue to them for this land, and the Commissioner of Indian Affairs having recommended such approval, I have respectfully to request that you will approve the same in order that patents may issue in accordance with their request as follows, viz.: To Matthew May-dway-gon, S. W. ¼ sec. 22, T. 50 N., R. 14 W. — 160 acres; To Antoine May-dway-gon, E. ½ N. E. ¼ sec. 28 and W. ½ N. W. ¼ sec. 27, T. 50 N., R. 14 W. — 160 acres; to Joseph May-dway-gon, S. E. ¼ sec. 28, T. 50 N., R. 14 W. — 160 acres; to Shaw-bwaw-skung or Benjamin G. Armstrong, W. ½ S. W. ¼ sec. 27, lot No. 3, sec. 34, lot No. 5, sec. 27, 182.62."

The patent to Armstrong, issued October 23, 1858, contained the following recitals and description of the land embraced by it:

"Whereas it appears from a return dated the twenty-seventh day of September, one thousand eight hundred and fifty-eight, from the office of Indian Affairs to the General Land Office, that there has been selected and approved for 'Shaw-Bwaw-Skung, or Benjamin G. Armstrong,' as one of the 'connections' of said Chief Buffalo, the west half of the southwest quarter and lot number five, both of section twenty-seven, and lot number three of section thirty-four, containing together one hundred and eighty-two acres and sixty-two hundredths of an acre, all in township fifty north, of range fourteen west, of the fourth principal meridian, in the State of Minnesota. Now, know ye, etc."

The parties, at the trial, entered into the following stipulation:

"It is admitted for the purposes of the trial of the above-entitled action that the land in dispute described in complaint of plaintiff herein is part of the land described and included in the patent of the United States to Benjamin G. Armstrong,

dated October 23, 1858, and recorded in book 'B,' at page 500, in the office of the register of deeds of St. Louis County, Minnesota; that the defendants are in possession of the specific portions of said land described in their respective answers herein, and as respects the Northern Pacific Railroad Company is in possession of the certain portions of said land colored blue upon the map hereto attached, and that all the defendants assert title to said respective portions derived from a certain deed made and executed by Benjamin G. Armstrong and wife to John M. Gilman, dated August 31, 1864, and recorded in the office of the register of deeds of St. Louis County, Minnesota, September 12, 1864, in book 'C' of deeds, at page 665, and from certain other deed made and executed by Benjamin G. Armstrong and wife to Daniel S. Cash and James H. Kelly, bearing date October 22, 1859, and filed for record in the office of the register of deeds in and for said St. Louis County January 5, 1860, and thereafter recorded in book 'C' of deeds, at page 206; that the said defendants have succeeded to whatever title or right said Kelly and Cash and said Gilman obtained by virtue of said deeds, respectively, in and to the premises in dispute; that at the commencement of this suit said defendants withheld said premises and the rents, issues, and profits of the same from said plaintiff, although they had theretofore been requested to admit him to the possession of an undivided half ($\frac{1}{2}$) of said premises and the rents and profits thereof; that the undivided half ($\frac{1}{2}$) of the portion of the premises described in said complaint claimed by each of said defendants is worth fifty thousand dollars ($50,000) and upwards." The court found the facts in accordance with this stipulation.

The United States government surveys of the lands ceded by the treaty of September 30, 1854, to the United States had not been made at the date of the deed from Armstrong to plaintiff and were not made until the year following that date.

Gilman took the above conveyance without actual notice of the deed from Armstrong to the plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him.

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The defendants herein claim title to the pieces or parcels of land in controversy as grantees of Gilman and under and through the deed to Gilman of August 31, 1864.

The large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, described in the deed from Armstrong to Prentice, is the beginning of the boundary of the tract conveyed, is well identified, and was generally known to the few people familiar with the place, and was recognizable at the time of the trial below, and a mile square measured from that point as called for in the deed would wholly depart from the shore of St. Louis Bay and would cover about one-half or three-fifths land, and the remainder the water of Lake Superior.

The land selected by Chief Buffalo lay upon the shore of St. Louis Bay, immediately adjoining Minnesota Point, and this selection was followed as near as it could be by the patents of the United States issued to satisfy that reservation, considering the elimination from the mile square of the lands held by the traders, and the vagueness of Buffalo's description, and the necessity of conforming the final grant to the surveys of the United States.

If the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts his title, were exactly reversed, the description in that deed would include a large part of the land actually selected by Chief Buffalo, and also included in the patents from the United States. But it would not include the land sued for in this action.

The instrument executed by the Chief Buffalo, dated September 30, 1854, was the only selection or appointment ever made by him under the sixth clause of the second article of the said treaty.

Chief Buffalo died in the month of October, 1855.

At the date of the deed to Prentice, of September 11, 1856, Armstrong did not have any interest in land in St. Louis County, Minnesota Territory, except what he was entitled to under the Buffalo selection and appointment above referred to, and under the above assignment from the other.

The conclusions of law found by the Circuit Court were —

That the appointment of persons to whom the United States were to convey the section of land reserved by the above provision of said treaty, made by Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under that provision, and, upon the ratification of the treaty, vested in Armstrong and the other appointees named such an interest as the treaty gave to the land so reserved;

That the patent of the United States to Armstrong and his acceptance of it was a valid execution of the treaty on that subject;

That the deed from Armstrong to plaintiff, of September 11, 1856, was, in its execution, acknowledgment, and recording, a valid and sufficient deed, and its record constructive notice of its contents;

That the description in the deed of Armstrong to plaintiff of September 11, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the tract described therein, and that said deed is ineffectual as a conveyance to plaintiff of any interest or title except such as Armstrong had in or to the land therein described, and that plaintiff took no title under it to the land for the possession of which this action is brought;

That the quitclaim deed from Armstrong to Gilman of August 31, 1864, conveyed to the latter such interest, and no more, as Armstrong had in the land therein described at the date of said deed; and

That the plaintiff is not entitled to recover in this action, and judgment must go in favor of the defendants for their costs and disbursements.

Mr. Elihu Root, (with whom were *Mr. John F. Dillon* and *Mr. Samuel B. Clarke* on the brief,) for plaintiff in error.

Mr. William W. Billson, for Fargusson, defendant in error, submitted on his brief.

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

Opinion of the Court.

The court below correctly interpreted the decision in *Prentice* v. *Stearns*, 113 U. S. 435, as holding that the deed from Armstrong to Prentice, under which alone the latter can assert a title to the land in controversy, was an instrument designed to convey a defined tract or parcel of land, not any possible interest existing in Armstrong under the treaty with the Chippewas, the selection of Buffalo, and the appointment that the lands selected by him should be conveyed to Armstrong and other named relatives.

This question was reargued in the court below, in the present case, in the light of additional facts supposed to have been adduced.

Mr. Justice Miller, in his opinion in this case, said: "We remain of the opinion we were on the former trial. The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly defined. And if that description is to stand as a part of the deed made by Armstrong to Prentice, it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that. It is now found as a fact that this boundary would include a surface from one-half to three-fourths of which is land, and the remainder is water of Lake Superior." 43 Fed. Rep. 270, 274.

The specific description by metes and bounds of the land conveyed by the Armstrong deed to Prentice, namely, "one undivided half of all the following-described piece or parcel of land, situate in the county of St. Louis and Territory of Minnesota, and known and described as follows: Beginning at a large stone or rock at the head of St. Louis River Bay, nearly adjoining Minnesota Point, commencing at said rock

and running east one mile, north one mile, west one mile, south one mile to the place of beginning," does not, it is conceded, embrace the land in dispute. Indeed, the plaintiff insists, on several grounds, that that description should be rejected altogether, as inaccurate and mistaken. And he is driven to rest his claim of title to the lands in dispute upon the clause of the deed, immediately following the words, above quoted, namely, "and being the land set off to the Indian Chief Buffalo, at the Indian treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to Armstrong, and is now recorded with the government documents."

But the plaintiff, although compelled to rely upon the words last quoted, insists that they mean what, in our opinion, is not justified by a fair interpretation of them. It seems entirely clear that the words in the clause beginning "*and being the land*," etc., were intended to describe, generally, what had been before specifically described by metes and bounds; that "*and being*" is equivalent to "which is," in which case this clause of general description — the specific description by metes and bounds being rejected as not embracing the land — cannot, it is conceded, be regarded as an independent description of the subject of the conveyance.

It is said that the deed should not be construed as intended to convey merely a specific tract, and thereby make it inoperative, because, at the time it was executed, Armstrong did not have any interest in a specific tract that he could convey, but only a general right, under the Buffalo document, to have land located and patented to him by the United States. Referring to the argument made by counsel in support of this view, Mr. Justice Miller said, p. 274 : "They say that the reference to the land set off to the Indian Chief Buffalo at the treaty of 1854 meant, not any definite piece of land, but any land which might come to Buffalo or his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey

such after-acquired interests which were patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it. Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now as a matter of fact find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced on that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. And so with regard to the other description. Buffalo had made his selection, had described the land which he designed to go by that treaty, not to him, but to his relatives, whose names are given, and it was an undivided half of this land thus selected by the Buffalo chief, and not other land, or different land which might come to Armstrong, that he conveyed and intended to convey to Prentice."

After distinguishing this case from *Doe* v. *Wilson*, 23 How. 457, and *Crews* v. *Burcham*, 1 Black, 352, Mr. Justice Miller proceeded, p. 275, 276: "But in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was talking about some vague and uncertain right — uncertain, at least, as to locality and as to its relation to the surveys of the United States — which he was intending to convey to Prentice, instead of the definite land which he described or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive clauses, neither

of which had that idea in it, one of which is rejected absolutely by the plaintiff's counsel as wholly a mistake, and the other is too vague in its language to convey even what plaintiff claimed for it. We are not able, therefore, to hold with counsel for plaintiff, that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative that the deed was intended to convey any land that might ultimately come to Armstrong under the treaty, and under the selection, and under the assignment to Buffalo."

We are entirely satisfied with these views. It results that neither the description by metes and bounds, nor the general description of the lands conveyed by the deed under which the plaintiff claims, is sufficient to cover the lands here in dispute.

Another matter deserves notice. It is found as a fact that if the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts title, were exactly reversed, the description in the deed would include a large part of the land actually selected by Buffalo Chief, and also included in the patents from the United States. But this fact is immaterial, for it is found that if the course were reversed, as suggested, it would not include the particular lands here in controversy.

The case then is this: Looking into the deed, under which the plaintiff claims title, for the purpose of ascertaining the intention of the parties, we find there a specific description, by metes and bounds, of the lands conveyed, followed by a general description which must be held to have been introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands so conveyed. As neither description is sufficient to cover the lands in suit, there can be no recovery by the plaintiff in this action of ejectment, whatever may be the defect, if any, in the title of the defendants. If this were a suit in equity to compel a reformation of the deed upon the ground that, by mistake of the parties, it did not properly describe the lands intended to be conveyed, and if such a suit were not barred

by time, a different question would be presented upon the merits.

What has been said renders it unnecessary to consider whether the deed from Armstrong and wife to Prentice was so acknowledged and certified as to entitle it under the laws of Minnesota to record in that State, and, by such record, become legal notice of its contents to Gilman and those claiming under him.

We perceive no error in the record to the prejudice of the plaintiff in error, and the judgment is

Affirmed.

BALKAM *v.* WOODSTOCK IRON COMPANY.

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

No. 329. Argued March 28, 29, 1894.— Decided May 26, 1894.

An action of ejectment was brought in a state court of Alabama, in which the parties were the same, the lands sought to be recovered were the same, the issues were the same and the proof was the same as in this action. That case was taken to the Supreme Court of the State, and it was there held that, whilst the plaintiffs and those whom they represented had no legal right to bring an action of ejectment pending a life estate in the premises, yet, in view of a probate sale of the reversionary interest and the recorded title thereto, and of the payment of the purchase price into the estate and its distribution among the creditors of the estate, the heirs had an equitable right to commence a suit to remove the cloud on the title which the probate proceedings created; and, inasmuch as they had failed to do so during twenty years, their right of action was barred under the doctrine of prescription. The statutes of Alabama provide that two judgments in favor of the defendant in an action of ejectment, or in an action in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, are a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title. The plaintiffs, availing themselves of this statute, brought this suit. *Held*, that, although the judgment of this court might be, if the question were before it for original consideration, that the bar of the statute would only begin to run upon the death of the holder of the life estate, yet that, the court of last resort of the State having passed upon the

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questions when the bar of the statute of prescription began to be operative, and when the parties were obliged to bring their action, whether legal or equitable, those questions were purely within the province of that court, and this court was bound to apply and enforce its conclusions.

THE plaintiffs in error, as heirs of Samuel P. Hudson, brought two suits of ejectment for the recovery of certain lands. By agreement, the suits were consolidated and tried as one. After judgment on verdict in favor of the defendants, the case was brought here by writ of error.

Samuel P. Hudson, a resident of Calhoun County, in the State of Alabama, died intestate in August, 1863. At the time of his death he was seized of certain parcels of land in Calhoun County. He left a widow, Kezia A. Hudson, and several children, some of whom were minors. James F. Grant was appointed administrator of his estate by the probate court.

The widow petitioned the court for allotment of dower, and after due proceedings, in accordance with the laws of Alabama, her right of dower in the land in controversy was duly recognized and decreed.

In January, 1866, the administrator petitioned the court to order the sale of the real estate, saving the rights of dower of the widow, in order to pay debts, alleging the insufficiency of the personalty.

To this petition the widow and heirs were made defendants, and a guardian *ad litem* was appointed to represent the minors. A day was set for the hearing; all parties, including the minors' guardian, were duly notified, and a commission was issued for the examination of certain witnesses. The caption of the interrogatories to be addressed to these witnesses recited that the answers, when taken, "were to be used in evidence before said court on the hearing of and in behalf of the application made by James F. Grant, administrator of said estate, to sell land belonging to said estate." The witnesses named appeared before the commissioners appointed by the probate court and testified as to their knowledge of the land and of the heirs and distributees, and swore that, to the best of their information and belief, the

personal property of the estate was insufficient to pay the debts. The caption to the answers of each of the witnesses recites that they were sworn and examined by virtue of a commission issued out of the probate court of Calhoun County, Alabama, "in the matter of the estate of Samuel P. Hudson, deceased, the application of James F. Grant to sell land." The certificate of the commissioners attests "the examination of the witnesses in the above-stated matter of Samuel P. Hudson, deceased, on the application of J. F. Grant, Administrator, to sell land." The answers of the witnesses under the commission were returned to the probate court, and were filed by the judge thereof on the 10th of February, 1866. On the 15th of February, 1866, the day set for the hearing of the petition, the following order was entered:

"Probate Court for Calhoun County, Alabama.

"FEBRUARY 15th, A.D. 1866.

"This being the day set by a former order of this court, the 9th day of January, A.D. 1866, to hear and determine upon the petition of James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, for the sale of the following-described lands belonging to said estate for the purpose of paying the debts of the said estate, to wit:

[Here follows a description of the real estate.]

* * * * *

"And comes the said Grant and prays that his said petition and application for the sale of the above-described land be heard and determined at this term of the court, and it appearing to the satisfaction of the court that notice of the filing of said petition and of the day set for the hearing of the same had been given according to law, thereupon the court proceeds to hear and determine upon the facts of the said petition; and comes into court L. W. Cannon, as the guardian of the minor heirs of said decedent, and denies each and all of the allegations of said petition, and thereupon said administrator introduces witnesses to sustain the same, and, after hearing all the testimony in the case, the court is of opinion

that the allegations of said petition are fully sustained by the evidence in the case. It is therefore ordered and decreed by the court that the above-described lands, as belonging to said estate, be, and the same are hereby, directed to be sold for the payment of the debts of said estate, subject, however, to the widow's dower interest in said lands.

"It is further ordered that said lands be sold on a credit of one and two years, with interest from the date of sale.

"It is further ordered that said administrator, after advertising the sale of said lands in the Jacksonville Republican for three weeks, giving the time, place, and terms of sale, proceed to sell the said lands known as the Steam Mill tract, at Blue Mountain, and the Nunnelly place and town lots, before the court-house door, in the town of Jacksonville, Ala.

* * * * *

"It is ordered that said land be sold at public auction to the highest bidder, and that said administrator secure the purchase-money for said lands by taking notes with two good solvent sureties.

* * * * *

"A. Woods, *Judge of Probate.*"

At the sale thus ordered, the widow, Kezia A. Hudson, purchased the reversionary interest in the lands in controversy for $450. The administrator duly reported the sale to the probate court, stating in his report that he had adjudicated to Kezia A. Hudson the "remainder after the demands of the dower interest in the land," which had been set apart as Mrs. Hudson's dower. This report was sworn to by the administrator, and on May 15, 1866, an order was passed approving the same, and ordering it to be filed. Afterwards the administrator made a formal deed to the widow, which reads as follows:

"Whereas I, James F. Grant, administrator of all and singular the goods and chattels, rights, and credits of the estate of Samuel P. Hudson, deceased, did as said administrator apply — and obtain an order from the probate court of Calhoun County, State of Alabama, *for an order* to sell the

real estate of which the said Samuel P. Hudson died seized and possessed, subject, however, to the widow of said deceased's right of dower; and whereas said widow did apply to said court of probate to have dower allowed to her out of said lands, and prior to the time said sale was brought there was set off and allowed to Mrs. Kezia A. Hudson, widow of said deceased, the following lands, to wit:

[Here follows a description of the lands.]

* * * * *

"Now, know ye that, for and in consideration of the foregoing premises and the payment of the said sum of four hundred and fifty dollars, to me in hand paid by the said Kezia A. Hudson, the receipt of which is hereby acknowledged, I, as such administrator, have this day bargained and sold, and do by these presents bargain, sell, and convey unto the said Kezia A. Hudson, her heirs and assigns forever, all the remaining interest or right which there is of the said lands; to have and to hold to the said Kezia A. Hudson, her heirs and assigns forever, but I am in no event personally liable upon the covenants of this deed.

"In witness whereof I have hereunto set my hand and affixed my seal this 9th day of April, A.D. 1866.

"J. F. GRANT, [SEAL.]

"*Administrator of Samuel P. Hudson, Deceased.*"

Upon which deed are the following endorsements, to wit:

"STATE OF ALABAMA, }
Calhoun County. }

"I, Alexander Woods, judge of probate in and for said county, hereby certify that J. F. Grant, administrator of the estate of S. P. Hudson, deceased, who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily as such administrator on the day the same bears date.

"Given under my hand this 9th day of April, A.D. 1866.

"A. WOODS, *Judge of Probate.*"

Statement of the Case.

"Filed in office April 9th, 1866, and recorded April 16th, 1866, and that the deed had on it fifty cents revenue stamps, this 16th day of April, A.D. 1866.

A. Woods, *Judge of Probate.*

"The State of Alabama, }
Calhoun County. }

"I, E. F. Crook, judge of the court of probate and *ex officio* clerk of said court, in and for said county and State, do hereby certify that the foregoing three pages, inclusive, contain a true and correct transcript of deed of J. F. Grant, administrator of estate of S. P. Hudson, deceased, to Kezia A. Hudson, as fully and as completely as appears of record in my office.

"Given under my hand at office, in the town of Jacksonville, Alabama, on this the 15th day of August, A.D. 1888.

"E. F. Crook,
"*Judge of Probate and ex officio Clerk of said Court, Calhoun County, Ala.*"

On May 9, 1866, the administrator prayed the court that the estate of his intestate might be declared insolvent, and after due hearing and notice to all parties in interest, the prayer was granted.

Mrs. Hudson, the purchaser of the reversionary interest, lived at the time of the sale, with her children, on the lands bought by her. Subsequently she conveyed them to the firm of Sherman & Boynton, who in turn conveyed them to H. L. Jeffers, and he again to the Woodstock Iron Company, one of the defendants in error, which latter sold a portion of the lands to the Anniston Land and Improvement Company, and that corporation conveyed it to the Anniston City Land Company, and, as was admitted, all the purchasers went into possession at the time of their respective conveyances and held the lands openly and unequivocally as owners thereof. The property, since the sale, has become very valuable, a portion of it being within the municipal limits of the town of Anniston and the other portion adjacent thereto. Mrs. Hudson died June 26, 1879.

Opinion of the Court.

On June 28, 1887, action was brought by the heirs of Samuel P. Hudson in the Circuit Court of Calhoun County to recover the lands which had been sold in the probate proceedings. In that suit the parties were the same, the lands were the same, the issues were the same, and the proof was the same as in the case now before us. Judgment was given in the Circuit Court in favor of the plaintiffs. This judgment, on appeal to the Supreme Court of Alabama, was reversed, on the ground that whatever rights the plaintiffs might have originally possessed were barred by prescription. *Woodstock Iron Co.* v. *Fullenwider*, 87 Alabama, 584, 587.

Section 2714 of the Code of Alabama provides: "Two judgments in favor of the defendant in an action of ejectment, or in an action in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, is a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title." Availing themselves of this provision of the Alabama law, the plaintiffs thereupon brought these suits in the Circuit Court of the United States for the Northern District of Alabama. As before stated, the parties, plaintiff and defendant, are the same, the issues are the same, and the proof is the same as in the case finally decided by the Supreme Court of the State. Under instructions from the court there was a verdict for the defendants. The instructions will be found reported in 43 Fed. Rep. 648. The facts were admitted below, and therefore the issues presented are altogether questions of law, and were all reserved by bill of exception taken during the trial below.

Mr. J. A. W. Smith for plaintiffs in error.

Mr. J. J. Willett and *Mr. John B. Knox* for defendants in error. *Mr. John M. McKleroy* was on their brief.

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

The plaintiffs rest their case upon an attack upon the pro-

bate proceedings, which they assert to be absolutely void, 1st, because the proof as to the necessity of the sale was not "taken by deposition, as in chancery cases;" and, 2d, because there was no order of the court authorizing the administrator to make a deed of the property to the purchaser. The first contention is based upon the language of the decree of sale, which is as follows: "And thereupon said administrator introduces witnesses to sustain the same, and after hearing all the testimony in the case, the court is of opinion," etc.; and it is urged that this statement, "the administrator introduces witnesses," necessarily imports that depositions were not "taken as in chancery cases," according to the requirement of the Alabama statute.

We are also told that the depositions which were ordered to be taken by the Probate Judge for the purpose of the inquiry, and which when taken were filed by him and constituted part of the probate record, cannot be considered, because the opinion makes no reference to them, and, therefore, we must presume that they do not exist; and the contention as to the deed is that it furnishes no evidence of title, because there was no specific order of the court to make it, although the sale was reported to the court and by it confirmed, and although the deed, when made, was returned to the probate court, certified by the judge, and by him duly put of record.

These very technical contentions are in conflict with the elementary rules by which the sanctity of probate proceedings are upheld, and are based on the terms of an Alabama statute, to which, we are told, a construction has been given by the courts of that State, which, however narrow and technical, is binding upon us.

The following provisions are found in the Alabama Code:

"2612 (3223). Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2614 (3225). Within ten years. 1. . . .

"2. Actions for the recovery of lands, tenements, hereditaments, or the possession thereof, except as herein otherwise provided."

"2624 (3236). If any one entitled to bring the actions enumerated in this chapter, or make an entry on land, or defence founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, he or she shall have three years after the termination of such disability to bring suit, or make entry or defence; but no disability shall extend the period of limitation so as to allow such action to be commenced, or entry or defence made, after the lapse of twenty years from the time the cause of action or right accrued; nor shall this exception extend to a married woman in respect to her separate estate."

We excerpt the following from the opinion of the Supreme Court of Alabama, in the case of *Woodstock Iron Co.* v. *Fullenwider:*

"The defendants, who are appellants in this court, contend, on the contrary, that all irregularities of sale and defects of title, under the admitted facts of the case, are cured by the presumptions arising from the lapse of twenty years, under the broad doctrine of prescription, now so thoroughly established in this State.

"The plaintiffs certainly had no right to sue in ejectment for these lands before the death of the widow, who was tenant for life, her possession, so far at least as concerns the legal title in the reversion, not being adverse or hostile to the heirs, during the continuance of such particular estate.

* * * * *

"In considering this question, we shall regard the contention of the appellees as well taken, so far as to assume that the sale of the administrator conferred no *legal* title to the reversion on the widow as purchaser under the probate proceedings in March, 1866.

"Regarding the proceedings in the probate court as void at law for the reasons stated, what, we may inquire, were the equitable rights, if any, acquired under it by the purchaser? This question has been fully settled by our past decisions. Where land of a decedent is sold by the probate court for the

payment of debts, or for distribution, and the proceeding is void for want of jurisdiction, or otherwise, and the purchase-money, being paid to the administrator, is applied by him to the payment of the debts of the decedent's estate, or is distributed to the heirs; while the sale is so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity. And he may resort to a court of equity to compel the heirs or devisees to elect a ratification or rescission of the contract of purchase. It is deemed unconscionable that the heirs or devisees should reap the fruits of the purchaser's payment of money, appropriated to the discharge of debts, which were a charge on the lands, and at the same time recover the lands. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase-money. And this principle applies to minors as well as adults. *Bland* v. *Bowie*, 53 Alabama, 152; *Bell* v. *Craig*, 52 Alabama, 215; *Robertson* v. *Bradford*, 73 Alabama, 116. See also *Ganey* v. *Sikes*, 76 Alabama, 421."

The court then proceeded to hold that, whilst the heirs of Hudson had no legal right to bring an action of ejectment pending the life estate, in view of the probate sale of the reversionary interest and the recorded title thereto, and of the payment of the price into the estate and its distribution among the creditors of the estate, the heirs had an equitable right to bring an action to remove the cloud on the title which the probate proceedings created; and inasmuch as they had failed to do so during twenty years, their right of action was barred under the doctrine of prescription. We again quote:

"Here, then, was the capacity to sue in a court of equity, so as to sweep away a cloud on the title of the plaintiffs, and, by an offer to do equity, to have the equitable title of the defendants, acquired at the void sale, divested out of them by decree of a court of chancery. A failure to exercise this right for over twenty years is such *laches* as authorizes the inference that the right to do so is barred in any one of the

modes in which that result may be effected. If the only existing right of action on the plaintiffs' part were at law — if his only *laches*, or slumbering on his rights, consisted in his failure to sue at law — then, as we have often said, 'the only fact open to inquiry, in such cases, would be the character of defendants' possession, either in its original acquisition, or in its continued use, as being, on the one hand, permissive and in subordination, or, on the other, hostile and adverse.' *Long* v. *Parmer*, 81 Alabama, 384; and cases cited on p. 388. But the *laches* here imputed to the plaintiffs is the fact of having allowed the probate court proceedings to remain unassailed for over twenty years — proceedings under which, though void at law, a good equitable title to the reversion had been acquired, accompanied with possession and claim of ownership, on the part of the purchaser and her sub-vendees, during the whole of this long period."

The conclusion of the Alabama court is assailed here on the ground that it is unsound in law. Whilst, of course, as the statutes of the State of Alabama allow two actions in ejectment, the decree of the Supreme Court of Alabama does not constitute "the thing adjudged" in the case before us, we think the rule under which we follow state statutes of limitation and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The whole subject was very fully reviewed by this court in the case of *Bauserman* v. *Blunt*, 147 U. S. 647. There, through Mr. Justice Gray, we said:

"By a provision inserted in the first judiciary act of the United States and continued in force ever since, Congress has enacted that 'the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.' Act of September 24, 1789, c. 20, § 34, 1 Stat. 92; Rev. Stat. § 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the

courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court. *Higginson* v. *Mein*, 4 Cranch, 415, 419, 420; *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Bell* v. *Morrison*, 1 Pet. 351, 360; *Henderson* v. *Griffin*, 5 Pet. 151; *Green* v. *Neal*, 6 Pet. 291, 297–300; *McElmoyle* v. *Cohen*, 13 Pet. 312, 327; *Harpending* v. *Dutch Church*, 16 Pet. 455, 493; *Leffingwell* v. *Warren*, 2 Black, 599; *Sohn* v. *Waterson*, 17 Wall. 596, 600; *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137; *Kibbe* v. *Ditto*, 93 U. S. 674; *Davie* v. *Briggs*, 97 U. S. 628, 637; *Amy* v. *Dubuque*, 98 U. S. 470; *Mills* v. *Scott*, 99 U. S. 25, 28; *Moores* v. *National Bank*, 104 U. S. 625; *Michigan Insurance Bank* v. *Eldred*, 130 U. S. 693, 696; *Penfield* v. *Chesapeake &c. Railroad*, 134 U. S. 351; *Barney* v. *Oelrichs*, 138 U. S. 529.

"In *Patten* v. *Easton*, 1 Wheat. 476, 482, and again in *Powell* v. *Harman*, 2 Pet. 241, this court had construed a Tennessee statute of limitations of real actions in accordance with the decisions of the Supreme Court of the State, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green* v. *Neal*, 6 Pet. 291, a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the state court, establishing the opposite construction."

Nor can the case before us be saved from the operation of the rule thus stated by the contention that the Supreme Court of the State of Alabama has misconstrued its statutes or has adopted a rule of limitation or prescription in conflict therewith. In *Leffingwell* v. *Warren*, 2 Black, 599, 603, Mr. Justice Swayne, speaking for the court, thus laid down the rule:

"The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to a statute of a

State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. . . . If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

These views meet every point presented here and do not in any way conflict with *Burgess* v. *Seligman*, 107 U. S. 20, 32; *Carroll* v. *Smith*, 111 U. S. 556, 562; or *Gibson* v. *Lyon*, 115 U. S. 439. None of those cases involved the question of the conclusiveness on this court of the decisions of the courts of a State as to a statute of limitations and the bar created thereby. It may be that, if the question were before us for original consideration, we should hold that the right of the heirs to sue did not arise until after the death of the holder of the life estate, and therefore, that the bar of the statute would only then begin to run; but we are not at liberty to pass upon that question. When the bar of the statute of prescription, under the laws and decisions of the State of Alabama, began to be operative has been construed by the court of last resort of that State. Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the Supreme Court of Alabama. In deciding them it passed upon its own statutes of limitations or the doctrines of prescription as applied by it, and we are obliged to apply and enforce their conclusions.

To endorse the position of the plaintiffs in error, we should be compelled at the same time to disregard the elementary rules by which decrees of probate are sanctioned and upheld, on the ground of a technical construction which, it is asserted, we are compelled to adopt because of the decisions of the state court of Alabama, and to depart from the settled rule under which this court adheres to the decision of state courts of last resort in construing statutes of limitation or enforcing the doctrine of prescription. In other words, the success of the

plaintiffs' case depends upon our adhering to the rule by which we follow the construction of state courts in a state matter on the one hand and departing from it on the other.

Judgment affirmed.

Mr. Justice Jackson, not having heard the argument, took no part in the decision of this cause.

NORTHERN PACIFIC RAILROAD COMPANY *v.* BABCOCK.

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

No. 328. Submitted March 28, 1894. — Decided May 26, 1894.

In an action by the representatives of a railroad employé against the company, to recover damages for the death of the employé, caused by an accident while in its employ, which is tried in a different State from that in which the contract of employment was made and in which the accident took place, the right to recover and the limit of the amount of the judgment are governed by the *lex loci*, and not by the *lex fori*.

A railroad company is bound to furnish sound machinery for the use of its employés, and if one of them is killed in an accident caused by a defective snow-plough, the right of his representative to recover damages therefor is not affected by the fact that some two weeks before he was sent out with the defective machinery, he had discovered the defect, and had notified the master mechanic of it, and the latter had undertaken to have it repaired.

Some alleged errors in the charge of the court below are examined and held to have no merit.

The plaintiff below, who was the administrator of the estate of Hugh M. Munro, sued in the District Court of the Fourth Judicial District of Minnesota to recover $25,000 damages for the killing of Munro on the 10th day of January, 1888, at or near a station known as Gray Cliff on the Northern Pacific Railway in the Territory of Montana. The complaint contained the following allegations:

Statement of the Case.

"That on the said 10th day of January, 1888, the said Hugh M. Munro, now deceased, was in the employ of the said defendant corporation within the Territory of Montana in the capacity of locomotive engineer for hire and reward by the said defendant paid, and that the duty of running a locomotive engine upon said defendant's line of railway within said Territory was by said defendant assigned to said Hugh M. Munro on the said 10th day of January, 1888, and the defendant directed and ordered the said Hugh M. Munro to run a certain locomotive engine, the property of said defendant, known as engine No. 161, over and upon its said railway in said Territory; that prior to and at the time the said orders were so presented to said Munro there had been and then was a severe snow storm in progress, and defendant's line of railway over and upon which said Munro was so ordered to run said engine was covered with drifting snow theretofore accumulated thereon and then fast accumulating, notwithstanding which the said defendant corporation did wilfully, improperly, negligently, and carelessly refuse and neglect to send a snow-plow ahead of said engine No. 161 to clear the snow and ice from said defendant's said track which had accumulated and was accumulating thereon by reason of said storm, so as to render the passage of said engine No. 161 safe and proper.

"That there was attached to the forward part of said engine No. 161 a certain attachment known as a pilot-plow, an appliance constructed thereon for the purpose of clearing the railway of snow and ice accumulated thereon and render safe the passage of the engine to which said plow was attached over and upon said railway of defendant.

"That on the said 10th day of January, 1888, the said defendant corporation knowingly, wilfully, negligently, and carelessly allowed to be and remain upon said engine No. 161, attached thereto as aforesaid, a certain pilot-plow, the iron braces, bolts, and rods of which were broken, imperfect, and insufficient, by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, allowing the said pilot to raise up and ride over obstructing

snow and ice instead of cutting through the same, as was the intention of its construction, rendering the running of said engine upon said railway dangerous, and that the said defendant well knew of the broken, defective, and dangerous condition of said engine No. 161 at the time the said Hugh M. Munro was so ordered to run the same upon and over said railway, notwithstanding which the said defendant corporation did negligently and carelessly furnish to said Hugh M. Munro said engine with the said broken and imperfect pilot-plow attached thereto to run over and upon its said line of railway.

"That while said Hugh M. Munro was running said engine in performance of his duty as such engineer and pursuant to the orders of said defendant corporation, and before daylight on said 10th day of January, 1888, near Gray Cliff, in said Territory of Montana, the said engine struck an accumulation of snow and ice which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, and the pilot-plow of said engine, by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said Hugh M. Munro was instantly killed.

* * * * *

"That the law of the Territory of Montana governing actions for recovery of damages for causing death was on the 10th day of January, 1888, and now is sections 13 and 14 of title II. of said chapter 1 of the first division of Code of Civil Procedure of the Territory of Montana; which said sections of said law of said Territory are in the words and figures following, viz.:

"'SECTION 13. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, or a guardian for the injury or death of his ward.

"'SECTION 14. Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for

damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.'"

The case was removed to the Circuit Court of the United States for the District of Minnesota, where an answer was filed by the defendant, denying the averments of the complaint, and alleging that the death of Munro was caused solely by his negligence and carelessness, and not by the negligence of the defendant or any of its servants or employés.

There was a verdict and judgment below in favor of the plaintiff for $10,000. To review that judgment this writ of error was sued out. The errors assigned were as follows:

"First. The court erred in charging the jury as follows: 'Did it fail to discharge any duty which the law imposed upon it for the safety of its employé, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover.'

"Second. The court erred further in charging the jury as follows: 'The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or, at least, that the defendant had not used reasonable care in clearing its track, and that when the engineer in that condition arrived at this cut, two miles from Gray Cliff, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence which caused the death.'

"Third. The court erred further in charging the jury as follows: 'Many States have different laws. The law in this State until recently was that only $5000 could be given in a case of death. It has lately been increased to $10,000.'

"Fourth. The court erred further in charging the jury as follows: 'If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate. The law of Montana limits it to such an amount as you think it would be proper under all circum-

stances of the case, and that is the law which will govern in this case.'

"Fifth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'You, the jury, are instructed to find a verdict for the defendant.'

"Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars.'

"Seventh. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The court instructs the jury that unless they find that it was customary for defendant company to send a snow-plow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snow-plow in advance, they will find for the defendant.'

"Eighth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The court instructs the jury that, unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulated snow and ice at said cut, and that thereby the said engine was thrown upon the track, the jury will find for the defendant.'"

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

The issue the defendant was obliged to meet in the case at

bar under the pleadings was, that the defendant had negligently furnished the plaintiff with an engine with a defective "pilot-plow," and that this defect in the pilot-plow was rendered dangerous by failure of defendant to keep its track clear from snow and ice. It was not contended by plaintiff either that the defective pilot-plow could have occasioned the accident except in conjunction with the accumulation of snow and ice, or the accumulation of snow and ice on the track could have occasioned it except in conjunction with the defective pilot-plow. They were inseparably joined both in the complaint and in the evidence.

The evidence shows clearly that Munro had full knowledge of the storm, of the general condition of the track, and that his means of knowing of the necessity of sending a snow-plow ahead of his train were as full and complete as the defendant's. He had been on this particular run for a number of years, he was a capable engineer, familiar with the country, and he knew that no snow-plow had been sent ahead of his train. It is an established rule on this subject that a servant who has a reasonable opportunity to inform himself of defects, is presumed, by remaining in the company's employ to have assumed the risk of them. Pierce on Railroads, 379; Thompson on Negligence, 1008.

Upon the pleadings and upon the evidence, or upon either or both, the question of negligence on the part of the company in not sending a snow-plough in advance of the train or in allowing the snow and ice to accumulate upon its track should be eliminated from the case as an independent factor upon which plaintiff could recover.

So it is insisted that the law upon the facts of this case is decidedly with the road, without going over distinctly and separately the different errors specified in the record, and the court should have directed the jury to find for the road as requested by it. The case when examined in the light of the authorities, is sufficiently discussed upon its merits, and there is left but one more proposition to place before the court.

The trial court erred in refusing to instruct the jury, as

asked by the road, "that the laws of Minnesota limit the amount of damages to be recovered in this case to $5000." Instead of that the court told the jury the recovery should be estimated under the laws of Montana, where Munro was killed.

It seems this action could have been brought in either Montana or Minnesota. The party had his selection as to the forum; that being so, it is but right and proper he should have only the remedy afforded by the law of the forum of his selection. Wharton, Conflict of Law, §§ 479, 747–754; Gould's Pleading, 104–112, 131, *et seq.;* Story, Conflict of Law, §§ 556, *et seq.; Nonce* v. *Richmond & Danville Railroad*, 33 Fed. Rep. 429.

If the party can take advantage of a remedy afforded in Minnesota, he must certainly take that remedy with the burdens ordinarily attached to it in that State. *Mostyn* v. *Fabrigas*, 1 Smith's Ldg. Cas. 340, and Eng. and Am. notes.

Mr. Reuben C. Benton and *Mr. Frank Healy* for defendant in error.

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

For convenience, we shall consider the various assignments of error without regard to their numerical order.

The third, fourth, and sixth assignments involve the same question, and may be decided upon together.

The plaintiff's intestate was an engineer in the employ of the defendant corporation in the Territory of Montana, and the accident by which he lost his life occurred there. The law of the Territory of Montana at the time provided as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his action, then also

against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." (Section 14, title II, chapter I, first division of the Code of Civil Procedure of the Territory of Montana.)

Under the law of Minnesota, when the death occurred, the limit of recovery in case of death was $5000, but at the time of the trial of the case in the court below this limit had been increased to $10,000 by amendment of the Minnesota statutes.

The question which those assignments of errors present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of *Herrick* v. *Minneapolis & St. Louis Railway Company*, reported in 31 Minnesota, 11, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that State for a cause of action originating in Iowa a law of the State of Iowa making railroad corporations liable for damages sustained by its employés in consequence of the neglect of fellow-servants, the court said:

"The statute of another State has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the State where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto.*

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text-writers — notably, Rorer on Interstate Law — seem to lay

down this rule, but the authorities cited generally fail to sustain it.

* * * * *

"But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the State of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

This opinion of the Supreme Court of Minnesota is in accord with the rule announced by Chief Justice Marshall in *The Antelope*, 10 Wheat. 66. In referring to that case in *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, the court said: "The courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury." The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith* v. *Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *The Scotland*, 105 U. S. 24, 29; *Huntington* v. *Attrill*, 146 U. S. 657, 670. Indeed, in *Texas & Pacific Railway Co.* v. *Cox*, *supra*, Mr. Chief Justice Fuller, speaking for the court, said: "The question, however, is one of general law, and we regard it as settled in *Dennick* v. *Railroad Co.*"

The contract of employment was made in Montana, and the accident occurred in that State, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.

The fifth error assigned is the refusal to instruct the jury to find a verdict for the defendant.

The evidence tended to show that Munro was an engineer in the employ of the railroad company at the town of Livingston; that, as such engineer, he was driving engine No. 161 some time in the latter part of December; that whilst driving the engine he discovered that an appliance known as the "pilot-plow," which was attached to the engine, was out of order, and in a dangerous condition. The purpose of such a plow is to push the snow from the track, and if not properly braced, as stated by one of the witnesses, it is likely to "rise up and ride over the drift, instead of going through it, and the natural result would be to throw the engine trucks from the tracks." After Munro discovered that the plow was defective, he called the attention of the foreman of the shop and master mechanic to its condition. On or about the 2d day of January, Munro was taken sick and did not pursue his occupation until January 9, when he reported for duty. At about twelve o'clock that night, while a severe snow storm was raging, Munro was sent for, by messenger, to take out a passenger train. The train was delayed in getting away from Livingston, and left that place about two o'clock in the morning drawn by engine No. 161, with Munro in charge as engineer. At a place called Gray Cliff the engine, in passing through a cut, capsized, and Munro was killed.

There was no conflict of evidence as to the fact that the plow was defective some two weeks before the accident, when Munro so stated to the foreman and master mechanic, but there was a conflict upon the question whether or not it had been subsequently repaired. Testimony was adduced by the plaintiff tending to show that the necessary repairs had not been made, and that at midnight on the 9th, when the engineer was called upon to take charge of the engine, the con-

dition of the plow was quite as defective as it had been some two weeks before, when the engineer had made his report of its condition to the foreman. On the other hand, the defendant offered testimony which tended to show that the repairs had been made. It was proven that, at the time Munro was called upon to take charge of the engine, on the night of the 9th, the round-house was so full of steam that the engine could not have been critically examined by him. The presence of this steam was due to the fact that there was no heating apparatus in the round-house, and, therefore, steam was allowed to escape therein, in order to prevent the engines from freezing. There was some evidence that the effect of the defective pilot-plow would be to throw the train from the track whenever the engine struck an accumulation of snow which had been in any way impacted, the resistance of the snow having the effect of pushing the defective plow up and thus derailing the engine. On the other hand, there was other evidence that such a result could not have followed from the defect in the plow.

Under this condition of proof it is clear that the instruction was rightfully refused. The obligation of the employer to furnish to his employé sound implements is established. *Hough* v. *Railway Co.*, 100 U. S. 213, 218; *Union Pacific Railway Co.* v. *Daniels*, 152 U. S. 684. And the fact that the engineer, when called upon at midnight on the 9th to perform duty, took the engine out under the conditions surrounding it in the round-house, implies no assumption by him of the risk of defective machinery. The proof showed, or tended to show, that notification by the engineer to the foreman and master mechanic of the existence of the defect was given some ten or twelve days before the accident, and that at the time there was an impression created in Munro's mind that it was to be remedied. It also shows that work of this character was usually done in the shops at Livingston, over which the foreman presided and in which the engine lay when the notice was given. From the time of the notice up to the time when the engineer was called upon to use the engine he was not on duty, but was absent on sick leave. As the employé had

given notice of the defect to the proper officer whose duty it was to make the repairs, and the impression had been conveyed to him that these would be made, he had a right to assume that they had been made, and to act upon that assumption. The mere fact of his taking the engine out at midnight under the circumstances did not of itself, unsupported by other proof, imply an assumption by him of the risk resulting from the dangerous and defective condition of the attachment to the engine. *Hough* v. *Railway Co.*, 100 U. S. 225.

The first assignment of error is, we think, without merit. The language of the charge complained of is: "Did it [the defendant company] fail to discharge any duty which the law imposed upon it for the safety of its employé, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover." Separated from the context this general language might have misled, but when considered in proper connection with the rest of the instruction given, it could not have done so.

The eighth error assigned was to a refusal of the court to give the following charge: "The court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot-plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulated snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant." The charge which the court gave was substantially as requested, and correctly stated the law. It was as follows: "The court instructs you that unless you find that the defendant negligently and carelessly furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imper-

fect, and insufficient, and by reason of said imperfect condition, when the engine struck the snow at the cut, as testified to, the engine and tender were derailed by reason thereof, which caused the accident in question, then the defendant would be entitled to a verdict. The claim is that the snow had accumulated to such an extent in that cut that when the engine struck it, the plow being in that condition in which it was, it was unable to clear the track, the accumulation of snow being so great, and that, as described by some witnesses, it rode up and threw the engine off the track from the fact that the front trucks of the engine could not ride over it. I instruct you that unless the cause of this derailment and the throwing over the engine was the imperfect condition of this plow, that it could not clear the cut from the snow which had accumulated there, but the engine was thrown over and thereby death ensued — unless this is found to be true to the satisfaction of the jury, the defendant would be entitled to a verdict." We can see no material variance between the charge requested and the charge which was given.

The seventh error assigned is to the refusal of the court to instruct the jury "that unless they find that it was customary for defendant company to send a snow-plow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snow-plow in advance, they will find for the defendant." This instruction was, of course, justly refused, because it implied that the defendant was entitled to a verdict, if, contrary to its custom, it had not sent a snow-plow in advance of the train, without reference to the defective condition of the pilot-plow, which was the cause of action upon which the plaintiff relied. Indeed, although the petition charged negligence on the part of the defendant in failing to send a snow-plow ahead of the train, the action, as stated in the complaint, was predicated upon the defect in the machinery, or pilot-plow — the failure to send the snow-plow being alleged as a mere incident, or remote cause of damage. And this distinction was elucidated

with great clearness in the charge of the court. It nowhere indicated that there could be any liability on the part of the defendant arising from the failure to send a snow-plow ahead of the train, as a distinct and substantive cause of action. It referred to the failure to send a snow-plow ahead of the train merely as the reason why it was necessary to have the pilot-plow attached to the engine. The court said: "The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or at least that the defendant had not used reasonable care in clearing its tracks, and that when the engineer with the engine in that condition arrived at this cut, two miles from Gray Cliff, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence on the part of the defendant that caused the death." In other words, throughout the whole charge, the court instructed the jury that the liability, if any, must result from the defective condition of the machinery or pilot-plow of the engine; and where it referred to the failure to send a snow-plow ahead of the train as an act of negligence, treated it as negligence giving rise only remotely, and not proximately, to the injury; the proximate cause being the defective machinery, and the remote accumulation of snow, which rendered the use of the engine unsafe because of the defect in the pilot-plow attached thereto.

Judgment affirmed.

Mr. Justice Jackson, not having heard the argument, took no part in the decision of this cause.

Syllabus.

COVINGTON AND CINCINNATI BRIDGE COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 1025. Argued April 25, 1894. — Decided May 26, 1894.

This company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, with authority to construct a bridge across the Ohio at Cincinnati. The third section of the act required its confirmation by the State of Ohio, before the corporation should open its books for subscription; and the eighth section declared that "the president and directors shall have the rights to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages, or animals of every description or kind; provided, however, that the said company shall lay before the legislature of this State a correct statement of the costs of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping the said bridge in repair, and of the other expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of the said bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions." By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that State, "with the same franchises, rights, and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation. Some subsequent legislation took place not affecting the matter in issue here. The bridge was completed in 1867 at a cost much in excess of what had been contemplated, and has never earned 15 per cent on its cost. On the 31st of March, 1890, the legislature of Kentucky enacted that it should be unlawful to charge, collect, demand, or receive for passage over the bridge spanning the Ohio River, constructed under such act of incorporation, any toll, fare, or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation, and made it obligatory upon the company to maintain an office and sell tickets in Kentucky at those rates. The company refusing to comply with the requirements of this act, an indictment was found against it. This was demurred to, and such proceedings were had thereafter that the defendant was adjudged guilty and fined $1000, and the judgment was sustained as constitutional by the Court of Appeals of the State. The case being brought here by

Statement of the Case.

writ of error, it is by the whole court *Held*, that the Kentucky act of March 3, 1890, in its effect upon the Bridge Company, violated the provisions of the Constitution of the United States.

The judges concurring in the opinion of the court, (BROWN, HARLAN, BREWER, SHIRAS and JACKSON, JJ.,) after reviewing in detail the course of the decisions, announce the following as their grounds for concurring in this result and in the judgment:

(1) That the traffic across the river was interstate commerce;

(2) That the bridge was an instrument of such commerce;

(3) That the statute was an attempted regulation of such commerce, which the State had no constitutional power to make;

(4) That Congress alone possesses the requisite power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory.

The minority of the court (consisting of FULLER, C. J., and FIELD, GRAY, and WHITE, JJ.) gave the reasons for their concurrence in the result and the judgment as follows:

(1) The several States have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.

(2) By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each State, and authorized to fix rates of toll.

(3) Congress, by the act of February 17, 1865, c. 39, declared this bridge "to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be as established by the two States.

(4) The original acts of incorporation constituted a contract between the corporation and both States, which could not be altered by the one State without the consent of the other.

THIS was an indictment found by the grand jury of Kenton County, Kentucky, against the defendant Bridge Company for demanding and collecting illegal tolls, refusing to sell tickets at the rates required by law, and for failing to keep an office for the sale of tickets at its bridge in said county.

The Covington and Cincinnati Bridge Company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, the third section of which required the confirmation of the act by the State of Ohio, before the corporation should open its books for subscription;

and the eighth section of which declared that "the president and directors shall have the right to fix the rates of toll for passing over said Bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages, or animals of every description or kind; provided, however, that the said Company shall lay before the Legislature of this State a correct statement of the cost of said Bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping the said Bridge in repair, and of the other expenses of the Company; and the said President and Directors shall, from time to time, reduce the rates of toll, so that the net profits of the said Bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that State, "with the same franchises, rights, and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this State to the centre of the said Bridge, nor in anywise to acknowledge the jurisdiction of the Commonwealth of Kentucky this side of the said centre."

On March 20, 1850, this act of confirmation was amended by the legislature of Ohio by granting the company "power to enter upon any lands in the city of Cincinnati, from low-water mark in the Ohio River northwardly, not exceeding one hundred feet in width, to Front Street, and appropriate the same" for passageways and abutments, etc.

The original act of incorporation was amended by the legislature of Kentucky by the following amongst other subsequent acts:

1. By act of February 23, 1856, authority was given to increase the capital stock from $300,000 to $700,000, with power in the city of Covington to subscribe for and purchase $100,000.

2. By act of February 6, 1858, the company was authorized

to issue preferred stock under certain restrictions, such stockholders to receive dividends of 6 per cent.

3. By act of February 5, 1861, the capital stock was increased to $1,000,000, one-half of such amount in preferred stock, and to pledge the revenues of the company for the payment of dividends upon such preferred stock to the extent of 15 per cent per annum.

4. By act of January 21, 1865, the capital stock was increased to $1,250,000, the additional $250,000 being preferred stock, the holders of which should enjoy all the benefits, privileges, and immunities to which the holders of the existing stock were entitled.

By the sixth section of this act the legislature reserved the right to change, alter, or amend the original charter, "but not so as to abridge or injure legal or equitable rights acquired thereunder."

5. By act of February 25, 1865, the above sixth section was repealed.

6. By act of Congress of February 16, 1865, the bridge was declared to be a lawful structure and post road for the conveyance of the mails of the United States. 13 Stat. 431.

The bridge was completed and opened for travel January 1, 1867.

On March 31, 1890, the legislature of Kentucky passed another act amendatory of the act of incorporation, and out of which this prosecution arose, providing that it should be unlawful for any person or corporation to charge, collect, demand, or receive for passage over the bridge spanning the Ohio River, constructed under such act of incorporation, any toll, fare, or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation. The second section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and by the third section, the company was required to keep an office within the county of Kenton constantly open

Counsel for Plaintiff in Error.

for the sale of such tickets; and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

The company failing to conform to this last-mentioned act, this indictment was filed May 9, 1890. Defendant demurred thereto, and the case was submitted upon this demurrer and a statement of facts, showing the cost of the bridge structure and offices to have been $1,855,462.36; the per cent of net earnings on cost for first 23 years, 4.82; the per cent of net earnings on cost for the year 1889, 6.14; the estimated per cent of net earnings on cost for 1890, $4\frac{2}{10}$, under the charges fixed by the directors; the estimated percentage of net earnings on cost for the year 1890, under the act of which complaint was made, $1\frac{6}{10}$. The court sustained the demurrer and dismissed the indictments upon the ground that the act of 1890 impaired the obligation of the contract contained in the eighth section of the original act. The Commonwealth appealed to the Court of Appeals, by which the judgment of the court below was reversed, and the case remanded with directions to overrule the demurrer, and for further proceedings. The case was thereupon remanded to the lower court and submitted without a jury. The court adjudged the defendant guilty, and imposed a fine of $1000, from which judgment the defendant again appealed to the Court of Appeals, which affirmed the judgment of the court below, and certified, at the request of the appellant, the following questions as arising under the Constitution and laws of the United States:

1. Whether the act of 1890 was within the constitutional inhibition of laws impairing the obligation of contracts.

2. Whether such acts were in violation of the exclusive power of Congress to regulate commerce among the States.

3. Whether said act was in violation of the Fourteenth Amendment, prohibiting the taking of private property without due process of law.

Defendant thereupon sued out a writ of error from this court.

Mr. Solicitor General for plaintiff in error. *Mr. William M. Ramsey*, *Mr. James W. Bryan*, *Mr. John F. Fisk*, and *Mr. Charles H. Fisk* were with him on his brief.

Mr. William J. Hendrick, Attorney General of the State of Kentucky, and *Mr. William Goebel* for defendant in error.

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

This case involves the power of a State to regulate tolls upon a bridge connecting it with another State, without the assent of Congress, and without the concurrence of such other State in the proposed tariff.

The right of the Commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it impairs the obligation of the contract contained in the original charter of the company.

The power of Congress over commerce between the States and the corresponding power of individual States over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the States with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the State may be concurrent. The adjudications of this court with respect to the power of the States over the general subject of commerce are divisible into three classes. First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the States cannot interfere at all.

The *first* class, including all those wherein the States have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the State, and while the regulations of the State may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot

be termed in any just sense an interference. Under this power, the States may authorize the construction of highways, turnpikes, railways, and canals between points in the same State, and regulate the tolls for the use of the same, *Railroad* v. *Maryland*, 21 Wall. 456; and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the State — such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries. *Veazie* v. *Moor*, 14 How. 568; *The Montello*, 11 Wall. 411; *S. C.* 20 Wall. 430. This is true notwithstanding the fact that the goods or passengers carried or travelling over such highway between points in the same State may ultimately be destined for other States, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The States may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Railroad Company* v. *Maryland*, 21 Wall. 456; *Ashley* v. *Ryan*, 153 U. S. 436.

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the States, *United States* v. *Dewitt*, 9 Wall. 41; *Patterson* v. *Kentucky*, 97 U. S. 501, nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a State. *License Tax Cases*, 5 Wall. 462, 470, 471. The remarks of the Chief Justice in this case contain the substance of the whole doctrine: "Over this," (the internal) "commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repug-

nant to the exclusive power of the State over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. *Allen* v. *Newberry*, 21 How. 244. But later adjudications have ignored this distinction as applied to those waters. *The Belfast*, 7 Wall. 624, 641; *The Lottawanna*, 21 Wall. 558, 587; *Lord* v. *Steamship Co.*, 102 U. S. 541.

Under this power the States may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the State may be carried on. *The Trade Mark Cases*, 100 U. S. 82.

Within the *second* class of cases — those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots: *Cooley* v. *Philadelphia Board of Wardens*, 12 How. 299; *Steamship Company* v. *Joliffe*, 2 Wall. 450; *Ex parte McNiel*, 13 Wall. 236; *Wilson* v. *McNamee*, 102 U. S. 572; quarantine and inspection laws and the policing of harbors: *Gibbons* v. *Ogden*, 9 Wheat. 1, 203; *City of New York* v. *Miln*, 11 Pet. 102; *Turner* v. *Maryland*, 107 U. S. 38; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455; the improvement of navigable channels: *County of Mobile* v. *Kimball*, 102 U. S. 691; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Huse* v. *Glover*, 119 U. S. 543; the regulation of wharfs, piers, and docks: *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Company* v. *Keokuk*, 95 U. S. 80; *Packet Company* v. *St. Louis*, 100 U. S. 423; *Packet Company* v. *Catlettsburg*, 105 U. S. 559; *Transportation Company* v. *Parkersburg*, 107 U. S. 691; *Ouachita Packet Co.* v. *Aiken*, 121 U. S. 444; the construction of dams and bridges across the navigable waters of a State: *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Pound* v. *Turck*, 95 U. S. 459; and the establishment of ferries: *Conway* v. *Taylor's Executors*, 1 Black, 603.

Of this class of cases it was said by Mr. Justice Curtis in *Cooley* v. *Board of Wardens*, 12 How. 299, 318: "If it were

admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution, (Federalist, No. 32,) and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of Congressional regulations." See also *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193. But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the State. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421. As matter of fact, the building of bridges over waters dividing two States is now usually done by Congressional sanction. Under this power the States may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the *third* class — of those laws wherein the jurisdiction of Congress is exclusive. *Brown* v. *Houston*, 114 U. S. 622; *Bowman* v. *Chicago &c. Railway*, 125 U. S. 465. Subject to the exceptions above specified, as belonging to the first and second classes, the States have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the States. That, while the States have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several States, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down

in *Crandall* v. *Nevada*, 6 Wall. 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one State to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the States to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn* v. *Illinois*, 94 U. S. 113, in which a power was conceded to the State to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other States. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. That the decision does not necessarily imply a power in the States to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the Chief Justice, p. 135, in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over

them, even though in so doing it may operate upon commerce outside its immediate jurisdiction." The principle of this case has been recently affirmed in *Budd* v. *New York*, 143 U. S. 517, and reaffirmed in *Brass* v. *North Dakota*, 153 U. S. 391, though not without strong opposition from a minority of the court.

In the next case, viz., that of the *Chicago, Burlington &c. Railroad* v. *Iowa*, 94 U. S. 155, 163, a bill was filed by the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this State." The complainant was also the lessee of the Burlington and Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi River at Burlington, thus making a continuous railroad from Chicago to Platsmouth on the Missouri River, in Iowa. The case was held to be covered by *Munn* v. *Illinois*, the road, like the warehouse in that case, being situated within the limits of a single State. "Its business," said the Chief Justice, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing, those without may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz., *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, it was held that, under the constitution of Wisconsin providing that all acts creating corporations within the State "may be altered or repealed by the legislature at any time after their passage," the legislature had a right to prescribe a maximum of charges to be made by the Chicago and Northwestern Railway Company for transporting persons or property within the State, or taken up outside the State and brought within it, or taken up inside

and carried without. The vital question is not discussed at any length, but it was held that, until Congress acted with reference to the relations of this company to interstate commerce, it was within the power of the State of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles* v. *Illinois*, 108 U. S. 526, in which the power of a State to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall* v. *De Cuir*, 95 U. S. 485, which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the States to give all persons travelling within that State, upon vessels employed in such business, equal rights and privileges in parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In the *Railroad Commission Cases*, 116 U. S. 307, it was held that the right of a State to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which granted to a railroad company the right from time to time to fix and regulate the tolls and charges by them to be received for transportation did not deprive the State of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the State might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. . . . The commission is in express terms prohibited by the act of March 15, 1884, from interfering

with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of property taken up without the State and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in the *Wabash &c. Railway* v. *Illinois*, 118 U. S. 557, in which there came under review a statute of Illinois enacting that if any railroad company should, within that State, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that case made such discrimination in regard to goods transported over the same road or roads, from Peoria, Illinois, and from Gilman, in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being eighty-six miles nearer the city of New York than the latter, this difference being in the length of line in the State of Illinois. The court held that such transportation was commerce among the States, even as to that part of the voyage which lay within the State of Illinois, and that the regulation of such commerce was confided to Congress exclusively, under its power to regulate commerce between the States, and that the statute in question, being intended to regulate the transmission of persons or property from one State to another, was not within that class of legislation which the States may enact in the absence of legislation by Congress. In delivering the opinion of the court Mr. Justice Miller cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce, which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States in the absence of any legislation by Congress upon the same subject. He further observed that "the great question to be decided, and

which was decided, and which was argued in all those cases, was the right of the State in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others; and the case of *Munn* v. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business in Chicago, . . . free from the question of continuous transportation through the several States, . . . and the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the States to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the States might regulate the charges for interstate traffic, they must be considered as overruled. See also *Bowman* v. *Chicago &c. Railway*, 125 U. S. 465. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash case*, and to that doctrine we still adhere.

The real question involved here is whether this case can be distinguished from the *Wabash case*. That involved the right of a single State to fix the charge for transportation from the interior of such State to places in other States. This case involves the right of one State to fix charges for the transportation of persons and property over a bridge connecting it with another State, without the assent of Congress or such other State, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The *first* question must be answered in the affirmative upon the authority of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, in which the State of Pennsylvania attempted to tax the capital stock of a corporation whose entire business

consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that State. "Congress alone," said the court, (page 204,) "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products and against those of other States." If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line — in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced this court to hold in the *Wabash case* that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two States, it is impossible for either to fix a tariff of charges.

With reference to the *second* question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in

commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two States are not instruments of commerce between such States in such sense as to exempt them from state control. In *Conway* v. *Taylor's Executors*, 1 Black, 603, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that State who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the State. The opinion, however, did not pass upon the question of the right of one State to regulate the charge for ferriage, nor does it follow that because a State may authorize a ferry or bridge from its own territory to that of another State, it may regulate the charges upon such bridge or ferry. A State may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the State. It is true the States have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several States. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of

Congress for the construction of bridges over navigable waters, and by the seventh section of the act of September 19, 1890, c. 907, 26 Stat. 426, 454, it is made unlawful to begin the construction of any bridge over navigable waters, until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges, where they connected two States. So, too, in *Wiggins Ferry Company* v. *East St. Louis*, 107 U. S. 365, it was held that a State had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry-keepers living in the State, for boats which they owned and used in conveying from a landing in the State passengers and goods across a navigable river to another State. It was said that "the levying of a tax upon vessels or other water-craft, or the exaction of a license fee by the State within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran* v. *New Orleans*, 112 U. S. 69, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the State of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own State. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that State to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the State of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the State of Ohio has the same right, and so long as their action is harmonious there may be no room for friction

between the States; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each State, (if the subject be one for state regulation,) and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each State may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own State, and as persons living in one State and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the State, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single State, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two States without involving a liability of controversies of a serious nature. For instance, suppose the agent of the Bridge Company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the State of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free

passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one State to make the charge for foot passengers very low and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 217, "freedom from such impositions does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the States may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the Commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the State to make. As was said by Mr. Justice Miller in the *Wabash case:* "It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which

levies a tax for the benefit of the State upon the same transportation."

The judgment of the Court of Appeals of Kentucky is therefore reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE WHITE concurred in the judgment of reversal, for the following reasons:

The several States have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each State, and authorized to fix rates of toll.

Congress, by the act of February 17, 1865, c. 39, declared this bridge "to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be as established by the two States. 13 Stat. 431.

The original acts of incorporation constituted a contract between the corporation and both States, which could not be altered by the one State without the consent of the other.

COVINGTON AND CINCINNATI ELEVATED RAILROAD AND TRANSFER AND BRIDGE COMPANY *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 1043. Argued April 25, 1894. — Decided May 26, 1894.

The judgment in this case is reversed on the authority of *Covington & Cincinnati Bridge Co.* v. *Kentucky*, *ante*, 204.

THE case is stated in the opinion.

Mr. William H. Jackson, (with whom was *Mr. W. H. Wadsworth* on the brief,) for plaintiff in error.

Mr. William J. Hendrick, Attorney General of the State of Kentucky, and *Mr. William Goebel* for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court.

This case differs from the last only in the fact that the plaintiff in error was not incorporated until 1886, and subsequently to a general law of the State declaring that all charters and grants of or to corporations shall be subject to amendment or repeal at the will of the legislature. Conceding that these words became a part of its charter, and hence that no contract was impaired by the legislation of 1890, such legislation is still open to the objection found to exist in the former case, that it is in conflict with the interstate commerce clause of the Constitution.

The judgment of the Court of Appeals of Kentucky is, therefore,

Reversed, and the case remanded to that court for further proceedings.

MR. CHIEF JUSTICE FULLER, MR. JUSTICE FIELD, MR. JUSTICE GRAY, and MR. JUSTICE WHITE concurred in the judgment of reversal, for the like reasons as in the case of *Covington Bridge* v. *Kentucky*, *ante*, 204, 223.

UNITED STATES v. ILLINOIS CENTRAL RAILROAD COMPANY.

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

No. 331. Argued March 29, 30, 1894. — Decided May 26, 1894.

Under the operation of the act of the legislature of Illinois of February 27, 1833, for the making and recording of town plats, the interest in and control of the United States over the streets, alleys, and commons in the Fort Dearborn addition to Chicago ceased with the record of the plat thereof and the sale of the adjoining lots.

When a resort is made by individuals, or by the government of the United States to the mode provided by the statute of a State where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation will be given to the instrument of conveyance as is there designated.

This was an appeal from a decree of the Circuit Court, sustaining a demurrer on the part of the Illinois Central and the Michigan Central Railroad, to an information filed by the United States, and dismissing the information as to all the appellees. The information sought to restrain the appellees from diverting the public ground marked on the plat of the Fort Dearborn addition to the city of Chicago from the easements to which it was dedicated. On this branch of the case the information proceeded upon the theory that the United States being the owners of the land in question, and having dedicated it to certain public purposes, were entitled to enjoin its diversion from those public purposes to private uses. The bill alleged:

That before and on the 7th day of June, A.D. 1839, the United States possessed and owned in fee simple the southwest fractional quarter of section 10, the same being a reservation out of the public domain, called the Fort Dearborn reservation; and the then Secretary of War having directed that reservation to be sold, the same was thereupon by his authority laid off into blocks, lots, streets, alleys, and public ground, as an addition to the municipality aforesaid, called the Fort Dear-

born addition to Chicago; and on the day last above mentioned a plat thereof was made and acknowledged by one Matthew Birchard as agent and attorney of the said Secretary of War, and was thereupon duly recorded in the recorder's office of the said county of Cook; on which plat a part of the ground therein comprised, being all that part between Lake Michigan, on the east, and blocks 12 and 15 (as shown by the plat) on the west, was designated as "public ground, forever to remain vacant of buildings," and there was a further declaration that "the public ground between Randolph and Madison streets, and fronting upon Lake Michigan, was not to be occupied with buildings of any description;" as by a plat therewith filed more fully and distinctly appeared. And afterward the several lots designated and shown on that plat were sold and conveyed by the United States to divers persons, by and according to the plat and with reference to the same; but the United States never parted with the title to the streets, alleys, and public ground in the said plat designated and marked, and still own the same in fee simple, with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public.

The bill further alleged a grant of right of way to the Illinois Central Railroad, under an act of the State of Illinois, approved February 10, 1851, which provided, however, that nothing in that act contained should authorize the said corporation to make location of its tracks within any city without the consent of the common council of such city.

The bill further alleged that the common council of the city of Chicago, by an ordinance dated June 14, 1852, gave the Illinois Central Railroad Company the right to enter upon and use for the purpose of its said railroad and works a space 300 feet wide, for the whole length of the public ground shown in the plat of the Fort Dearborn addition, and that the railroad company, having accepted said act of the legislature and said ordinance, by virtue and under color of the same proceeded to and did build its said railroad and extend and complete the same from the southward into the said city, on the course indicated in the said ordinance, to

a terminus near the Chicago River aforesaid; and the said company has ever since maintained and operated its said railroad, and continues so to do. And the said District Attorney for the United States says that no authority or license was ever given by the United States for building or maintaining or operating its said railroad upon or along . . . said public ground shown on said plat of Fort Dearborn addition, or any part of those tracts of ground; that the General Assembly of the State of Illinois passed an act on April 16, 1869, whereby it assumed and attempted, among other things, to grant in fee to the said Illinois Central Railroad Company, etc., . . . all the right and title of the State of Illinois in and to the lands submerged, or otherwise, lying north of the south line of Monroe Street, and south of the south line of Randolph Street, and between the east line of Michigan Avenue and the track and way of the said Illinois Central Railroad, the said pretended act purporting to grant the said grounds for a passenger station and other railroad purposes, and providing that the said railroad companies named as grantees should pay to the city of Chicago the sum of $800,000 . . . ; that the said Illinois Central Railroad Company, etc., . . . now give out and claim that the said pretended act was and is a legal and binding act, and passed to them respectively a valid title to the property in and by the same attempted to be granted; and the same companies now claim the right and threaten to take possession and exclusive control of the property so in and by the said pretended act attempted to be granted to them respectively.

Thus the information showed that the railroad companies named claimed title to that portion of the public ground shown on the plat of the dedication of the Fort Dearborn addition lying east of Michigan Avenue, and threatened to take possession and exclusive control thereof, for the purpose of appropriating it to a passenger station and other railroad purposes.

Mr. Solicitor General for appellants.

I. The Birchard plat of the Fort Dearborn addition to the

city of Chicago did not divest the United States of the fee in the public ground for the following reasons:

1. The act of March 3, 1819, c. 88, 3 Stat. 520, under which the Secretary of War acted, while it probably conferred authority upon him to lay out streets and alleys as fairly incidental to the power "to sell," which power alone was conferred upon him in terms, did not authorize him to convey away the fee of a large tract to be used as a public ground. By the language of the act it was only "on the payment of the consideration" that the Secretary was authorized "to make, execute, and deliver all needful instruments, conveying and transferring the same in fee."

2. The town-plat act of Illinois, of February 27, 1833, Revised Laws of Illinois, 1833, 599, provides only for cases in which "any county commissioners or other person or persons wish to lay out a town." The United States are not fairly within the description of "person or persons," and a plat made by or on behalf of the United States is not within the terms of the act. Note the penalties prescribed by sections 8 and 9, to which the United States could not be subject.

3. The act of Congress under which Fort Dearborn was sold authorized the Secretary of War "to cause to be sold" and "to make, execute, and deliver all needful instruments, conveying and transferring the same in fee," so that, if the Illinois statute covers this plat at all, the Secretary of War must be deemed to be "the person" who is authorized by its first section "to lay out" the addition, and "the person" who is required under the fourth section to acknowledge the plat before one of the judicial officers named. It has been held that the statute does not authorize a plat to be made or acknowledged by an agent or attorney in fact. *Gosselin* v. *Chicago*, 103 Illinois, 623, 626. Only stone planting can be done through an agent. Ib. 626. The attempt of the Secretary of War to act through an agent and attorney was therefore ineffectual to accomplish a *statutory* dedication, assuming all the other requirements of the statute to have been complied with.

4. But if the Secretary of War could act through an attorney

in fact, it was necessary to the validity of his power of attorney that it should be recorded under section sixteen of the "Act concerning conveyances of real property." Rev. Stat. Ill. 1833, 135, quoted in 103 Illinois, 627. Birchard's power of attorney does not appear to have been recorded.

5. Section 1 of the Illinois act requires the plat or map of the addition, and also the survey itself, to be made by the county surveyor. See also section 10 providing for his fees. On the Birchard plat the county surveyor certifies "that the foregoing field notes of the same [plat] are correct as done by me immediately preceding the date hereof," but he does not certify that either the survey or the plat were made by him.

6. Section 4 requires that the surveyor, as one of "every person or persons whose duty it may be to comply with the foregoing requirements," shall acknowledge the plat before one of the judicial officers named. No such acknowledgment was made by the county surveyor.

7. Section 4 requires that the plat or map shall be certified not only by the surveyor but by the county commissioners. It is suggested by counsel for the appellees that "and" in this section should be read "or." No decision is cited to support that contention. The same language requiring both the surveyor and the county commissioners to certify the plat is found in the Revised Statutes of Illinois, 1845, p. 115, c. 25, § 20, and in statutes of Illinois, 1869, (Gross's ed.,) c. 25, div. 1, § 20. The object of the statute in requiring the certified approval of the county commissioners to the plat is obvious, otherwise it would be left to the option of individuals to lay out such additions to towns as they saw fit. Section 4 also requires, I submit, that the county commissioners shall acknowledge the plat before one of the judicial officers named. The Birchard plat contains neither the certificate of the county commissioners, nor the acknowledgment of the county commissioners required by this section.

II. If either of the foregoing points is well taken, the fee of the United States in the public ground has not been divested, for it has been held repeatedly that a dedication which does not conform to the requirements of the statute

does not divest the fee of the owner in streets and public grounds, but operates only as a common law dedication. By the express terms of section 5 it is only plats "when made out and certified, acknowledged, and recorded, as required by this act," that are effective to vest the fee. *Banks* v. *Ogden*, 2 Wall. 57; *Gosselin* v. *Chicago*, 103 Illinois, 623, 625; *Manly* v. *Gibson*, 13 Illinois, 308, 312; *United States* v. *Illinois Central Railroad*, 2 Bissell, 174, 177.

The information admits that the United States have made a common law dedication — in other words, that although the United States are the owners of the fee in the public ground, they are estopped to prevent its use as public ground, or themselves to occupy it with buildings. But that is the extent of the estoppel or of the easement which they have granted, and as the owners of the fee, subject to such easement, they are clearly entitled to an injunction to prevent others from occupying it with a depot or other buildings.

III. But if the court holds that the plat is good as a statutory dedication, so as to vest the fee of the public ground in the city of Chicago, section 5 of the Illinois statute declares that such fee "shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended." The Supreme Court of Illinois has held, in *Zinc Company* v. *La Salle*, 117 Illinois, 411, that the fee so vested is a base or determinable fee, and that upon the entire and permanent abandonment of the easement the property reverts to the dedicator.

I submit that the United States, not only as donors of the trust, but in view of the possibility of reversion, may maintain this bill to restrain an abuse of the trust and to prevent an occupation of the grounds with the buildings, even if they have parted with the fee. One who dedicates property to public uses is entitled in a court of equity to enforce the trusts declared by the dedication, whether he accompanied the dedication with a transfer of the fee to the municipality or retained the fee in himself.

Warren v. *Lyons City*, 22 Iowa, 351, 355, is a case in which the fee of a public square had vested in the city. The suit

was brought by the dedicator to enjoin the municipal authorities from selling the square or otherwise diverting it to uses and purposes foreign to those for which the dedication was made. The court said:

For the use contemplated, they may have parted with the fee — the "proprietary right," but not for all purposes; and, therefore, if the city authorities, as the claimed trustee of the public, should undertake to make gain by the sale, or to authorize its use for anything else but a "public square," they violate the trust, and the original owners, in virtue of the terms of the grant, may demand that the trust shall be executed in good faith, and restrain any such proposed violation of the terms upon which the grant was accepted.

Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him in a court of equity to insist upon the execution of the interest as originally declared and accepted.

In *Barclay* v. *Howell's Lessee*, 6 Pet. 498, 507, Mr. Justice McLean, in denying the right of the dedicator to recover in ejectment, said:

If this ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions.

In *Hardy* v. *Memphis*, 10 Heiskell, 127, 128, where the original proprietors sought to recover land, first, because not dedicated, and second, if dedicated, because the use was claimed to have been abandoned, the court said a misuse of the land did not work a forfeiture, "nor entitle the original proprietors to any relief except, upon a bill properly filed, to have the buildings obstructing the proper use removed."

IV. The United States seek to maintain this suit, not in the exercise of sovereignty or of governmental or police control, but solely by virtue of their title in and ownership of land,

just as any private owner might do. Fort Dearborn was land which the United States owned in propriety and could dispose of as Congress saw fit, and with respect to it, therefore, the United States are in the position of a private owner; and if a private owner, having dedicated the public ground, might maintain this bill, the United States can do so.

The distinction between the case at bar and the case of *New Orleans* v. *United States*, 10 Pet. 662, 736, is clearly recognized by Mr. Justice McLean in the following passage in his opinion: "If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it, there can be no doubt that it passed under the treaty to the United States, and they have a right to dispose of it, the same as other public lands. But if the King of Spain held the land in trust, for the use of the city," etc.

Neither that case nor *Pollard's Lessee* v. *Hagan et al.*, 3 How. 212, relate to land which the United States ever held as property, with power to sell as part of the public domain.

In *New Orleans* v. *The United States*, 10 Pet. 662, relief was denied the United States upon the ground that the King of Spain had not power to alienate the public levee in New Orleans, that the treaty did not pass the title to the United States, and that the Federal government did not succeed to the limited police jurisdiction, which had been exercised by the King of Spain to regulate the use of the quay; in other words, that the United States never were owners of the quay; whereas at bar we have an abandoned military post, held as the property of the United States and sold and dedicated by them as such.

In *United States* v. *Chicago*, 7 How. 185, 194, this court recognized the right of the Federal government to hold the very land in question as a *mere proprietor*. The government is not claiming any municipal power or control over this public ground; but only the rights concerning it that an ordinary person would have, asserting merely the legal rights which grow out of its ownership as a proprietor.

Opinion of the Court.

Mr. Benjamin F. Ayer for the Illinois Central Railroad Company, appellee.

Mr. John S. Miller for the City of Chicago, appellee.

Mr. Justice Field delivered the opinion of the court.

This is an appeal on the part of the United States from a decree of the Circuit Court sustaining a demurrer to an information or bill in equity, in which they were complainants and the Illinois Central and other railroad companies were defendants. The information charges that encroachments are made or threatened upon property of the United States, and the object of the information, so far as contended on the present appeal, is to prevent their continuance in the future, as to one particular parcel of property and to preserve it open to the uses for which it was dedicated by the United States. That property consists of land situated on the shore of Lake Michigan, being part of fractional section ten in Chicago, lying between Lake Michigan on the east and block twelve of the plat of Fort Dearborn addition to Chicago on the west.

The several parties named as defendants appeared to the information, and the Illinois Central Railroad Company and the Michigan Central Railroad Company demurred to it on the ground that it does not state such a case as entitles the United States to the relief prayed for, or show any right of interference on their part, either in law or in equity, respecting the matters referred to, or allege any violation, contemplated or threatened, of any right, legal or equitable, of the United States.

Upon the hearing of the several cases known and spoken of together as the *Lake Front case*, before the Circuit Court of the United States at Chicago on the 23d of February, 1888, this demurrer was argued, and was sustained, "except as to that part of the information which alleges, in substance, that the Illinois Central Railroad Company claims the absolute ownership of, and threatens to take possession of, use and occupy the outer harbor of Chicago," the opinion of the court

being "that the general government, upon the showing made by it, has no title to any of the streets or grounds described in said information, and has no standing in court, except so far as it seeks to protect the said harbor against obstructions that would impair the public right of navigation, or interfere with any plan devised by the United States for the development or improvement of the outer harbor." 33 Fed. Rep. 730. Afterwards, on the 23d of August, 1890, the attorney of the United States was granted leave to amend the information by striking out whatever related to the outer harbor and the encroachments alleged to have been made, or threatened in the navigable waters of the lake; and, at the same time, an order was entered by the district judge sustaining the demurrer to the information as amended, and directing that it be dismissed, "without prejudice to the United States, however, to hereafter institute any appropriate action or proceedings for the purpose of enforcing any rights they may have in the navigable waters of the lake or outer harbor of Chicago;" and thereupon an appeal was prayed and allowed to the Supreme Court.

From the decree of the Circuit Court in the *Lake Front case*, rendered in February, 1888, appeals were taken to the Supreme Court of the United States by the Illinois Central Railroad Company and the city of Chicago, and they were argued and decided at its October term, 1892. *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387. The United States did not appear and participate in the argument on the appeal. As they were never a party to those suits in the court below and never appealed from the decree, they were dropped as a party in the designation of the title of the case. The questions involving the title and right of the parties embraced in the cases, considered under the general designation of the *Illinois Central Railroad Company* v. *State of Illinois*, to the navigable waters of the harbor of Chicago and in the Lake Front property, and the encroachments on the harbor by the railroad company, and the validity of the act of April 16, 1869, granting submerged lands in the harbor, were fully considered and settled as between the State and the city of

Chicago, on the one part, and the Illinois Central Railroad Company on the other.

The appeal now before the court is the one taken by the United States from the decree of the Circuit Court rendered on the 23d of August, 1890, sustaining the demurrer to the information. The amendment allowed to the information consisted in striking out that part to which the demurrer was not sustained, and was made in order that the demurrer might go to the entire information. The only contention now urged by the Solicitor General, on behalf of the appellants, is that the information is good to the extent that it seeks to restrain the appellees from diverting the public ground designated as such, on the plat of the Fort Dearborn addition to the city of Chicago from the supposed public easement to which it was dedicated. The Solicitor General states that on this branch of the case the information proceeds upon the theory that the United States, being the owners of the land in question, and having dedicated it to a public purpose, are entitled to enjoin its diversion from that public purpose to private uses. It will, therefore, be unnecessary for the disposition of the appeal to consider any other position originally taken by the United States in the information.

As early as 1804 a military post was established by the United States south of Chicago River, upon the southwest fractional quarter of section ten, and was subsequently occupied by troops until its sale many years afterwards. In 1819 Congress passed an act authorizing the sale by the Secretary of War, under the direction of the President, of such military sites belonging to the United States as may have been found or had become useless for military purposes. And the Secretary of War was authorized, on the payment of the consideration agreed upon into the Treasury of the United States, to execute and deliver all needful instruments conveying the same in fee. And the act declared that the jurisdiction which had been specially ceded to the United States for military purposes, by a State, over such site or sites should thereafter cease. Act of March 3, 1819, c. 88, 3 Stat. 520. Subsequently, in 1824, upon the request of the Secretary of War, the south-

west quarter of this fractional section ten, containing about fifty-seven acres, and on which Fort Dearborn was situated, was reserved from sale for military purposes by the Commissioner of the General Land Office. The land thus reserved continued to be used for military purposes until 1837. In that year, under the direction of the Secretary of War, it was laid off by his authority into blocks, lots, streets, alleys, and public ground, as an addition to the municipality of Chicago, and called the "Fort Dearborn addition to Chicago," and in June, 1839, a plat thereof was made and acknowledged by his agent and attorney and recorded in the recorder's office of the county of Cook. On that plat a part of the ground situated between Lake Michigan on the east and block twelve on the west is designated as "public ground forever to remain vacant of buildings." [146 U. S. 392, Map A.] It bears also a further declaration in these words, viz.: "The public ground between Randolph and Madison Streets and fronting upon Lake Michigan is not to be occupied with buildings of any description." Subsequently, and for some years, several lots designated and shown on the plat were reserved from sale and remained in the military occupation of the government, but eventually, in 1845, or soon afterwards, all of them were sold and conveyed by the United States to divers persons "by and according to said plat and with reference to the same."

The statute of Illinois of February 27, 1833, then in force for the making and recording of town plats, (Rev. Stat. of Ill. § 833, p. 599,) provided that every donation or grant to the public, marked or noted as such on the plat, should be deemed in law a sufficient conveyance to vest the fee simple title, and that "the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended." The plat in such cases had all the force of an express grant and operated to convey all the title and interest of the United States in the property for the uses and purposes intended. *Zinc Company* v. *La Salle*, 117 Illinois, 411, 414, 415; *Chicago* v. *Rumsey*, 87 Illinois, 348; *Gebhardt* v.

Reeves, 75 Illinois, 301; *Canal Trustees* v. *Havens*, 11 Illinois, 554.

It is stated in the information that the United States never parted with the title to the streets, alleys, and public grounds designated and marked on the plat, and that they still own the same in fee simple "with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public."

But we do not think this position is tenable. A title to some of the streets may have continued in the government so long as the title to any of the adjoining lots remained with it, but not afterwards without disregard of the statutory regulations of the State and its provisions for the transfer of the title. When a resort is made by individuals or the government to the mode provided by the statute of a State where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation given to the instrument of conveyance as is there designated. The language of the statute is clear, "that the land intended for streets, alleys, ways, commons, or other public uses in any town or city or addition thereto shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended."

The interest in and control of the United States over the streets, alleys, and commons ceased with the record of the plat and the sale of the adjoining lots. Their proprietary interest passed, in the lots sold, to the respective vendees, subject to the jurisdiction of the local government, and the control over the streets, alleys, and grounds passed by express designation of the state law to the corporate authorities of the city.

In 1854, the validity of the survey and plat made of Fort Dearborn reservation was recognized by Congress in an act for the relief of one John Baptiste Beaubien, Act of August 11, 1854, c. 172, 10 Stat. 805, by which the Commissioner of the General Land Office was authorized to issue a patent or patents to Beaubien for certain lots designated and numbered on the survey and plat of the Fort Dearborn addition to Chicago,

made under the order of the Secretary of War. And it is averred, as already stated, in the information that all the lots were sold and conveyed by the United States to divers persons "by and according to the said plat and with reference to the same."

It was the intention of the government to have a plat made conformably to the provisions of the statute, and it is plain, from its inspection, that all the essential requisites were followed. Nor is any reason suggested why a different effect should be given to the plat and its record in this case from that of similar plats made and recorded by other land proprietors. And if, as we have already said, the government, charged with the duty of disposing of a tract of public land within a State, chooses to proceed under the provisions of a particular statute of that State, it is clear that the same legal effect should be given to its proceeding as in case of an individual proprietor. The effect of the recording of the plat in this case was therefore to vest in the city of Chicago the legal title to the streets, alleys, and public ground in Fort Dearborn addition, and after its execution and record and sale of the abutting property the United States retained no interest in them, legal or equitable. That interest was as completely extinguished as if made by an unconditional conveyance in the ordinary form.

Again, the sale of the lots was, in law, an effectual dedication of the streets and public grounds for municipal uses, and, as observed by counsel, the purchasers of the lots acquired a special interest in the streets and public grounds on which their lots abutted, and the United States could make no disposition of them after the sale inconsistent with the use to which they had been dedicated.

The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated, and the public in general. The owners of abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the protection

of the property in the use for which it was dedicated. The only party interested, outside of abutting owners, is the general public, and the enforcement of any rights which such public may have is vested only in the parties clothed with the execution of such trust, who are in this case the corporate authorities of the city, as a subordinate agency of the State, and not the United States.

The United States possess no jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein. The jurisdiction in such cases is with the State or its subordinate agencies. The case of *New Orleans* v. *The United States*, 10 Pet. 662, furnishes an illustration of this doctrine. In that case the United States filed a bill in the District Court for an injunction to restrain the city of New Orleans from selling a portion of the public quay, or levee, lying on the bank of the Mississippi River in front of the city, or of doing any other act which would invade the rightful dominion of the United States over the land or their possession of it. The United States acquired title to the land by the French treaty of 1803. By it Louisiana was ceded to the United States, and it was shown that the land had been appropriated to public uses ever since the occupation of the province by France. It was contended that the title to the land, as well as the domain over it during the French and Spanish governments, were vested in the sovereign, and that the United States by the treaty of cession of the province of Louisiana had succeeded to the previous rights of France and Spain. The land and buildings thereon had been used by both governments for various public purposes. The United States had erected a building on it for a custom-house, in which, also, their courts were held.

It was argued on behalf of the city that the sovereignty of France and Spain over the property, before the cession, existed solely for the purpose of enforcing the uses to which it was appropriated, and that this right and obligation vested in the State of Louisiana, and did not continue in the United States after the State was formed. It was therefore contended that

the United States could neither take the property, nor dispose of it or enforce the public use to which it had been appropriated. A decree was rendered in the District Court in favor of the United States, and an injunction granted as prayed, but on appeal to the Supreme Court it was reversed, and it was held that the bill could not be maintained by the United States because they had no interest in the property. Upon the question whether any interest in the property passed to the United States under the treaty of cession, the court said, speaking through Mr. Justice McLean:

"In the second article of the treaty, 'all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property,' were ceded. And it is contended, as the language of this article clearly includes the ground in controversy, whether it be considered a public square or vacant land, the entire right of the sovereign of Spain passed to the United States.

"The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the Federal jurisdiction, nor can it be enlarged under the treaty-making power.

"If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alienate it, as other lands, there can be no doubt that it passed under the treaty to the United States, and they have a right to dispose of it the same as other public lands. But if the King of Spain held the land in trust for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty?

"That this common, having been dedicated to the public use, was withdrawn from commerce, and from the power of the king rightfully to alien it has already been shown; and also, that he had a limited power over it for certain purposes. Can the Federal government exercise this power? If it can, this court has the power to interpose an injunction or interdict

to the sale of any part of the common by the city if they shall think that the facts authorize such an interposition.

"It is insisted that the Federal government may exercise this authority under the power to regulate commerce.

"It is very clear that, as the treaty cannot give this power to the Federal government, we must look for it in the Constitution, and that the same power must authorize a similar exercise of jurisdiction over every other quay in the United States. A statement of the case is a sufficient refutation of the argument.

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the Federal government shall establish forts or other military works. And it is only in these places, or in the Territories of the United States, where it can exercise a general jurisdiction.

"The State of Louisiana was admitted into the Union on the same footing as the original States. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of the Federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust and prevent what they shall deem a violation of it by the city authorities.

"All powers which properly appertain to sovereignty, which have not been delegated to the Federal government, belong to the States and the people."

The decree of the District Court was accordingly ordered to be reversed and annulled.

This doctrine of the Supreme Court in the New Orleans case is decisive of the question pending before us in the present case and must control the decision.

It was also held in *Illinois Central Railroad* v. *Illinois*, that the ownership in fee of the streets, alleys, ways, commons, and other public ground on the east front of the city bordering upon Lake Michigan, in fractional section ten, was a good title, the reason assigned being that by the statute of Illinois the making, acknowledging, and recording

of plats operated to vest the title in the city in trust for the public uses to which the grounds were applicable. 146 U. S. 387, 462.

It follows from these views that the United States have no just claim to maintain their contention to control or interfere with any portion of the public ground designated in the plat of the Fort Dearborn reservation. The decree dismissing the information will therefore be

Affirmed.

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

I am unable to concur in the views expressed by the court in this case. I agree that the United States have no governmental interest or control over the premises in question; that as a sovereign they have no right to maintain this suit; that by the act of dedication they parted with the title, and that, in accordance with the statute of the State in respect to dedication, the fee passed to the city of Chicago, to "be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended." I agree that the only rights which the United States have are those which any other owner of real estate would have under a like dedication; but I think the law is that he who grants property to a trustee, to be held in trust for a specific purpose, retains such an interest as gives him a right to invoke the interposition of a court of equity to prevent the use of that property for any other purpose. Can it be that, if the government, believing that the Congressional Library has become too large for convenient use in this city, donates half of it to the city of Chicago, to be kept and maintained as a public library, that city can, after accepting the donation for the purposes named, give away the books to the various lawyers for their private libraries, and the government be powerless to restrain such disposition? Do the donors of libraries or the grantors of real estate in trust for specific purposes, though parting with the title, lose all right to invoke the aid of a court of equity to

compel the use of their donations and grants for the purposes expressed in the gift or deed? I approve the opinion of the Supreme Court of Iowa, in the case of *Warren* v. *The Mayor of Lyons City*, 22 Iowa, 351, 355, 357. In that case the plaintiffs had years before platted certain land as a site for a city, and on the plat filed by them there was a dedication of a piece of ground as a "public square." After the city had been built up on that site the authorities, for the purposes of gain, and under the pretended authority of an act of the legislature, attempted to subdivide the public square into lots and to lease them to individuals for private uses. A bill was filed by the dedicators to restrain such diversion of the use, and a decree in their favor was affirmed by the Supreme Court. I quote from the opinion:

"Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him in a court of equity to insist upon the execution of the trust as originally declared and accepted. *Williams* v. *First Presbyterian Society*, 1 Ohio St. 478; *Barclay* v. *Howell's Lessee*, 6 Pet. 498; *Webb* v. *Moler*, 8 Ohio, 548; *Brown* v. *Manning*, 6 Ohio, 298."

And again, after picturing the injustice which in many cases would result by permitting such a diversion, the court adds:

"Such a doctrine would enable the State at pleasure to trifle with the rights of individuals, and we can scarcely conceive of a doctrine which would more effectually check every disposition to give for public or charitable purposes. No, it must be, that if the right vested in the city for a particular purpose the legislature cannot vest it for another; that, when the dedicator declared his purpose by the plat, the land cannot be sold or used for another and different one; that while the corporation took the premises as trustee, it took them with the obligations attached as well as the rights conferred; that while the legislature might give the control and management of these squares and parks to the several municipal corporations, it cannot authorize their sale and use for a purpose foreign to the object of the grant.

"Without quoting, we cite the following cases: *Trustees of Watertown* v. *Cowen*, 4 Paige, 510; 2 Stra. 1004; *Commonwealth* v. *Alberger*, 1 Whart. 469; *Pomeroy* v. *Mills*, 3 Vermont, 279; *Abbott* v. *Same*, 3 Vermont, 521; *Adams* v. *S. & W. R. R. Co.*, 11 Barb. 414; *Fletcher* v. *Peck*, 6 Cranch, 87; *Godfrey* v. *City of Alton*, 12 Illinois, 29; Sedgwick's Constitutional and Statute Law, 343, 344; *Haight* v. *City of Keokuk*, 4 Iowa, 199; *Grant* v. *City of Davenport*, 18 Iowa, 179; *Le Clercq* v. *Trustees of Gallipolis*, 7 Ohio, 217; *Common Council of Indianapolis* v. *Cross*, 7 Indiana, 9; *Rowans, Executor*, v. *Portland*, 8 B. Mon. 232; *Augusta* v. *Perkins*, 3 B. Mon. 437."

I do not care to add more, but for these reasons withhold my assent to the opinion.

I am authorized to say that MR. JUSTICE BROWN concurs in this dissent.

The CHIEF JUSTICE, having been of counsel in the court below, took no part in the consideration and decision of this case on appeal.

RIGGLES *v.* ERNEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 335. Argued April 2, 3, 1894. — Decided May 26, 1894.

Part-performance of an oral contract for the conveyance of an interest in real estate in the District of Columbia takes it out of the operation of the statute of frauds, and authorizes a court of equity to decree a full and specific performance of it, if proved.

THIS was a bill in equity for the specific performance of an oral contract for the sale of land.

The bill made substantially the following case: Thomas Riggles, ancestor both of plaintiffs and defendant, died in 1863, leaving a will in which he made the following devises:

Statement of the Case.

"I will and devise that my house and premises which I now occupy, situated in the city of Washington in the District of Columbia, being lot numbered seven (7) and part of lot numbered eight (8) in square numbered one hundred and ninety-nine (199), together with all the household and kitchen furniture and other personal property that may be on said premises at the time of my decease shall be and remain in the possession of my wife, Catharine Riggles, during her life-time, for the benefit of herself and our four children, named Thomas, Catharine, Maria, and Hannah Riggles, respectively; and, after the death of my said wife, the said house and premises to remain in the hands of my executor, hereinafter named, to be by him used for the benefit of the above-named four children until the youngest one of them surviving shall become twenty-one years of age; provided, that when the said Thomas shall arrive at twenty-one years of age, and when either of the said daughters shall be married, then, and in either such case, the benefit arising from said property shall be exclusively for the use of such of said daughters as may then be unmarried; and after the death of my said wife, and the said youngest child shall attain the age of twenty-one years, then the said house and premises I will and bequeath unto my son Thomas Riggles, with the express provision that such of my aforenamed daughters as may then be unmarried shall be taken care of by my said son Thomas; and, in case the said Thomas Riggles shall depart this life before the said three sisters, then the said house and premises to be sold, and the proceeds be divided equally among the said three sisters or the survivors of them.

"Item: I will and devise that all the lots of ground belonging to me situate in square numbered one hundred and seventy-nine (179) in said city of Washington which may remain unsold and disposed of by my said executor at such time and in such manner as his discretion may dictate as most for the advantage of my wife and children aforenamed, and the amounts that may be realized therefrom, after paying all necessary expenses of my wife and family, be by him

invested at his discretion for the benefit of my said wife and four children or as many of them as shall remain unmarried; and after the death of my said wife, and our four children shall have attained the age of twenty-one years if any of said property in square one hundred and seventy-nine remains unsold, and also any surplus that may then remain from the proceeds of said square one hundred and seventy-nine, to be divided between my other children, John, James, and William Riggles, and my daughters, Mary Ann Miller and Sarah Turton; and it is further my wish and desire that should the residue remaining from the sale of my lots in square one hundred and seventy-nine be more than the value of said house and premises I now occupy in square one hundred and ninety-nine, then, and in that case, I will and devise that my son Thomas and my said daughters Catharine, Maria, and Hannah Riggles shall receive from the proceeds of square one hundred and seventy-nine, such portion of such proceeds as make all their shares alike or equal to each other and to the shares of my other children."

Under this will, John B. Turton subdivided square 179, sold portions of the same and died, leaving lots from 1 to 42 and from 61 to 80, inclusive, unsold and subject to a deed of trust executed by him to secure the repayment of certain moneys borrowed. Such moneys, as well as the proceeds of the lots sold, were alleged to have been appropriated to the support of the widow and her four children.

In 1873, the widow and her four children, Thomas, Maria, Catharine, and Hannah, desiring to have the property in square 179 sold for the purpose of a partial division of the estate, and for the purpose of paying certain indebtedness they had incurred, as well as certain taxes and assessments upon the homestead, it was proposed and agreed that, notwithstanding the devises in the will, the entire estate should be equally divided between the widow and the children of the testator; that the lots in square 179 should be at once sold for the payment of the incumbrances, taxes, and assessments upon the whole realty and of the indebtedness of the widow and her four children, and that the net proceeds

should be divided between the widow and *all* the children, and that the homestead should be retained for the use and occupation of the widow and her four children until her death, and the death or marriage of her daughters, when the said homestead property should be sold and the proceeds divided among all the children of the testator.

In pursuance of this arrangement, a deed was executed, whereby all the parties in interest conveyed to John Riggles and George W. Evans the remaining lots in square 179 in trust to sell and dispose of the same, to pay and discharge all taxes and assessments due upon the lots in both squares, and after paying and discharging all liens, taxes, and assessments upon all the property, to distribute the remainder of the proceeds between the widow and children in equal proportions, share and share alike, and "that the said deed was made and executed by all of the parties, including the defendant Hannah Erney, (who executed the said deed as Hannah Riggles,) upon the distinct agreement and condition that whenever under the said will and testament that the said property in square 199 should be sold, the proceeds of such sale should be applied and distributed in the same manner." The trustees, Riggles and Evans, proceeded under this arrangement, sold the lots in square 179, from time to time, paid the liens and incumbrances upon the property, as well as taxes and assessments; paid and discharged the indebtedness contracted by the widow and her four children, including defendant Hannah Erney, for their maintenance, and also advanced to the widow the further sum of $500, the said payments on account of the said homestead property, and of the maintenance and support of the widow and her four children, amounting to nearly $3000. After such payments, the trustees divided the remainder of the proceeds among all the children of the testator; the shares so paid to each of the devisees being over $3000, and such distribution being made strictly in pursuance of the original agreement.

That the period has arrived when the lots in square 199 should be sold, and the proceeds divided; that the widow is

dead, as well as three of her four children, leaving Hannah Erney sole survivor of such devisee; that plaintiffs have applied to defendant Hannah to carry out this agreement, but she refuses to acknowledge it, and claims that, under the provisions of the will, she, as the sole survivor of the devisees of the lots in square 199, is entitled to all of said property and the proceeds thereof. Plaintiffs further averred that her agreement to sell the homestead property was the only consideration for the appropriation to the widow and her four children of the proceeds of sale of the property in square 179; that under the will defendant and her co-devisees were not entitled to any portion of such property except for their current support, while the daughters were unmarried, and that plaintiffs by making the agreement gave the defendant Hannah and her co-devisees $18,000 — much more than the entire value of the homestead property; that it was the intention of the testator that in the ultimate division of the estate all the children should have an equal share; that such intention was recognized and was the basis upon which the agreement was made, and that the distribution of the proceeds of the sales of square 179 was in partial execution of such intention and agreement.

The prayer of the bill was that defendants Hannah and her husband might be enjoined from disposing of the property in square 199 until the rights of the parties could be definitely settled, and that such property might be sold and the proceeds distributed upon the basis of the agreement.

Defendant Hannah Erney in her separate answer admitted signing the deed for the sale of the remaining lots in square 179, but denied there was any agreement or condition that the homestead should be sold and the proceeds divided in the same manner.

Replication was filed, proofs taken, and, the case coming on to be heard in the court below, the bill was dismissed upon the ground that the statute of frauds presented an insurmountable barrier to relief. Plaintiffs appealed to the General Term, by which the decree of the special

term was affirmed, and the plaintiffs appealed to this court.[1]

Mr. James G. Payne for appellants.

Mr. Edwin B. Hay for appellees.

The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. The words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *Barry* v. *Coombe*, 1 Pet. 640. And to authorize a decree for the specific performance of a parol agreement within the statute, on the ground of part performance, it is indispensable, not only that the acts which are alleged to be part performance, but the contract itself, as stated in the bill, should be established by clear and definite proof.

In *Smith* v. *Crandall*, 20 Maryland, 482, in which reference is made to 3 Maryland, 490, it is said that where a party claims to take the case out of the statute of frauds, on the ground of part performance of the contract, he must make out by clear and satisfactory proof the existence of the contract as laid in the bill, and the act of part performance must be of the iden-

[1] The judgment of the court below was as follows:

"This cause having been duly calendared and argued and submitted and the proofs read and considered, and it appearing to the court that the provisions of the statute of frauds in respect to contracts for and conveyances of interests in real estate present an insurmountable barrier to granting the relief prayed upon the case as made in the bill and attempted to be made out in proof, it is this 14th of November, A.D. 1887, ordered, adjudged, and decreed that the bill in this cause be dismissed with costs."

The judgment of the appellate court was as follows:

"This cause came on to be heard at this term of the court on appeal by the complainants, John Riggles *et als.* from the decree passed therein on the 14th day of November, 1887, dismissing the bill with costs, and was argued by counsel for the respective parties and submitted. Upon consideration thereof it is now here, this 18th day of February, A.D. 1890, adjudged and decreed and is hereby affirmed with costs, to be taxed by the clerk."

tical contract set up. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill.

In *Mundorf* v. *Kilbourn*, 4 Maryland, 459, 462, the court says: "We need not multiply authorities to show that in cases for specific performance the complainant must establish the *very* contract set up in the bill, and that all acts of part performance relied upon to take the case without operation of the statute of frauds, must be clear and definite, and refer exclusively to the alleged agreement."

In *Stoddert* v. *Bowie*, 5 Maryland, 18, 35, the court said: "No rule is better established than that every agreement, to merit the interposition of a court of equity in its favor, must be plain, just, reasonable, *bona fide*, certain in all its parts, mutual, etc. And if any of these ingredients are wanting, courts of equity will not decree a specific performance." See also *Wadsworth* v. *Manning*, 4 Maryland, 59; *Waters* v. *Howard*, 8 Gill, 262, 275; *Hall* v. *Hall*, 1 Gill, 383; *Owings* v. *Baldwin*, 8 Gill, 337; *Beard* v. *Linthicum*, 1 Maryland Ch. 345; *Hopkins* v. *Roberts*, 54 Maryland, 312.

The defendant denies positively any agreement whatever to dispose of the homestead, and there is only uncertain proof that she was aware of such agreement. Those who testify, state that it was talked of loud enough for her to hear it, but concerning her understanding of it they only conjecture.

In the testimony there is no proof of that clear and decisive character which should govern a court, in the exercise of its discretion, to decree a specific performance.

Mr. Justice Grier, in *Purcell* v. *Coleman*, 4 Wall. 513, 517, in his opinion, says: "A mere breach of a parol promise will not make a case for the interference of a chancellor. . . . When he requests a court to interfere . . . he should be held to full, satisfactory, and undubitable proof of the contract and of its terms. Such proof must be clear, definite, and conclusive and must show a contract leaving no *jus deliberandi* or *locus pœnitentiæ*. It cannot be made by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had

no reason to recollect from interest in the subject-matter which may have been imperfectly heard or inaccurately remembered, perverted, or altogether fabricated; testimony therefore impossible to be contradicted.

In *Williams* v. *Morris*, 95 U. S. 444, even though written receipts were introduced to identify parties to the property, the testimony was not sufficient to prove part performance.

In *Bigelow* v. *Armes*, 108 U. S. 10, while there was no written contract, yet the facts were such that left no *jus deliberandi*, and showed such part performance that took the case out of the operation of the statute. There is, however, a written memorandum in this case which describes the property and states the consideration — signed by the parties to the transaction.

In *Beckwith* v. *Talbot*, 95 U. S. 289, the defendant in that action was charged on a memorandum in which his name was not found, but letters were produced in evidence which proved a sufficient ratification of the memorandum to comply with the statute and the court below so held and was sustained by this court.

In *Grafton* v. *Cummings*, 99 U. S. 100, even though there are memoranda and writings, yet this court held them defective and not sufficient to take the case from the operation of the statute.

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

The sole question is whether the plaintiffs have made out such a case as entitles them under the statute of frauds to a specific performance of the alleged agreement for the sale of the homestead property in square 199, and an equal division of the proceeds.

Thomas Riggles, the ancestor, was possessed of two parcels of land in Washington, viz.: Certain lots in square 199, containing the homestead, worth from six to eight thousand dollars, and a large number of lots in square 179, then unimproved, and worth about forty thousand dollars.

The lots in square 199, the homestead, he left to his widow for life, for the benefit of herself and her four children; after her death, to his executors, for the benefit of his four children until the youngest should become of age, and then to his son Thomas, charged with the care and support of the unmarried daughters by his second wife; and in case of the death of Thomas before his sisters, the property was to be sold and the proceeds equally divided among these sisters.

The lots in square 179 were also charged with the maintenance and necessary expenses of his wife and her four children during her life, and after her death, with the support of the children, until the youngest should become of age. The executor was given power to dispose of all of 179 if, in his discretion, it should become necessary to apply the same to such use, and any surplus that should remain was to be divided among testator's children by his first wife, but should such residue remaining from 179 be more than the value of the homestead property, the children by the second wife should receive from such proceeds such portions as to make their shares alike or equal to each other, and the shares of the other children.

Thomas Riggles, Jr., son of the second wife, died December 27, 1883; Catharine Riggles, widow, died November, 1884. Hannah Riggles Erney, by the death of her brother and sisters, is the sole survivor of the children of the second wife, and entitled to the homestead under the will.

Plaintiffs' testimony tended to show that, at a meeting of the widow and all the heirs of the estate in June, 1873, it was agreed that the entire estate should be equally divided among the widow and children; that the lots in square 179 should be immediately sold, and the net proceeds, after payment of incumbrances, taxes, and assessments upon the whole estate, should be divided between the widow and all the children; and that the homestead lots in square 199 should be retained for the use of the widow and her children until her death, or the death or marriage of the daughters, when this property should also be sold, and the proceeds divided among all the children. This agreement, so far as it concerned lots in 179,

was carried out; so far as it concerned square 199 it was denied and the statute pleaded.

But if the contract was made, as claimed, the sale and division of proceeds of the lots in square 179 was a part performance of such contracts under the decisions both of this court and of Maryland. The case of *Caldwell* v. *Carrington*, 9 Pet. 86, is not dissimilar. This was a bill filed by Carrington's heirs in the Circuit Court for the District of Kentucky, claiming certain lands in that State, under a parol agreement, by which Carrington agreed with Williams for an exchange of lands which Carrington owned in Virginia for certain military lands in Kentucky. Williams took possession of the lands in Virginia and sold a part of them. The bill prayed that the heirs of Williams should be decreed to convey the military lands in Kentucky. This court held that, although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the lands he had agreed to give him in exchange, prevented the operation of the statute. See also *Galbraith* v. *McLain*, 84 Illinois, 379; *Paine* v. *Wilcox*, 16 Wisconsin, 202. So in *Neale* v. *Neales*, 9 Wall. 1, a parol gift of land was made to a donor, who took possession, and, induced by the promise of the donor to give a deed of it, made valuable improvements on the property. It was held that the donor, having stipulated that the expenditure should be made, this should be regarded as a consideration or condition of the gift, and a specific performance was decreed. To same effect is *Hardesty* v. *Richardson*, 44 Maryland, 617. So in *Bigelow* v. *Armes*, 108 U. S. 10. Armes proposed in writing to Bigelow to exchange his real estate for Bigelow's with a cash bonus. The latter accepted in writing. Armes complied in full; Bigelow in part only. It was held to be unnecessary to determine whether the written memorandum was sufficient, as it was the duty of the court, in view of the full performance by Armes, to decree performance by Bigelow. There are other cases in this court in which the evidence was deemed insufficient to justify a decree for specific performance, but the principle of the cases above cited has never been ques-

tioned. *Colson* v. *Thompson*, 2 Wheat. 336; *Purcell* v. *Miner*, 4 Wall. 513; *Grafton* v. *Cummings*, 99 U. S. 100. Indeed, the rule is too well settled to require further citation of authorities, that, if the parol agreement be clearly and satisfactorily proven, and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done acts in part performance of such agreement, to the knowledge of the defendant — acts which have so altered the relations of the parties as to prevent their restoration to their former condition — it would be a virtual fraud to allow the defendant to interpose the statute as a defence and thus to secure to himself the benefit of what has been done in part performance. It must appear, however, that the acts done by the plaintiff were done in pursuance of the contract, and for the purpose of carrying it into execution, and with the consent or knowledge of the other party. While acts done prior to the contract or preparatory thereto, such as delivering abstracts of titles, measuring the land, drawing up deeds, etc., are not regarded as sufficient part performance, it is otherwise with such acts as taking open possession of the land sold, or making permanent or valuable improvements thereon, or doing other acts in relation to the land manifestly inconsistent with any other theory than that of carrying out the parol undertaking.

Plaintiff introduced the testimony of three witnesses, all of which tended to show that a meeting of all the heirs was held the last of May, 1873, at the homestead, at which it was agreed to sell square 179, pay off the indebtedness, and divide the balance. The indebtedness consisted of taxes upon square 179 and a mortgage debt upon it, the indebtedness of the widow, and the taxes due upon the homestead occupied by her in square 199. There was another meeting in June, at which there was a deed read which had been prepared. John Riggles, who appeared for the first wife, objected to the deed upon the ground that it was not in accordance with the will, when Mr. Evans, who appeared on behalf of the children of the second wife, promised that the children should share and share alike in the house at the death of the mother, and said

"that it would not be fair for the children of the last wife to do all the waiting and the children of the first wife get their share at once; that it would only be equitable for the children of the first wife to do part of the waiting and share equally with them, so that it would be literally carried out, and we consented to divide equally upon that basis, and would have refused to have sold any more than sufficient to pay off the indebtedness unless they would agree to this equitable division, which was agreed to by all the heirs without any objection."

This agreement, so far as concerned square 179, was carried out, and defendant Hannah was paid about $3000 as her share of the proceeds of the sale. Mr. Evans, who, as before stated, appeared for the children of the second wife, among whom was defendant Hannah, after stating that it was understood that the homestead was to be sold, says that "it was a distinct and positive verbal agreement, thoroughly understood and consented to by all without reservation; we did not wish to send the deed back for a change, fearing that delays were dangerous; we were anxious to settle. Q. Do you know that Hannah Riggles Erney understood positively that she was consenting and agreeing to break the terms of her father's will? A. I do not know that she did. . . . As I said before, I represented the children by the second wife, and my wife's interest, like Mrs. Erney's, I was bound to protect in every way. I, therefore, consulted with her, explained the terms of the deed, read the will to her, and asked her, as well as the other heirs by the second wife, if she thoroughly understood and consented to selling the property. She was satisfied, and so expressed herself." This testimony was also corroborated by Sarah A. Turton, one of the children by the first wife.

The only testimony to the contrary is that of defendant herself, who always understood that the land was sold "to pay the indebtedness of mother, and then it was to be divided equally, and that is all." She remembered of but one meeting, but acknowledged that Mr. Evans was her representative in the transaction. She denied entering into any contract con-

cerning the disposition of the land, but her testimony is quite unsatisfactory and her memory evidently defective.

By the terms of the will square 179, after being charged with the maintenance and support of the widow and her four children during her life, and after her death until the youngest should become of age, was to be sold and the proceeds to be divided between the children of the first wife, with a proviso that, if the lands so sold should exceed the value of the homestead lands, the children of the second wife should receive enough to make the shares of all equal.

The ultimate objects of the will were, *first* to provide for the maintenance and expenses of the wife and younger children until they became of age; and, *second*, that the property should then be equally divided between them. This equality would certainly be defeated, if the defendant Hannah were permitted to share equally in the proceeds of square 179, and in addition to receive the whole of the proceeds of square 199. It seems to us altogether improbable that the children of the first wife would have entered into this arrangement, without an understanding that they were also to share in the proceeds of the homestead.

The decree of the court below is, therefore, reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER and MR. JUSTICE WHITE dissented from this opinion.

MORAN *v.* STURGES.

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

No. 892. Argued March 13, 14, 1894. — Decided May 26, 1894.

On the 31st day of July, 1891, proceedings were commenced in the Supreme Court of the State of New York for the voluntary dissolution of a Steam Tow Boat Company, a corporation organized under the laws of that State,

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and an order was made on that day restraining creditors from bringing action and requiring all to show cause, on the 16th day of November, 1891, before a referee, why the prayer of the petitioner should not be granted. An order was made at the same time for the appointment of a receiver, which required him to give bonds before entering on the duties of his office. On the 1st of August, 1891, in the forenoon of that day, these orders were entered and the papers filed in the office of the clerk of the court. On the afternoon of the same day, which was Saturday, and on Monday, August 3, libels in admiralty were filed in the District Court of the United States for the Eastern District of New York to enforce maritime liens against six of the vessels of said Tow Boat Company's fleet. On the 1st of August the marshals for the district seized and took into custody three of the six, and on the 3d of August did likewise with the other three. On the 4th of August the receiver filed his official bond, duly approved, and entered upon the discharge of his duties. On the same day he went to take possession of the six vessels and found them in the custody of the marshal. Thereupon, on his motion, process issued against the several libellants, to bring them before the Supreme Court of the State, where, after hearing, they were enjoined from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court. *Held*, That the state court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction; and that the judgment under review was in effect an unlawful interference with proceedings in that court.

Though courts, for the purpose of protecting their jurisdiction over persons and subject-matter may enjoin parties who are amenable to their process, and subject to their jurisdiction from interference with them in respect of property in their possession or identical controversies therein pending, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction; and though, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court; yet, upon the facts disclosed in this record, the District Court was not required to stay its hand until the termination of the proceedings in the state court, that court being without jurisdiction as to maritime liens, and being incapable of displacing them.

The Schuyler Steam Tow-Boat Company was a corporation organized under the laws of New York. On July 31, 1891, the trustees of the company filed a petition in the Supreme Court of the State of New York at Albany County, at cham-

bers, for the voluntary dissolution of the company under §§ 2419 and 2423 of the Code of Civil Procedure of that State, and in their petition prayed for the appointment of a temporary receiver under § 2423 as amended, whose powers and duties were specified in § 1788. (Code Civ. Proc. N. Y. 1892, pp. 643, 835, 836.) The petition stated that the stock, effects, and other property of the corporation were not sufficient to pay the just amounts for which it was liable, nor to afford reasonable security to those who might deal with it, for the reasons that the corporation was indebted to the Holland Trust Company of New York in a large sum of money on a demand loan, payment whereof had been demanded, and that there were no available assets to meet the same; that the corporation had already defaulted upon certain claims set forth in the schedule attached, which were secured by notes which had been presented for payment and payment refused for want of such assets; that "other claims set forth in the schedule are either due or rapidly becoming due; and that there is serious danger of the company's vessels, constituting the sole property of the said company, being libelled in the admiralty courts of the United States for such claims as constitute maritime liens, including the claims for services and supplies rendered to said vessels. That in the event of said vessels being libelled and sold under a decree in admiralty, there would be little hope of realizing the value of said vessels on such sale, and the security of creditors and stockholders would be seriously imperilled;" that the assets must be realized by sale, and would be insufficient to pay all the claims in full, etc. Thereupon the presiding judge, the attorney general of New York appearing and consenting thereto, signed an order to show cause before a referee therein named, on November 16, 1891, why the company should not be dissolved, and by the same order appointed Frank D. Sturges temporary receiver of the property, "with all the powers and subject to all the duties that are defined as belonging to temporary receivers appointed in an action in § 1788 of the code." It was further ordered "that all creditors of said corporation, be and they are hereby restrained and enjoined

from bringing any actions against the said corporation for the recovery of a sum of money, and from taking any further proceedings in any action already commenced against the said corporation for such purpose." A copy of the order was directed to be published at least once in each of the three weeks immediately preceding November 16, 1891, and that a copy be served upon each of the several persons specified in the schedule attached to the petition as a creditor or stockholder of the corporation. It was further ordered that before entering upon the duties of such receivership the said receiver should execute and acknowledge in due form of law a bond in the penal sum of $50,000, payable to the State of New York, with sureties. This order was entered and the petition and accompanying papers filed in the office of the clerk of the court for Albany County in the forenoon of August 1, 1891. On the afternoon of August 1, 1891, which was Saturday, and on Monday, August 3, 1891, plaintiffs in error, Michael Moran and other coöwners of certain tugs, filed libels in admiralty in the District Court of the United States for the Eastern District of New York against certain steamboats, which were the property of the Schuyler Company. Process was issued under said libels to the United States marshal for that district, and on August 1 he seized and took into his possession the steamboats Niagara, Belle, and Syracuse, and affixed his notice of seizure thereto. On August 3 he seized and took into his custody the steamboats Vanderbilt, Jacob Leonard, and America, and affixed his notice of seizure thereto. On August 4, 1891, the receiver went on board the steamboats mentioned and ascertained that the marshal was in possession thereof by his keepers, and he also found affixed to the boats the marshal's notice of seizure. The receiver applied to the state court, August 26, and was duly authorized by order that day in that court entered to contest said libels or to take such other proceedings therein as might be advisable, and to use the funds in his hands for the purpose of giving such security as he might be able, as required in contesting the libels. In September, 1891, the receiver made a motion in the United States District Court for an order

directing the marshal to withdraw from the custody of the steamboats held under the admiralty process. The motion was denied on the ground that the question should be raised by answer to the libels, and leave was given to answer accordingly. The receiver availed himself of this permission and appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. He thereafter made an application to this court for a writ of prohibition to the District Court, which was denied November 13, 1891.

On November 10 the receiver verified a petition addressed to the Supreme Court of the State of New York, in which he asked that plaintiffs in error herein might be enjoined from prosecuting the libels which they had filed in the District Court of the United States for the Eastern District of New York. Affidavits were attached to the petition, and on these papers and the preceding record one of the justices of the Supreme Court of the State entered an order November 11, 1891, that plaintiffs in error show cause at a special term of the court, November 14, 1891, why they should not be enjoined from taking any further proceedings on their libels in the United States courts, and in the meantime plaintiffs in error were enjoined and restrained from taking any further action under their libels, and from attempting any proceeding looking to the condemnation or sale of the steamboats or any of them. Affidavits in opposition were presented by plaintiffs in error on the hearing of the order to show cause. Certain allegations were made in the petition and the moving affidavit of a knowledge by Moran at the time he filed the first libel that a receiver of the company had been appointed. These were denied, and Moran set forth under oath all his information and sources of information on the subject of the proceedings contemplated to dissolve the company, with the dates. The petition set forth that if libellants were permitted to prosecute their libels and obtain decrees thereunder, and the steamboats were condemned and sold to satisfy the same, it would result in the vessels being sold for less than their value, and that the interest of the corporation and the general creditors thereof would be greatly sacrificed; that the

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vessels would bring a much larger price if sold as a fleet; that all creditors who were entitled to a preference by having liens as well as all unsecured creditors could be fully protected in this proceeding; that petitioner was advised that a larger portion of the claims for which libels had been filed did not constitute liens against the vessels, nor were libellants entitled to any preference for such portion of their claims. The petition further stated that under the order of August 26 the receiver had not sufficient funds to give security to contest all of the libels, and was wholly unable to give the security necessary to release the vessels from the marshal's custody, and for which reason, unless the libellants were restrained from prosecuting the libels, the receiver would be unable to prevent the condemnation and sale of the steamboats. The petition also set forth the receiver's application to the District Court of the United States for the Eastern District of New York for an order directing the marshal of the district to surrender the custody of the steamboats; the denial thereof on the ground that the question of jurisdiction ought not to be decided upon motion; the leave to the receiver to answer the libels and contest the jurisdiction by answer; his appearance and answer in one action brought against each steamboat for the purpose of testing the jurisdiction of that court, he not being able, as he alleged, to furnish the security necessary in order to answer all the libels, which were some forty in number. It was also averred that a motion had been made in the District Court by Moran for the sale of the steamboats, and that the proceeds be deposited in court to await the result of the action; that the motion was opposed by the receiver and withdrawn as to the libels in which he had answered; that the motion had since been urged in the actions in which the receiver had not appeared and answered, and that the District Court had intimated that the motion would be granted November 13. Petitioner denied the jurisdiction of the District Court over the steamboats, or any of them, at the time the libels were filed, and asserted that they were at that time in the custody of the state court, and not liable or subject to the attachment made by the marshal. On December 7, 1891,

the special term of the Supreme Court granted the prayer of the receiver and entered an order for an injunction, enjoining plaintiffs in error from taking any further proceedings upon their libels in the District Court of the United States for the Eastern District of New York against the steamboat company or against the steamboats of that company, except the Niagara, and from taking any action whatsoever under said libels and in proceedings looking to the condemnation and sale of the steamboats, or any of them, except the Niagara.

Plaintiffs in error appealed from that order to the general term, by which it was affirmed, and they then carried the case to the Court of Appeals of the State of New York, which affirmed the order of the general term, 136 N. Y. 169, and directed that its judgment be made the judgment of the Supreme Court, which was done December 6, 1892, whereupon this writ of error was sued out.

Mr. Robert D. Benedict, (with whom were *Mr. James Emerson Carpenter* and *Mr. Joseph F. Mosher* on the brief,) for plaintiffs in error.

Mr. de L. Berier, by leave of court, filed a brief on behalf of the Lehigh Valley Coal Company, and of the United States marshal for the district.

Mr. James W. Eaton for defendant in error.

By the order of July thirty-first, appointing a receiver, the New York state court acquired jurisdiction of the property of the corporation, and that jurisdiction is exclusive as against all other courts of coördinate jurisdiction.

This proposition is fully established by the decision of the Court of Appeals in this case; but, prior to that decision, the point was decided in favor of our contention, so far as the conflicting jurisdiction of courts of the same State was concerned, by the *Christian Jensen Case*, 128 N. Y. 550, which is directly in point. The proceeding was similar to the proceeding heretofore taken in the case at bar, and the case is conclusive upon

the proposition that the jurisdiction of the court appointing the receiver attaches from the moment of filing the order, and the process of other courts, levied intermediate the filing of the order appointing the receiver and the filing of his bond, is void. There are, indeed, a large number of cases holding that while it may be necessary for the receiver to file security in order to give him power to administer the assets of the corporation, the act of filing security is not at all essential to the jurisdiction of the court, and process levied intermediate the appointment of the receiver and his giving a bond is void. See *Maynard* v. *Bond*, 67 Missouri, 315; *Rutter* v. *Tallis*, 5 Sandf. (N. Y. Super. Ct.) 610; *Steele* v. *Sturges*, 5 Abb. Prac. 442; *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480; *Wiswall* v. *Sampson*, 14 How. 52.

And this rule has been repeatedly applied to cases where such an exercise of jurisdiction on the part of the state court has been held to give it exclusive cognizance and control to the exclusion of a Federal court of coördinate jurisdiction attempting to interfere with the subject-matter in dispute; and that, too, by the Federal courts themselves. See *Union Trust Co.* v. *Rockford &c. Railroad*, 6 Bissell, 197; *Wiswall* v. *Sampson*, 14 How. 52; *Holladay Case*, 29 Fed. Rep. 226; *Bruce* v. *Railroad Co.*, 19 Fed. Rep. 342; *Walker* v. *Flint*, 7 Fed. Rep. 435; *Kennedy* v. *Railroad Co.*, 3 Fed. Rep. 97; *The Red Wing*, 14 Fed. Rep. 869.

In *Judd* v. *Bankers' & Merchants' Tel. Co.*, 31 Fed. Rep. 182, an action in which the complainant, a creditor of an insolvent corporation, sought to have the Federal court take possession and distribute the assets of the corporation already in the hands of a receiver under the state court, it was said by Judge Wallace: "The case is one for the application of the rule that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation to the *exclusion* of all *interference* by other courts of coördinate jurisdiction. Citing *Taylor* v. *Carryl*, 20 How. 583; *Williams* v. *Benedict*, 8 How. 107; *Hagan* v. *Lucas*, 10 Pet. 400; *Buck* v. *Colbath*, 3 Wall. 334; *Heidritter* v. *Eliza-*

beth Co., 112 U. S. 294; *Schuehle* v. *Reiman*, 86 N. Y. 270; *Union Trust Co.* v. *Rockford Railroad*, 6 Bissell, 197; *Sedgwick* v. *Menck*, 6 Blatchford, 156; *Young* v. *Montgomery &c. Railroad*, 2 Woods, 606. And see also the very recent case of *Porter* v. *Sabin*, 149 U. S. 473.

The case of *Heidritter* v. *Elizabeth Co.* is instructive in this connection. There property was seized by a United States officer for an infringement of Federal law. While thus in custody of the United States District Court it was seized under the state court to enforce a mechanic's lien. Both proceedings were *in rem*. The United States Supreme Court held that the Federal court had taken possession of the property and that the possession was necessarily exclusive. "The *res* was thereby drawn into the exclusive jurisdiction and dominion of the United States, and, for the purposes of that suit, it was at the same time withdrawn from the jurisdiction of the courts of New Jersey. Any proceeding against it involving the control and disposition of it in the latter, while in that condition, was as if it were a proceeding against property in another State. It was vain, nugatory and void, and, as against the proceedings and judgment of the District Court of the United States and those claiming under them, was without effect."

This doctrine was also asserted in the strongest terms by Judge Wallace in the recent case of *Central National Bank* v. *Hazard*, 49 Fed. Rep. 293. See also, *Attleborough Bank* v. *Northwestern Co.*, 28 Fed. Rep. 113.

In *Morrison* v. *Menhaden Co.* 37 Hun, 522, in which certain vessels had been seized by a marshal upon libels filed to enforce maritime demands, Daniels, J., says, that the custody of the property of the defendant prevented its seizure under the execution of the applicant. It was wholly within the jurisdiction and authority of the United States District Court and was not the subject of seizure and levy under his execution.

The principle is generally acknowledged that property in possession of an officer of a state court, under legal process is in the possession of that court, and, therefore, within its

exclusive jurisdiction; and the Federal courts, by replevin or any other process, cannot disturb such possession. *Senior* v. *Pierce*, 31 Fed. Rep. 625, cases cited; *Kressel* v. *The E. L. Cams*, 45 Fed. Rep. 367, cases cited; *Tefft* v. *Sternberg*, 40 Fed. Rep. 2.

It may be argued that these cases do not apply to the case at bar, because here the property was not taken into manual possession under process of the court. But that, under the authorities, is not necessary. The rule is stated in Gluck on Receivers, section 31, as follows: "The rule stated that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession of or control the *res* . . . to the exclusion of all interference from other courts of coördinate jurisdiction, applies to state and Federal courts as well as to the several courts of a State. The proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy if tangible and susceptible of seizure; for such a rule would only lead to unseemly haste on the part of officers to get the manual possession of the property. To avoid such a result, the broad rule is laid down that the court first invoked will not be interfered with by another court while the jurisdiction is retained."

Indeed, it will be found, upon examination, that all the cases which hold priority of manual possession as the test of jurisdiction between Federal and state courts are cases relating to the levy of a marshal on the one hand and the levy of a sheriff on the other, and do not apply to the case of a receiver. In those cases the liens are coördinate and equal, and the tribunal first acquiring actual possession, through its officers, gains complete control of the *res*. That is the only way that the court can gain control under its execution. The sheriff or marshal is not the hand of the court, as is the receiver, but only its officer to execute its mandate by seizing the property in behalf of an individual suitor. But, by the appointment of a receiver, the court in the exercise of its equity powers assumes the custody of the property to be dis-

posed of for the benefit of all concerned, and such an act is the assertion of its highest prerogative and does not require any actual seizure to make it effectual. That this distinction is clearly recognized is shown by a great number of cases which hold that even where the sheriff or marshal has made an actual seizure the subsequent appointment of a receiver, by the court, prevents any sale under the levy, because the order appointing the receiver vests the custody of the property immediately in the court, without the necessity of manual possession. *Union Trust Co.* v. *Rockford &c. Railroad Co.*, 6 Bissell, 197; *Matter of Berry*, 26 Barb. 55. The last mentioned case is particularly instructive in this connection. There a levy of property made by the sheriff before the appointment of the receiver, but after the making of an order directing his appointment, was held void. The court will take into account fractions of a day in determining priority of jurisdiction. *Matter of Berry, supra; People* v. *Central Bank*, 53 Barb. 412, 417.

If the rule were otherwise than has been above stated, the receiver of a corporation, the property of which was scattered over a large area, would be practically powerless and the object of his appointment absolutely frustrated. The learned counsel for plaintiffs in error, in his contention for the doctrine that manual possession is essential to establish jurisdiction, relies wholly on the cases relating to the conflicting claims of sheriffs and marshals which, as above pointed out, bears no analogy to the case of a receiver and a marshal. It is undoubtedly true that an execution in the hands of a sheriff binds personal property of a judgment debtor from the time that it is lodged in the sheriff's hands, but this doctrine is only true so far as subsequent purchasers are concerned, and has no application to the case where process is issued out of two coördinate courts, and the reasoning of the learned counsel as to the analogy between such process and the order appointing a receiver is therefore fallacious.

Apply this principle, above stated, to the case of courts of coördinate, but conflicting jurisdiction, and it follows that the court appointing the receiver has priority over the court

subsequently levying, through its officer, upon the property which, by the act of appointing the receiver, is in the custody of the first court. The question of what title, if any, is taken by the receiver to the property is immaterial. The real question is that of the custody of the court through its receiver and during the continuance of the receivership. The above rule applies to most of the cases where manual possession has been held to be important. *Hagan* v. *Lewis*, 10 Pet. 400; *Taylor* v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. 450; *Buck* v. *Colbath*, 3 Wall. 334; *Covell* v. *Heyman*, 111 U. S. 176; *Heidritter* v. *Elizabeth &c. Co.*, 112 U. S. 294; *Pulliam* v. *Osborne*, 17 How. 471; *Adler* v. *Roth*, 5 Fed. Rep. 895; *Senior* v. *Pierce*, 31 Fed. Rep. 625; *The Sailor Prince*, 1 Ben. 237; *The Caroline*, 1 Lowell, 173; *Loving* v. *Marsh*, 2 Cliff. 311.

The only conclusion warranted by the authorities is that the New York Supreme Court, by the appointment of its receiver, gained complete and exclusive jurisdiction of the property and that the Federal court had no right to interfere.

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

This court declined to issue the writ of prohibition to the District Court of the United States for the Eastern District of New York from proceeding upon these libels because the alleged want of jurisdiction in the District Court over the vessels was in course of litigation in that court on due process. *In re Fassett, Petitioner*, 142 U. S. 479, 484. The state court upon the receiver's application granted in effect the prohibition which we denied, and restrained libellants from prosecuting their libels. The question is whether it was within the power of the state court to do this?

The general rule is that state courts cannot enjoin proceedings in the courts of the United States, and this was held at a very early day, in reference to a judgment of the Circuit Court; *M'Kim* v. *Voorhies*, 7 Cranch, 279, 281; while on the other hand, it was determined that the Circuit Court would

not enjoin proceedings in a state court, and any attempt of that kind was forbidden by act of Congress. *Diggs* v. *Wolcott*, 4 Cranch, 179; Act of March 2, 1793, c. 22, § 5, 1 Stat. 333, 335. In *Riggs* v. *Johnson County*, 6 Wall. 166, 195, this court, speaking through Mr. Justice Clifford, said: "State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and state courts act separably and independently of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' . . . Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of state tribunals." And in *United States* v. *Keokuk*, 6 Wall. 514, 517, the same learned justice, again speaking for the court, observed: "Orders for an injunction issued by state courts are as inoperative upon the process of the Circuit Court of that district as they would be if directed to the process of a Circuit Court in any other district of the United States, because the state and Federal courts, in their sphere of action, are independent of any such control."

Mr. Justice Story was of opinion that to the doctrine which permits the courts of one State in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other States, or from further proceeding in actions already begun, there exists the exception that the state courts cannot enjoin parties from proceeding in the courts of the United States, nor the latter enjoin them from proceeding in the former courts, an exception based upon peculiar grounds of municipal and constitutional law. Story Eq. § 900; Story Const. § 1757.

By the Judiciary Act of March 2, 1793, c. 22, § 5, 1 Stat. 334, the granting of injunction to stay proceedings in any

court of a State was prohibited in express terms, and it was held in *Peck* v. *Jenness*, 7 How. 612, 624, that even the District Court sitting in bankruptcy could not issue an injunction to stay a creditor of the bankrupt from proceeding in a state court, Mr. Justice Grier saying: "It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *The Earl of Cassilis*, 2 Swanston, 313, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

The provision of the act of 1793 was carried forward into section 720 of the Revised Statutes, with the addition of the words "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy," and

under that exception restraint by injunction was held authorized in *Chapman* v. *Brewer*, 114 U. S. 158.

In *French* v. *Hay*, 22 Wall. 250, a cause had been properly removed from a state court to the Circuit Court of the United States, under the removal acts, and the Circuit Court had vacated a decree previously rendered in the state court and dismissed the cause for want of equity, and it was held that the Circuit Court, having jurisdiction *in personam* over the parties, and having control over the cause, would not permit its jurisdiction to be trenched upon by any other tribunal, and might properly enjoin a party to the cause from proceeding beyond the territorial jurisdiction of the court in contravention of its decree. So, in *Dietzsch* v. *Huidekoper*, 103 U. S. 494, a plaintiff in a replevin suit brought in a state court had properly removed it to the Federal court and obtained a judgment there in his favor, but the state court proceeded to try the cause and render judgment against the plaintiff, notwithstanding the removal, and an action was then brought in the state court upon the replevin bond. It was held that the court of the United States might enjoin the prosecution of such action, the relief being merely ancillary to the jurisdiction already acquired and necessary to give effect to its own judgment.

And resort to injunction in proceedings in admiralty for the limitation of the liability of ship owners under an act of Congress, passed since the act of 1793, and expressly provided that after the institution of such proceedings "all claims and proceedings against the owner shall cease;" Act of March 3, 1851, c. 43, § 4; 9 Stat. 635; Rev. Stat. § 4285; was sustained in *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 599, 600.

These were all cases in which the issue of an injunction to a state court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a court of the United States of its lawful jurisdiction over particular persons or things.

In *Gaylord* v. *Fort Wayne &c. Railroad*, 6 Bissell, 286, 291, 292, a bill was filed in the Circuit Court of the United States

for the District of Indiana, to obtain, among other things, the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made, a receiver was appointed. While proceedings were pending in the Federal court a suit was commenced in the state court of Indiana in which a receiver was also appointed, who took possession of the property. Subsequently the property was surrendered by the persons in possession under the receiver of the state court to the receiver of the Federal court upon his application, and he retained possession of the property, the court refusing to rescind the order appointing him. In disposing of the case, the Circuit Court, Drummond, J., said: "We think that there is no other safe rule to adopt, in our mixed system of state and Federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled. . . . Of course, in all that has been said, it is assumed, what was the fact in this case, that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court."

In *Home Insurance Co.* v. *Howell*, 24 N. J. Eq. (9 C. E. Green) 238, 241, the complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois, and prayed that the policies might be delivered up and cancelled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or in equity upon them or making use of them in any way for the purpose of establishing any claim for damages against the complainant. Defendant appeared and filed an answer, to which a replication being filed, proofs were taken. After the suit was commenced, defendant brought an action at law on the policies against the company in a state court of Illinois, which suit was on its petition removed into the Circuit Court of the United States for the Northern District of that State.

The company thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting his suit in Illinois, and an injunction having been issued, a motion was made to dissolve it. In denying the motion, the Chancellor said: "This court having the power to hear and determine the subject-matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is, that as between courts of concurrent and coördinate jurisdiction, (and the Circuit Court of the United States and the state courts are such in certain controversies — such as that involved in this suit, for example — between citizens of different States,) the court that first obtains possession of the controversy must be allowed to dispose of it, without interference from the coördinate court. . . . Where a party is within the jurisdiction of this court, so that on a bill properly filed here, this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and, of course, from prosecuting one commenced after the bringing of the suit in this court."

In *Brooks* v. *Delaplaine*, 1 Md. Chan. 351, 354, the high court of chancery of Maryland dismissed a bill in equity, because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction. And see the observations of Mr. Justice Field, in *Sharon* v. *Terry*, 36 Fed. Rep. 337, 355.

We decided in *Cole* v. *Cunningham*, 133 U. S. 107, that a creditor, who is a citizen and resident of the same State as his debtor, against whom insolvent proceedings have been instituted in such State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to seize or attach the personal property of the debtor situated in another State, and embraced in the assignment, he may be restrained by injunction by the courts of the State in which he and the debtor reside. But we also held in *Reynolds* v. *Adden*,

136 U. S. 348, that a creditor who was not a citizen or resident of the same State with his debtor might proceed in another State against property there, unaffected by insolvency proceedings in the State of the debtor's residence, if in accordance with the law of such other State. The debtor in that case was a citizen and resident of Massachusetts, where the insolvency proceedings were had. The creditor was a citizen of New Hampshire, and he attached property of the debtor in Louisiana, where the rule was that the transfer of the estate of an insolvent debtor by judicial operation is not binding upon the citizens and inhabitants of Louisiana or any other State except the State in which the insolvent proceedings have taken place, at least until the assignee has reduced the property to possession or done what is equivalent thereto.

In *Worthington* v. *Lee*, 61 Maryland, 530, in a suit for specific performance of a covenant for the renewal of a lease and for an injunction to restrain an action of ejectment for the recovery of the premises, the Court of Appeals of Maryland held, Alvey, C. J., delivering the opinion of the court, that so far as the parties were within the jurisdiction of the court or bound by the decree, they might be restrained from taking any action at law in the courts of Maryland for the recovery of the property, but as to those parties residing in other States, they could not be restrained by injunction from the state court from suing in the Circuit Court of the United States, by which their right so to sue must be determined.

It will be perceived that the principle invoked in such cases as *Gaylord* v. *Railroad Company* and *Insurance Company* v. *Howell*, *supra*, is, that courts for the purpose of protecting their jurisdiction over persons and subject-matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession or identical controversies therein pending, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction.

The proceeding in which upon petition the injunction under consideration was granted, was a proceeding in insolvency in the state court to dissolve and wind up the Schuyler Com-

pany on its own application, under the statutes of New York in that behalf, and if it be conceded that that court could protect its exercise of jurisdiction over that subject-matter by enjoining creditors from prosecuting suits against the company on petition of the receiver in that suit and without the bringing of a new suit for that purpose, it does not follow that it had power to grant the injunction in question.

If the state court could not restrain proceedings in the District Court of the United States; if the jurisdiction of the state court over the libellants had not attached; or if the District Court obtained jurisdiction over the vessels in priority to the state court, then this judgment must be reversed.

It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been repeatedly affirmed by this court. *Hagan* v. *Lucas*, 10 Pet. 400; *Taylor* v. *Carryl*, 20 How. 583; *Peck* v. *Jenness*, 7 How. 612, 625; *Freeman* v. *Howe*, 24 How. 450; *Ellis* v. *Davis*, 109 U. S. 485, 498; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Borer* v. *Chapman*, 119 U. S. 587, 600. These cases were cited in *Byers* v. *McAuley*, 149 U. S. 608, 614; and the language of Mr. Justice Matthews in *Covell* v. *Heyman* was quoted to this effect: "The point of the decision in *Freeman* v. *Howe*, *supra*, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of

that court; but that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And *vice versa*, the same principle protects the possession of property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States." *Porter* v. *Sabin*, 149 U. S. 473.

In *Buck* v. *Colbath*, 3 Wall. 334, 341, 345, the same rule was referred to as settled, and Mr. Justice Miller said: "A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit. This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudication of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions." It was further said: "It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other

matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." Hence it was held that an action of trespass might be sustained in the state court against the marshal for levying on property not belonging to the defendant in his writ, although his possession could not have been interfered with.

The reason was that his possession was the possession of the court, and, pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession, while the action of trespass constituted no such interference.

In this and like cases the question has arisen in respect of courts of concurrent jurisdiction as to parties and subject-matter.

But the question in the case at bar arises in respect of the state court and a District Court of the United States, whose cognizance of all civil causes of admiralty and maritime jurisdiction is, under the Constitution and by the ninth section of the Judiciary Act of 1789, (reproduced in Rev. Stat. § 711,) exclusive. *The Lexington*, [*New Jersey Nav. Co.* v. *Merchants' Bank*,] 6 How. 344, 390; *The Moses Taylor*, 4 Wall. 411; *The Hine*, 4 Wall. 555; *The Lottawanna*, 21 Wall. 558, 580; *Johnson* v. *Chicago &c. Elevator Co.*, 119 U. S. 388, 397; *The J. E. Rumbell*, 148 U. S. 1, 12. As said by Mr. Justice Miller: "It must be taken as the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law." 4 Wall. 568. The act saves to suitors in all cases "the right of a common law remedy, where the common law is competent to give it;" that is, not a remedy in the common law courts, but a common law remedy. Suitors are not compelled to seek such

remedy, if it exist, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty, and the state courts have no authority to hear and determine a suit *in rem* to enforce a maritime lien. *The Belfast*, 7 Wall. 624, 644; *The Josephine*, 39 N. Y. 19, 27.

A statutory proceeding to wind up a corporation is not a common law remedy, and a maritime lien cannot be enforced by any proceeding at common law. These libellants were entitled to have their causes tried in the court of admiralty, according to the rules and practice of admiralty, and that right could not be taken away from them, nor would the decree or judgment of the state court be pleadable in bar to their libels. If, then, the receiver had first taken actual possession of these vessels and sold them, such sale would not have cut off maritime liens and the right to have them enforced, and while it may be true that the state courts, exercising equitable jurisdiction, might undertake, in the distribution of property, to save the rights of holders of maritime liens, yet it is certain that those courts would have no power by a sale under statute to destroy their liens unless they had voluntarily submitted themselves to that jurisdiction.

In *Taylor* v. *Carryl*, 20 How. 583, 601, it was held that where a vessel had been seized under process of foreign attachment issuing from a state court in Pennsylvania, and a motion was pending in that court for an order of sale, process issued under a libel filed in the District Court of the United States for mariners' wages and supplies, could not divest the authorities of the State of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative. And this because while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. Mr. Chief Justice Taney and three of his associates dissented upon the ground that the question was not one "between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and

duties of a court of admiralty and a court of common law in the case of an admitted maritime lien." The Chief Justice stated that the following propositions were undisputed: "The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid. By the Constitution and laws of the United States, the only court that has jurisdiction over this lien, or is authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so. The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they may not be left penniless, and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman. A general creditor of the ship owner has no lien on the vessel. When she is attached (as in this case) by process from a court of common law, nothing is taken, or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship. And the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seaman's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the court of admiralty." Mr. Justice Campbell, who delivered the opinion of the majority, observed, at its close, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them;" and he cited the case of *The Oliver Jordan*, 2 Curtis, 414, in which Mr. Justice Curtis held that property in the custody of the law of a State, under an attachment, cannot be arrested by a warrant from a District Court, sitting in the admiralty, in a proceeding to

enforce the lien of a material-man, but declined to then order the libel to be dismissed as "the state process may be so terminated as to render it practicable to proceed in the admiralty against the vessel."

As already pointed out, it was held in *Buck* v. *Colbath*, *supra*, that whenever the litigation in the court where the property is first seized has ended, or the possession of such court or its officers is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. This view is illustrated by many decisions in the District Courts, and was applied by Mr. Justice Blatchford, then district judge, in *The Sailor Prince*, 1 Ben. 234.

That was a case of a libel by seamen to recover wages against a ship and freight money, wherein the marshal made return to the process that he had not attached the vessel, but had attached the freight money in the hands of the parties who held it. Prior to the service of process, suit had been brought in the state court against the owners of the vessel, in which warrants of attachment had been issued, under which the sheriff had seized and was holding her when the marshal came to seize her. He had also served copies of the warrants on the parties who held the freight money, with notice that he attached it. But Judge Blatchford held that the seamen had a paramount lien for their wages upon the freight money, and that such lien was to be administered by the court of admiralty by the service of its process; that as against a lien of that character, the principle established in *Taylor* v. *Carryl* ought not to be extended; that the application of the principle of that case to an attachment issuing from a state court against a vessel only worked delay in the enforcement of a sailor's lien for wages upon her, but that the application of it to an attachment against freight money would work the entire destruction of the lien; that the possession of the freight money by the sheriff, constructive or otherwise, was not such as the possession of the vessel in *Taylor* v. *Carryl*, or such as prevented the marshal from levying his process

upon it, so as to give the District Court jurisdiction of it *in rem*. The learned judge considered the cases of *Taylor* v. *Carryl*, *Freeman* v. *Howe*, and *Buck* v. *Colbath;* and regarded the principle proceeded on in *Taylor* v. *Carryl*, at best, as a rule of comity; a relinquishment by a court of admiralty of its clear jurisdiction, "in favor of a state court, which cannot enforce or displace such lien, and has no jurisdiction over it, giving to the state court the right, for the time being, to obstruct and interfere with the lien and with the remedy of the seamen. That principle or rule of comity is, according to *Taylor* v. *Carryl*, to be sustained in regard to a vessel which has been seized by and is in the lawful custody of the sheriff under process from the state court, so long as it is in such custody, the Federal court being at liberty, when the litigation in the state court is ended, or when the possession of the sheriff is discharged, to take possession of the vessel and enforce against it admiralty liens. . . . Now, this rule of comity, thus regarded and limited and administered, may, perhaps, in ordinary cases, work no other mischief than to cause unnecessary and harsh delay in the enforcement of their rights by a class of men whose paramount and superior claims are recognized in the codes of law of all commercial countries. The state court can seize and sell only the interest of the owner in the vessel over and beyond the amount of the liens of the seamen, and can convey no absolute right of property in the whole vessel to a purchaser. Legally, the lien remains, to be enforced the moment the hand of the state officer is withdrawn from the vessel. And the vessel, in theory at least, remains *in specie*, so as to be subject to process for the enforcement of such lien." But that learned judge declined to extend that principle so far as to permit the state court to appropriate the money to the payment of inferior claims of creditors who had attached it by the process of the state court, as if this were done, "the lien of the seamen on such money for their wages is gone, extinguished, put out of existence, in the face of an admiralty court, by the act of a court of common law. The court of admiralty is to abnegate functions which are conferred upon it by the Constitu-

tion and laws, and to refuse to enforce a clearly admitted paramount admiralty lien, which no other court can enforce or directly destroy or supersede, because a state officer has, under process from a state court, attached a sum of money which is the subject of such lien, and is to permit the state court to apply that money to the payment of an inferior claim not founded on a lien, and thus indirectly destroy the lien practically and to all intents and purposes."

A similar question arose in *The Caroline*, 1 Lowell, 173, and it was held that it was not a good defence to a petition that freight might be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials, and that the consignee, before the libels were filed, was summoned as trustee or garnishee of the ship owner in a court of common law; that the courts of common law of Massachusetts had no power to adjust maritime liens upon a fund attached under the foreign attachment law of that State, and the consequence of giving priority to such an attachment might be the destruction of the liens; that a court of common law would be bound to guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and that the District Court might proceed to adjust the liens and might order the freight to be brought in for that purpose; and Lowell, J., said: "The decision in *Taylor* v. *Carryl*, as explained in *Freeman* v. *Howe*, and in *Buck* v. *Colbath*, does not operate to defeat the paramount maritime liens, but only to delay their enforcement, because the sheriff can sell only the right of the ship owner, subject to those liens; the practical effect of which I find to be that the sheriff usually waives his possession when libels are filed for maritime liens, because his title becomes of little or no market value. So that we have come back pretty much to the practice which prevailed before the leading case was decided." The views of Judge Blatchford in respect of the attachment of credits, and thereby the destruction of maritime liens, were fully concurred in. And see *Clifton* v. *Foster*, 103 Mass. 233; *Eddy* v. *O'Hara*, 132 Mass. 56.

In *The E. L. Cain*, 45 Fed. Rep. 367, 370, the sheriff had

attached a tug and turned it over to a receiver appointed by the state court. After that the marshal, under process upon libels filed for seamen's wages and supplies, seized the vessel, but the District Court held that the tug, "having been taken possession of by process of the state court, and by that court placed in the custody of the receiver, it could not be held by any process out of this court until discharged by order of the state court." And Simonton, J., said: "So, for the present, this court can proceed no further. But the liens set up in this court are maritime liens, which cannot be adjudicated or passed upon in the state court. Over these liens the jurisdiction of this court is exclusive. They will be protected in this court." The cause was continued until the state court had ordered a sale or in any other mode released its custody of the tug. To the same effect, Brown, J., in *The James Roy*, 59 Fed. Rep. 784.

In *The Elexena*, 53 Fed. Rep. 359, § 2186 of the Code of Virginia, providing that the sale of a vessel forfeited by proceedings in a state court for violating the oyster laws of the State "shall vest in the purchaser a clear and absolute title," was held by Hughes, J., inoperative to divest maritime liens of innocent parties attaching before the arrest of the vessel, and that the vessel might be subsequently seized in the hands of the purchaser and subjected to such liens by proceedings in the admiralty courts.

A maritime lien is not divested by a forfeiture for a breach of municipal law; *St. Jago de Cuba*, 9 Wheat. 409; nor by a sale to a *bona fide* purchaser without notice. *The Chusan*, 2 Story, 455; *The Bold Buccleugh*, 3 W. Rob. 220; *S. C.* 7 Moore P. C. 267. It is *jus in re;* and "it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear anything; but a claim against all mankind; a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world." *The Young Mechanic*, 2 Curtis, 404, 412. See also *The Rock Island Bridge*, 6 Wall. 213; *The J. E. Rumbell*, 148 U. S. 1.

Opinion of the Court.

We think it entirely clear that, as a state court is without jurisdiction to enforce maritime liens, so it is incapable of displacing them, and, therefore, though under the rule laid down in *Taylor* v. *Carryl*, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto; and when its jurisdiction has determined the admiralty courts may proceed.

But upon the facts disclosed in this record, was the District Court required to stay its hand until the termination of the proceedings in the state court? It is admitted that the receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels; but it is said that, as his appointment was made on July 31, before the libels were filed, when his bond was executed, approved, and filed in the office of the clerk of the court for Albany County, his title to the property related back to the time of his appointment, and that he had constructive possession as of that date, which constructive possession overreached the possession of the marshal.

Certain sections of the New York statutes (Rev. Stats. Part 3, c. 8, §§ 66, 67; Code Civ. Proc. 1891, App. 1167) provide that a receiver "before entering on the duties of his appointment shall give such security to the people of the State, and in such penalty as the court shall direct;" and "such receiver shall be vested with all the estate, real and personal, of such corporation from the time of his having filed the security hereinbefore required."

The contention is not only that the title to these vessels vested in the receiver as of July 31, and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the District Court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between

two courts of concurrent and coördinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *N. Y., Lake Erie &c. Railroad*, 105 N. Y. 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libellants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the order of July 31, as mere creditors of that Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction *in invitum*, was placed in such a situation in respect of liability to being ultimately

brought within the custody of the court that the District Court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the District Court violated no rule of comity nor any other rule in entertaining the libels.

The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, but this could not operate to divest a jurisdiction, not concurrent, to the exercise of which no actual impediment existed at the time it was invoked. As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the court which alone has cognizance to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes and into whosesoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*.

The receiver accordingly properly applied to the state court for leave to contest the libels or to take such other proceedings therein as might be advisable, and was duly authorized so to do. Thereupon he made a motion in the District Court for an order directing the marshal to withdraw from the custody of the steamboats held under the admiralty process, which motion was denied on the ground that the question should be raised by answer to the libels. The receiver then appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. If the decision of that court had been adverse, he could have tested its correctness on appeal, but he seems to have been unwilling to abide the result, and to have entertained the view that while the proceedings in the District Court, to which he had become a party, were pending, he could go into

the state court and ask it to determine the question of jurisdiction by anticipation and by injunction prevent its decision by the tribunal to which it had authorized him to resort. Not only so, but he made an application to this court to prohibit the District Court from exercising jurisdiction. This was denied because the question involved was in due course of decision below, and the receiver thereafter obtained the injunction under consideration. Apart from the legal effect of this submission to the jurisdiction of the District Court, we cannot say that we are favorably impressed with this course of proceeding, and the less so since in the original application to the state court on July 31 it was averred that there was serious danger of the vessels "being libelled in the admiralty courts of the United States for such claims as constituted maritime liens, including the claims for services and supplies rendered to said vessels."

We are of opinion that the state court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was, as the case stood, one for the District Court to decide in the first instance; that the District Court had jurisdiction; and that the judgment under review was in effect an unlawful interference with proceedings in that court.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Brewer, with whom concurred Mr. Justice White, dissenting.

While I agree with nearly all that is said in the opinion, I am unable to concur in the conclusions finally reached and the judgment ordered. I agree that "it is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court;" and I may say that I agree further that when a court has possession of property it may restrain the bringing of any suit in any other court to disturb that possession, and that an order for

such restraint operates upon all persons within its jurisdiction, and can be enforced, if need be, by proceedings as for a contempt; but I disagree with my brethren as to the matter of possession. In the opinion of the court the possession of the officer is deemed the important matter. I submit that that is significant only as it bears upon the question of possession by the court. No one would pretend that the act of a marshal or a sheriff in taking possession of property would have any significance unless it were in the execution of some order of the court. If the proceeding is of itself such as to put the property into the possession of the court, that is enough, and there is no need of inquiry as to whether the officer of the court has in fact placed his hand upon it. Now, the statutory proceeding instituted by this insolvent corporation — a creature of the State of New York — involved a surrender of its property to the possession of the court. Such is the construction placed by its highest court upon the statutes of New York; and that construction, it seems to me, is binding upon this court. It is only in harmony with views that have been expressed by judges of the Federal courts. The bankrupt act of Congress authorized voluntary proceedings in bankruptcy, as do the statutes of New York authorize voluntary proceedings on the part of its corporations in insolvency. In *In re Vogel*, 7 Blatch. 18, 20, a question was presented as to the jurisdiction of the bankruptcy court as against that of a state court, whose officers in obedience to a writ of replevin had taken manual possession of the property before any officer of the former court had touched it, and the court held that from the time of the filing of the petition in bankruptcy the jurisdiction of that court over the property attached. I quote the language of District Judge Blatchford, whose opinion was sustained by Mr. Justice Nelson:

"It is manifest, from these provisions, that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes, *eo instanti*, a bankrupt, so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court, and placed in its custody and under its protection, as

fully as if actually brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it; and, to so interfere, is a contempt of the bankruptcy court."

Believing that the rule thus stated is the one to be applied in this case, I hold that, when the petition in insolvency was filed, the corporation, the owner and possessor of the property, surrendered it to the state court, and by no subsequent proceedings in any other court could that possession be disturbed.

I cannot agree that the respective jurisdiction of state and Federal courts is to be determined by a scramble between sheriff and marshal for possession.

For these reasons, while I concur in most of the reasoning of the opinion, I am constrained to dissent from the judgment.

I am authorized to say that Mr. Justice White concurs in the foregoing views.

BARDEN *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 612. Argued April 11, 1894. — Decided May 26, 1894.

By the grant of public land made to the Northern Pacific Railroad Company by the act of July 2, 1864, c. 217, 13 Stat. 365, all mineral lands other than iron or coal are excluded from its operation, whether known or unknown; and all such mineral lands, not otherwise specially provided in the act making the grant, are reserved exclusively to the United States, the company having the right to select unoccupied and unappropriated agricultural lands in odd sections, nearest to the line of the road, in lieu thereof.

Deffeback v. *Hawke*, 115 U. S. 392, and *Davis* v. *Weibbold*, 139 U. S. 507, explained and distinguished.

This was an action for the possession of certain parcels of land containing veins or lodes of rock in place bearing gold,

silver and other precious metals, situated within section 27 of township 10 north, range 4 west of the principal meridian of Montana, claimed by the Northern Pacific Railroad Company — the plaintiff below, the defendant in error here — as parts of the land granted to it by the act of Congress of 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 Sound on the Pacific coast, by the northern route," and the acts and resolutions supplementary and amendatory thereof.

By its first section the plaintiff was incorporated and authorized to construct and maintain a continuous railroad and telegraph line with the appurtenances, from a point on Lake Superior in the State of Minnesota or Wisconsin and thence westerly by the most eligible route as should be determined by the company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch by the valley of the Columbia River to a point at or near Portland in the State of Oregon. The company was invested with all the powers, privileges, and immunities necessary to carry into effect the purposes of the act.

By the third section a grant of land, other than mineral, was made to the company in words of present conveyance to aid in the construction of the railroad and telegraph line and for other purposes. Its language is: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway *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 said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the

United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." The grant thus made is accompanied with certain conditions or provisos — these among others: "That *all mineral lands* be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected, as above provided; and *provided* further, that the word '*mineral*' when it occurs in this act shall not be held to include iron or coal."

By the fourth section it was enacted: "That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the addi-

tional sections of land as aforesaid; and so on as fast as every twenty-five miles of said road is completed as aforesaid."

By the sixth section it was enacted: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or preëmption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preëmption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company; and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The complaint alleges that the general route of the railroad extending through Montana was fixed February 21, 1872, and the lands in controversy were within forty miles of such general route, and were public lands not reserved, sold, granted, or otherwise appropriated, and were free from preëmption or other claims or rights; that thereafter, July 6, 1882, the line of the road extending opposite and past the described lands, was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and that the demanded parcels were within forty miles of the line thus definitely fixed; that thereafter the plaintiff constructed and completed that portion of its railroad and telegraph line extending over and along the line of definite location; that thereafter the President of the United States appointed three commissioners to examine the same, and they reported to him that that portion of the railroad and telegraph line had been completed in a good, substantial, and workmanlike manner, in all respects, as

required by the act of July 2, 1864, and the act supplementary thereto and amendatory thereof; that the President accepted the line as thus constructed and completed; that at the time of filing the plat of definite location in the office of the Commissioner of the General Land Office, namely, July 6, 1882, the described land was not *known* mineral land, and was more valuable for grazing than for mining purposes; that in 1868 all the lands in township 10 north, of range 4 west, were duly surveyed, and the township plat was, September 9, 1868, filed in the United States district land office for the district of Helena, Montana, that being the district in which said township is situated, and by that survey the land of the township was ascertained and determined to be agricultural and not mineral, and that said determination and report have continually remained in force; that after the completion of the railroad the plaintiff listed the section, including the lands described, and other lands, as portions of the grant, and on November 8, 1868, filed the list in the district land office at Helena, and paid the fees allowed by law; that the list was accepted and approved by the receiver and register and certified to the Commissioner of the General Land Office, and has since remained in the same district land office and in the office of the Commissioner; that at the time of the acceptance, approval, and allowance of the list, and at all times prior thereto, no part of the land was *known* mineral land, or was of greater value for mining purposes than for grazing, agricultural, or town-site purposes; that during the year 1888 certain veins or lodes of rock in place bearing gold and silver and other precious metals were discovered on said described land; and thereafter William B. Wells, William Muth, Harpin Davies, and Richard P. Barden, citizens of the United States, without the consent and against the will of the plaintiff, entered upon said land and made locations of said veins and lodes upon certain lots thereof, as follows, to wit: the Vanderbilt quartz lode mining claim on lot 68, August 10, 1888; the Four Jacks and the New York Central and Hudson River quartz lode mining claims on lots 72, 74, and 75, respectively, May 9, 1889; and the Chauncey M. Depew quartz lode mining claim on lot

Statement of the Case.

73—all of said lots being within section 27, township 10 north, range 4 west; that the defendants are in possession of said lots, claiming under said locations, through mesne conveyances from the locators, and have been and are extracting ore therefrom; and that the same are mineral lands.

And the complaint further alleges that the United States have failed, neglected, and refused to issue to the plaintiff a patent for said land, though all acts required by law to entitle the plaintiff to a patent have been fully performed; that the title to the premises has vested in the plaintiff under and by virtue of the acts of Congress and its compliance therewith; that the lots designated are of the value of over $6000, and that the value of the ore wrongfully extracted and taken from them by the defendants is over $100.

Wherefore the plaintiff prays judgment against defendants for the recovery of the possession of the said lots, for the value of the ore so extracted, and for costs.

To this complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action, and entitle the plaintiff to the relief prayed. The demurrer was argued before the Circuit Judge and the District Judge holding the Circuit Court of the Ninth Circuit, at Helena, in the State of Montana, and they differed in opinion upon the demurrer, the Circuit Judge holding that it was insufficient and should be overruled, and the District Judge dissenting therefrom. Judgment was accordingly entered, overruling the demurrer, and the defendants were allowed ten days within which to answer the complaint. But they came into court and stated that they would abide by their demurrer, and declined to file an answer; whereupon their default was entered, and on application of the plaintiff's attorneys it was ordered that judgment be entered against them for the recovery of the possession of the lots designated, the value of the ore taken therefrom, and costs of suit, which was accordingly done. To the ruling of the court in overruling the demurrer exception was taken by the defendants; and to reverse the judgment they brought the case to this court on writ of error.

Argument for Plaintiffs in Error.

Mr. Solicitor General, with whom was *Mr. W. W. Dixon*, for plaintiffs in error.

I. This is an action in ejectment in which the plaintiff must recover, if at all, on the strength of its own title. The complaint admits that the lands sued for are "mineral lands." The plaintiff must, therefore, show title to mineral lands. But its grant, instead of being for mineral lands, is of "every alternate section of public land *not mineral*," etc., with the proviso "that all mineral lands be, and the same are hereby, excluded from the operation of this act," and with the further proviso, in the joint resolution of January 30, 1865, (13 Stat. 567,) "that no act passed at the first session of the Thirty-eighth Congress granting lands to States or corporations to aid in the construction of roads or for other purposes . . . shall be so construed as to embrace mineral lands, which, in all cases, shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant."

Upon this simple statement of the case it would seem that the plaintiff cannot recover, because it does not deraign title to mineral lands.

II. But the complaint contains the further averment that the lands were not known to be mineral until after the filing of the map of definite location. The lands were the same then that they are now, and were, therefore, in fact mineral at that time. The further allegation that they were then more valuable for grazing than for mining must be construed to mean that they were then, so far as was known, more valuable for grazing than for mining. So that the plaintiff's claim reduces itself to this: that its grant must be construed as conveying to it all lands not known to be mineral at the time of filing its map of definite location.

Is it permissible to so construe the act of Congress? I submit not, (1) because that would be to interpolate a term not found in the act, and to violate the rule which forbids the enlargement of public grants by implication; (2) because the circumstances attending the grant are inconsistent with such a construction.

Argument for Plaintiffs in Error.

At the time of the grant little was known of the country through which the road was to pass. The situation is thus disclosed in the dissenting opinion of Judge Knowles: "On July 2, 1864, comparatively little was known of the great mineral resources of this section. There were but two mining camps of any importance in Montana at that time, and one of these was south of the 40-mile limit of that road. The great quartz mining interests of Montana were then almost, if not entirely, unprospected. In northern Idaho no mineral developments had been made worthy of mention; nothing was known of its great mineral resources. It may be said that the only mines then sought for were placers. But few miners in this section knew anything of silver or copper mining, and none had any knowledge of the extent of these mines along the route of the plaintiff's road.

"Silver mining had not existed in the United States for more than five years previous to 1864, and gold quartz mining in the western States and Territories not more than ten years. Copper mining was only known on the shores of Lake Superior, in Michigan. None of this country had been surveyed. Plaintiff did not know just what route would be selected for its road. It had not been surveyed even in a preliminary way. Large portions of the country had never been explored, except by wandering bands of trappers. Gold mining, confined to placers, had existed in Montana for only two years."

Congress could not therefore have meant to reserve simply lands not known to be mineral at the time of the act, for practically nothing was known, and such a reservation would have been of no avail. Nor could Congress have meant to reserve only lands not known to be mineral at the time of the filing of the map of definite location, for the railroad company was at liberty to file its map of definite location whenever it saw fit, and when the knowledge of the country might be no greater than at the time of the passage of the act. I submit, then, that the grant must be construed to mean just what it says, and as excluding from its operation not merely lands known to be mineral, but all lands in fact mineral.

No question is raised at bar as to the character or amount of precious metals necessary to make land mineral, for the allegation is that these lands are "mineral lands" — in other words, that the conditions exist, whatever they may be, which are necessary to bring the land within the description of mineral lands. Nor is it material that the grant is one *in præsenti*, which attaches at the time of filing the map of definite location, for the exception is also *in præsenti*, and no matter when the grant attaches, it cannot attach to mineral lands, for they are not granted, but reserved.

III. But it is said that this construction, which excludes lands in fact mineral from the operation of the grant, works a hardship because it leaves the title of the company forever uncertain in all its lands and liable to be defeated at any time by the discovery of minerals, and it is upon this ground that the opinion of the Circuit Judge proceeds. The objection would be serious if it were well founded. But what is the fact?

The act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.

But it is said that the Secretary of the Interior has no authority to patent mineral lands, and that a patent for lands, in fact mineral, would afford no protection to the railroad company in the event of the future discovery of precious metals therein. This is a mistake. After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals. The authorities upon this point are cited in Mr. Shields's original brief.

The point is also covered by the case of *Davis* v. *Weibbold*, 139 U. S. 507, where a patent was issued for a town site, and minerals were subsequently discovered in the lands patented. But it was held that the title was not affected by such dis-

covery, and that the provision of the town-site act, Rev. Stat. § 2392, that "no title shall be acquired to any mine of gold, silver, cinnabar, or copper," does not apply where the mines were discovered after a patent has been issued.

Mr. Justice Field, delivering the opinion of the court, quotes with approval, at page 521, the following language of Judge Sawyer in *Cowell* v. *Lammers*, 10 Sawyer, 246, 257: "There must be some point of time, when the character of the land must be finally determined, and, for the interest of all concerned, there can be no better point to determine this question than at the time of issuing the patent."

And again, at page 523, he quotes with approval the following language of Mr. Justice Lamar, while Secretary of the Interior: "The issue of said patent was a determination by the proper tribunal that the lands covered by the patent were granted to said company, and hence, under the proviso of said act, were not mineral at the date of the issuance of said patent." And again, page 524: "The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

In *Moore* v. *Smaw*, 17 California, 199, it was decided, in the first opinion delivered by Mr. Justice Field as Chief Justice of the Supreme Court of California, that the patent of the United States passes title to minerals.

Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent cancelled, as was done in *Morton* v. *Nebraska*, 21 Wall. 660, and in *The Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

Here, then, is a method of adjusting the company's grant according to the procedure contemplated by the act itself, which protects fully the interests of both the government

and the railroad, and which is in accordance with the practice which has always prevailed in the Department of the Interior. In *Central Pacific Railroad Company* v. *Valentine*, 11 Land Dec. 238, 246, Secretary Noble, speaking of that practice, said: "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to, or for the use of, the railroad company.

"By reason of this jurisdiction it has been the practice of that department, for many years past, to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the land department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent, or certification, where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned. It has, in effect, become a rule of property."

IV. What plan of adjustment does the plaintiff propose? That it shall acquire all lands not known to be mineral at the time of filing its map of definite location. But that plan affords no opportunity to the government to protect itself from being divested of the mineral lands, which Congress seems to have been so anxious to reserve; for prior to the filing of the map the government cannot know where the road is to be located, and cannot, therefore, make any investigation to ascertain whether the lands which may be taken are or are

not mineral, and after the filing it is too late, for by the act of filing the map the rights of the railroad company are fixed, according to its contention. A construction so unreasonable and unfair cannot be accepted.

V. The reservation of mineral lands from the grant does not have the effect of diminishing the aggregate amount of land which the company shall receive, for the act provides in terms "that in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands may be selected."

A decision of this case adverse to the railroad company therefore deprives it of nothing, but simply requires it to select the lands due to it from agricultural tracts, as the act contemplates, and to keep its hands off of mineral lands.

VI. But it is said that the government may unduly postpone an investigation and determination of the mineral or non-mineral character of land and the issuing of patents therefor, and it is asked whether the rights of the railroad company are to be left in that event to the mercy of the government. The same question might be asked with respect to the surveys which are necessary to fix the odd sections and to enable the company to locate any lands.

The answer to both questions is that the government has contracted by the act, in express terms, to make surveys and to issue patents, which implies the doing of all things necessary to enable it to issue the patents, and the other provisions of the act are to be construed upon the assumption that these are binding obligations.

Whether they are enforceable by suit, (as to which see *United States* v. *Jones*, 131 U. S. 1,) is another matter. It is likewise immaterial in this case to know whether the decision of the Secretary of the Interior as to the mineral or non-mineral character of land is final or subject to judicial review.

The essential point is that the act contemplates a procedure which involves the issuing of patents and the investigation prior thereto, by somebody in some way, of the facts necessary to determine whether the land applied for falls within the terms of the act of Congress; in other words, whether, among other things, it is "mineral land."

The delay of the government in issuing a patent does not affect the power of the railroad company to assert, meantime, by possessory action, as in *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, its rights in lands which are in fact not mineral, but such delay cannot have the effect of authorizing it to recover, as is attempted at bar, lands which it admits to be mineral.

VII. While the Secretary of the Interior may make use of the public surveys, no conclusive effect is to be given to them either in favor of the government or against the government in determining whether lands are mineral or non-mineral. The reason for this and the character generally of the government surveys are disclosed very clearly in the opinion of Secretary Smith in *Winscott* v. *Northern Pacific Railroad*, 17 Land Dec. 274, where he says (pp. 275 *et seq.*): "The act of May 18, 1796, (1 Stat. 464,) now embodied in section 2395 of the Revised Statutes, prescribed many of the rules which are yet followed in surveying the public lands. It directed that the lands be laid off into townships 6 miles square, by running lines north and south, to be crossed by others running at right angles to them. The corners of each township were to be marked, and also each distance of a mile between the corners. The townships were to be divided into sections of 640 acres each, by running through the townships, each way, parallel lines 'at the end of every 2 miles; and by making a corner on each of said lines at the end of every mile.' Thus the outlines only of every other section were run, the corner of the intermediate section only being then fixed, and the outline thereof being protracted on the plat when made.

"Subsequently Congress directed that the lands be sold by half and quarter sections, and the surveyor-general was directed to thus divide the sections by north and south and east and west lines protracted upon the plats, it not being intended that he should 'run the subdivisional lines.' 2 Public Land Laws, 820; 854.

"Subsequently the Commissioner of the General Land Office issued a 'manual of surveying instructions' for the guidance of surveyors and their deputies. By this manual it

was directed that the outlines of each section be actually surveyed and the quarter-section corners established on the line as run. This manual has been legalized by act of Congress and is 'deemed to be part of every contract for surveying the public lands.' Rev. Stat. § 2399. As the public lands are only surveyed by contract they must necessarily be surveyed according to the manual, and thus, indirectly, the law requires that the outlines of each section should be actually surveyed.

"It results, therefore, that only the section lines or rather the outlines of the sections are run, the minor subdivisions not being surveyed in the field. The surveyor general in making his plats merely protracts these imaginary subdivisional lines in red ink upon the plats, connecting the opposite corners both ways, thus making the quarter sections; these, in turn, are again subdivided in like manner into quarter quarters or 40-acre tracts. Public Domain, 184. So that there is no law nor instructions requiring the surveyor, in his line of duty, to go anywhere than along the borders or outlines of the section he is surveying.

"By the same act of 1796, Rev. Stat. § 2395, Seventh, it is provided that 'every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge, all watercourses over which the line he runs may pass, and also the quality of the lands.'

"It is under this last provision that the report of the surveyor is made, which creates the presumption referred to.

"The surveyor, as a public officer, must follow the law, and that does not require him or afford him an opportunity to pass over the interior or body of the section he is surveying. He is directed to report the situation of 'all mines' that 'come to his knowledge,' and all watercourses over which 'the line he runs may pass.' He is not directed to search for mines or watercourses, but to report such as come to his knowledge whilst passing along the outlines of the section he is surveying. This is all he is required to do in the discharge of his duty. The law nowhere says that the report thus made is to be conclusive of even matters of fact reported; and certainly it would be contrary to all rules of sound reason to hold that such a

report is to be conclusive or even presumptive negatively — that is, of matters not reported.

"The most that can be said in favor of such report is that it raises a presumption as to the belief or opinion of the surveyor as to the matters of fact affirmatively stated by him. These instructions to the surveyor relate only to his report of 'mines.' He may or may not report that the lands indicate that valuable minerals are hid beneath their surface. Such indications are not 'mines.' A report to that effect, not being required by the law, is optional with him. Being something beyond his required duty, no conclusion of law arises from it. It is merely a statement of the officer, more or less valuable according to his opportunities of observation, and ought not to preclude the assertion of any right or the proof of the facts of the case as they really exist.

"It has been seen how limited are these opportunities of observation; the officer merely passing over the confines of the section, with his attention more directly absorbed by the duties of his scientific profession and the necessity for absolute accuracy in his courses and distances. Even were he a geologist or mineralist, his opportunities of observation along the course of his lines would be the scantiest; and beyond those lines, or on either side of them, his duties do not carry, but prohibit him from going. So that, practically, the interior of the section, or that portion thereof not immediately along the line being run, is beyond the observation or knowledge of the surveyor, and his opinion in relation to the same cannot be of much value. So that the report of the surveyor must necessarily constitute but a small element of consideration when the question is as to the true character of the land.

"And this has been the ruling of the Department and the courts for a long time. See *Cole* v. *Markley* (2 Land Dec. 847), where the subject is ably and exhaustively discussed and numerous authorities cited to sustain the views herein stated.

"In the case cited, it was a question as to the effect of report of the surveyor that certain lands were salines. After reviewing all the decisions and discussing the subject at great length, Secretary Teller said, on p. 851:

Argument for Plaintiffs in Error.

"'These cases seem to be decisive of the issue raised in the case at bar, and to establish the rule that a notation of "saline" on the plats, or its omission, is immaterial, and that no land but that in fact saline is reserved from agricultural entry. . . . The character of the lands is a question of fact, to be determined by due proofs, and the qualified party who first settles upon them, or applies to enter them, and otherwise conforms to the law, has priority of right when their non-saline character is determined.'

"To the same effect is the case of *Robinson* v. *Forrest*, 29 California, 317, 321; *Merrill* v. *Dixon*, 15 Nevada, 401, 405, *et seq.*; *Morton* v. *Nebraska*, 21 Wall. 660, 674. The surveyor's report in this case, therefore, has but little weight with me in its determination."

VIII. It is asked how lands, in fact mineral, but not known to be mineral, are to be dealt with under the homestead, preëmption and town-site laws. All of these laws provide for the issuing of patents, and two points are clear; first, that the discovery of minerals after patent does not defeat the title. It was so decided with respect to a town-site patent in *Davis* v. *Weibbold*, 139 U. S. 507, and the principle is applicable to the case of a homestead settler or preëmptor. It is equally clear that lands known to be mineral cannot be entered for town-site, *Deffeback* v. *Hawke*, 115 U. S. 392, or by a preëmptor or homestead settler, *Morton* v. *Nebraska*, 21 Wall. 660.

The only question that remains to be decided by this court is whether the discovery of minerals after preliminary entry and before final certificate will defeat the right of the settler to perfect his title and obtain a patent as of agricultural lands. This question the Department of the Interior has uniformly answered, and it is submitted correctly, by holding that if the land is discovered to be mineral before the settler has acquired a vested interest and become entitled to his final certificate, he must take the land, if at all, and pay for it as mineral land. *Rea* v. *Stephenson*, 15 Land Dec. 37; *Jones* v. *Driver*, 15 Land Dec. 514; *Harnish* v. *Wallace*, 13 Land Dec. 108. It is well settled that occupation and improve-

ment of the public lands do not confer any vested right on the preëmptor prior to final entry and payment. *Frisbie* v. *Whitney*, 9 Wall. 187.

In *Colorado Coal Company* v. *United States*, 123 U. S. 307, 328, Mr. Justice Matthews, referring to the case of a preemptor, said that "the question must be determined according to the facts in existence at the time of the sale;" that is, when the preëmptor makes the only entry that is required of him and pays the purchase money.

But these questions arising under the preëmption act, which provides, Rev. Stat. § 2258, that "lands on which are situated any known mines and salines" shall not be subject to preëmption, and under the homestead act, Rev. Stat. § 2289, which allows the homestead settlement of lands "subject to preëmption," and, therefore, of those on which are situated no known mines or salines, are not involved in the case at bar, although the analogies are interesting.

I submit that the Northern Pacific Railroad Company cannot claim title to unpatented land which it admits to be mineral in fact, and that the judgment of the Circuit Court should therefore be reversed, with directions to sustain the demurrer and dismiss the complaint.

Mr. Edwin W. Toole and *Mr. William Wallace, Jr.*, filed a brief for plaintiffs in error.

Mr. Martin F. Morris and *Mr. W. W. Dixon* filed a brief for plaintiffs in error.

Mr. Assistant Attorney General Shields filed briefs for plaintiffs in error.

Mr. James McNaught and *Mr. A. H. Garland* filed briefs for defendant in error.

Mr. A. T. Britton, *Mr. A. T. Browne* and *Mr. George R. Peck*, by leave of court, filed a brief on the part of the Atlantic and Pacific Railroad Company.

Argument for Defendant in Error.

Mr. James C. Carter for defendant in error.

I. The whole question turns upon the definition of mineral lands. It is only lands "not mineral" which are granted by the act. No mineral lands can pass by it.

(1) The decision of the Secretary of the Interior as to what are mineral lands, whether evidenced by issuing a patent or otherwise, is not final; and no method is provided in the act for determining what such lands are. Whether any lands described in a patent are really conveyed by it is, in any disputed case, a question of fact to be determined by an inquiry whether they conform to the description in the statute.

If the Secretary should issue a patent for lands confessedly mineral it would be absolutely void, and open to collateral attack, just as much as a patent issued by him for lands previously sold or otherwise disposed of.

(2) Practically, however, his decision would be generally effective, for it would be presumed to be correct unless the contrary were clearly shown.

(3) But he is to give a patent only for such lands as are "not mineral," and, in order to discharge his duty, he must know what is intended by the act as lands "not mineral;" in other words, he must have a definition to apply, and must apply it. Thus the whole question turns upon definition.

(4) This being so, the definition must have regard to the apparent condition of the lands at some particular time before patent; for he is to apply it in order to discharge his duty.

(5) The title to the lands, even after the patent is granted, must always be subject to the infirmity arising from the possibility of a question whether the lands, at the time to which the definition looks, were mineral or otherwise. This is a small evil. The company could not desire a patent for lands obviously mineral at that time, for it wishes a valid patent; nor would the Secretary be likely to issue a patent for such lands.

(6.) But if the patent were subject to the infirmity arising from the possibilities of a discovery of minerals at any period

in all future time, the condition would be intolerable and certainly in conflict with the legislative intent.

II. The next question is, what is this time to which the definition relates? Plainly the time when Congress intended the title to vest. Congress intended that at this point of time the grantee should have useful, beneficial possession. And what this time is has been determined in a multitude of cases. It is the moment when the lands can be identified; that is, the moment when the route is definitely located.

It has been suggested by the decision in this court in *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, 640, that if the lands are not then surveyed, there is a possibility that the time may be deferred until such survey may be had; but it would seem that, in such case, the survey ought to describe the character of the lands, whether mineral or not, as it was when the route was located; otherwise the government could, by deferring its survey, postpone the performance of its obligation indefinitely, and the transaction would be robbed of its character as a contract.

(1) This disposes of the objection started on the part of the government that when the definite location is made the government may have no means of knowing whether the lands are mineral or not, for want of a survey. Let it take such time as it needs for this purpose, but not change the right of the other party by its own delay. If when the survey is made the time of location is regarded in ascertaining the character of the lands no harm can result and justice is done to both sides.

(2) Mr. McNaught's briefs have fully shown that this view is the only one consistent with reason, with the whole legislative and administrative treatment of the subject, and, what is more to the purpose, that numerous decisions of this court absolutely require it. This court has decided in more than one case that on the completion of definite location the grant ceases to be a float, and actually operates on the territory of the earth, giving the grantee a right of actual possession, so that it can maintain ejectment. To yield to the view of the plaintiffs in error would involve the reversal of these decisions;

for, as the plaintiff in ejectment must establish affirmatively a title in himself or fail, he would necessarily fail, unless it would be sufficient for him to show, that according to the then appearance of the land, it was not mineral. If any subsequent discovery in respect to its character might show that it was mineral, within the meaning of the grant, it would follow that the time for ascertaining their character had not arrived, that the lands could not be identified, and that the grant was still a float and nothing more.

(3) It might indeed be suggested that although the title vested at the time of definite location, it vested subject to a condition subsequent, that it should fail upon the discovery of its mineral character. This must be promptly rejected. It does, indeed, vest subject to a condition subsequent; but that condition is, and only is, that the grantee shall pay the consideration for the lands by building the road.

And the notion of the suggested condition subsequent would be otherwise repelled. It would reintroduce the perpetual infirmity of title; a thing which never could have been intended. The issuing of the patent could not nullify the condition, for, if it could, it would give a final judicial character to the determination of the Secretary, and, should he issue a patent for lands notoriously mineral at the time of the location of the route, would make that patent unassailable.

III. There is another and distinct aspect in which the whole argument may be presented. The transaction between the government and the grantee company is in every sense a contract. The argument of the plaintiffs in error wholly denies to it this character.

(1) Nothing can be plainer than that the government promises to convey certain lands by way of remuneration for the building of the railroad. It agrees to convey, or rather conveys, to the company a present interest in these lands, not effectual indeed, at first, but becoming effectual upon the location of the route. This interest is subject to a condition subsequent that the road shall be built; and when that condition is performed the title is to be confirmed (not created) by the issuing of a patent. The agree-

ment to build the road may not indeed be enforceable by suit, the method provided for its enforcement being the penalty which the company comes under of losing all its labor and expenditure unless it completes the road. The obligation of the government to give the patent, however, is, in its nature, enforceable by suit, the only reason why it cannot be so enforced being that the sovereign is not liable to suit. But we may easily suppose that the government was liable to suit for the specific performance of the promise to give a patent. Existing statutes, indeed, come very near making it so liable, and it was by a divided court only that it was held in this court that such statutes did not apply to a suit for the specific performance of the government's agreement to convey land.

(2) This view enables us very easily to demonstrate that the notion that what lands are "not mineral" depends upon their apparent condition at the time of the issuing of the patent and is determinable only by the patent, is wholly erroneous. Let it be supposed that the road has been completed and patent applied for, and that the secretary refuses to issue one on the alleged ground that the road has not been completed according to the conditions, and that at that time, as well as previously, the lands were, according to all appearances, not mineral, so that if the completion of the road had not been disputed the government would have been bound to issue a patent for them. The company now files its bill in a district court of the United States for a specific performance, in which the character of the lands is shown, and the dispute turns upon the question of whether or not the road was completed at the time of the demand for the patent. The court finds that it was not, and dismisses the bill, and an appeal is taken to the Supreme Court of the United States. That court decides the other way — determines that the Secretary ought to have issued the patent when it was demanded, reverses the decree below, and orders a decree to be entered for the company. The company has a decree entered in its favor, and presents a copy of it to the Secretary of the Interior, and demands its patent. Pending the appeal, however, further explorations had disclosed the fact that the land was really

mineral, and the Secretary refuses the patent on that ground. According to the argument of the plaintiffs in error his refusal is justified and required — that is to say, that the wrongful refusal of the government to perform its own obligation has had the effect of effacing the obligation itself!

(3) The only way in which this *reductio ad absurdum* can be avoided is by at once admitting that there must be some time fixed upon before the issue of the patent at which it is to be determined whether the government is bound to issue it, and that the character of the lands is to be determined as of that time, so that the right of the company cannot be injuriously affected by any refusal or delay by the government after that time. This view might be expressed by saying that the government was bound to issue the patent on the completion of the road, or within a reasonable time thereafter, and that the character of the lands was to be determined at the one time or the other, whichever were adopted. But neither of these views would be at all practicable. The second is wholly indefinite, and would leave a question of fact open which there is no means of determining, and which the statute never intended. The first is equally inconsistent with the contract, for that does not contemplate that the company is to be deprived of the useful possession of the land until the time when it is to receive its patent. If this were so it would never have been said that the title vested under the language of the act when the route was definitely located, but was subject to a condition subsequent until the patent was issued. The statute itself, the reason of the thing, and all the adjudications, assume that there is a useful, beneficial right of enjoyment intended and secured to the company long before the time for the issuing of the patent.

(4) It may be urged that the government must certainly have a reasonable time in which to make an examination of the lands in order to know what the character of them is, and that the character of the lands is not to be finally determined until the lapse of such reasonable time, and that the vesting must be postponed until that time. But this in like manner denies to the transaction the character of a contract. Such

examination would be the act of the government alone, and could be deferred or protracted at its pleasure. Of course, in such case, it would be the obligation of the government to make such examination as speedily as possible, and yet if it deferred or protracted the performance of that obligation the character of the lands might meanwhile change, and thus one party to the contract might, by its own wrongful delay in performing its obligation, relieve itself altogether from such performance.

In every contract there must be a time when the obligations imposed by it ripen and become enforceable. An obligation which does not mature at some definite time is no obligation at all.

It is reasonable enough and very proper that the government should make an examination as carefully as it may choose before issuing its patent, and such examination may cause great delay. It is often the case that delays occur in the performance of contracts, but who has ever heard that it could be within the power of one party to a contract, by his own delay, to affect the rights of the other, or relieve himself from his own obligations? The rights of both are preserved and no difficulty will arise if, in making the examination respecting the character of the lands, the moment when the title is intended to be vested is taken as the one to be regarded.

(5) The policy of the government to reserve mineral lands should not be magnified beyond its real importance and intent. That policy has not been, for a long period of years, in any way similar to the ancient policy of European nations of reserving the precious metals for themselves. The underlying idea of that policy was that the precious metals should never be parted with by the government, but be forever kept for the uses of State. This view has long been abandoned by the government of the United States, if, indeed, it was ever entertained. The public lands are thrown open, like all others, for sale or other disposition to private individuals; no careful exploration of them is made for the purpose of accurately separating such as contain mineral wealth. It must necessarily be that lands will often be disposed of as if

they were agricultural, but will subsequently turn out to possess mineral wealth. The only consequence of this is that in some instances individuals may obtain valuable mineral lands for something less than their real worth; but the instances will not be very frequent, it being usually true that the labor expended in extracting the minerals is equal to their value when extracted.

It is very plain that Congress regarded the opening up of the Territories of the nation by means of railroads as a matter far superior in importance to that of husbanding mineral lands by a careful segregation. It has never provided the means by which such segregation could be made. The immense dispositions of public lands heretofore made have not been preceded by any thorough explorations. If it had been intended, in making these railroad grants, to carefully discriminate beyond the external appearances presented at the time the grants were made between mineral and non-mineral lands, suitable provision would have been framed for such purpose, and the vesting of title would have been deferred until the results of the examination had been made known.

IV. There is one view conspicuously presented by the government briefs not calculated to induce calm judicial consideration. It is that great corporations have "gobbled" up nearly the entire body of public lands, and that it is time to call a halt.

A view which excludes the obligations of contract, and even any obligation at all, is incapable of being dealt with by judicial reasoning. The Northern Pacific Railroad has been built upon the solemn promise of the government to pay a stipulated consideration. Any disposition to withhold that stipulated consideration will certainly not be indulged in this tribunal. It would deserve the condemnation which Mr. Chief Justice Marshall once bestowed upon a somewhat similar attempt: "Such conduct would be disreputable in a private individual, and a court of equity would interfere to prevent it."

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

This action is brought for the possession of certain parcels or lots of mineral land claimed by the plaintiff below — the defendant in error here — as embraced in the grant of the United States of July 2, 1864. The facts constituting the claim of the plaintiff are set forth at length in the complaint, and to their sufficiency the defendants demurred as not constituting a cause of action, or entitling the plaintiff to the relief prayed. The lots are there conceded to be mineral lands, and the grant of the government applies in terms only to lands other than mineral.

To remove any doubt of the intention of the government to confine its concession to lands of that character, the grant is accompanied with a proviso declaring that all mineral lands are *excluded* from its operations. And as if to cut off every possible suggestion by any ingenious and strained construction, that mineral lands might be reached under the legislation giving vast tracts of public lands to States and private corporations, under the pretence of aiding public improvements, a joint resolution was passed by Congress on January 30 of the following year, declaring "that no act passed at the first session of the Thirty-eighth Congress [that being of the year 1864] granting lands to States or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant." 13 Stat. 567. This provision should be borne in mind when the statement is made, as it is, that there has been no reservation of mines or minerals to the government.

No part of the contemplated road or telegraph line of the Northern Pacific Railroad Company had at the passage of this joint resolution been constructed or commenced, and on the authority of the case of that *Company* v. *Traill County*, 115 U. S. 600, its provisions are to be deemed an amendment of the original act, and as operative as if originally incorporated therein.

The action being for the possession of lands conceded to be

mineral, under the act of Congress of July 2, 1864, it would seem that the simple reading of the granting clause and its proviso and the joint resolution mentioned would be a sufficient answer to the complaint, and a sufficient reason to sustain the demurrer without further consideration. But the plaintiff's counsel appear to find in the fact which they allege, that the lands were not known to be mineral at the time the plaintiff, by the definite location of the line of its road, was able to identify the sections granted, a sufficient ground to avoid the limitations of the grant and the prohibitions of the proviso and joint resolution.

The grant was of 20 alternate sections of land, designated by odd numbers, on each side of the road which the plaintiff was authorized to construct — a tract of 2000 miles in length and 40 miles in width constituting a territory of 80,000 square miles. It is true the grant was a float, and the location of the sections could not be made until the line of the proposed road had become definitely fixed. The ascertainment of the location of the sections in no respect affected the nature of the lands or the conditions on which their grant was made. If swamp lands, or timber lands, or mineral lands previously, they continued so afterwards.

It is also true that the grant was one *in præsenti* of lands to be afterwards located. From the immense territory from which the sections were to be taken, it could not be known where they would fall until the line of the road was established; then the grant attached to them, subject to certain specified exceptions; that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared in the creation of the grant. The

location of the sections and the exceptions from other causes in no respect affected that one, or limited its operation. There is no language in the act from which an inference to that effect can be drawn, in the face of its declaration that all mineral lands are thereby "excluded from its operations," and of the joint resolution of 1865 that "no act of the Thirty-eighth Congress, [that is, of the previous session of 1864,] granting lands to States or corporations, to aid in the construction of roads or for other purposes, shall be so construed as to embrace mineral lands." The plaintiff, however, appears to labor under the persuasion that only those mineral lands were excepted from the grant which were known to be such on the identification of the granted sections by the definite location of the proposed road and the ascertainment at that time of the exceptions from them of parcels of land previously disposed of; and that the want of such knowledge operated in some way to eliminate the reservation made by Congress of the mineral lands. But how the absence of such knowledge on the ascertainment of the sections granted and the parcels of land embraced therein previously disposed of, had the effect or could have the effect to eliminate the reservation of mineral lands from the act of Congress, we are unable to comprehend. Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein; and yet the reverse is the experience of every day. The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble, or granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the res-

ervation of quarries or mines in the cases supposed. And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any severable products thereof, whether minerals or quarries contained therein, and whether known or unknown; yet such must be the contention of the plaintiff or its conclusion will fall to the ground. The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport, of the cases of *St. Paul and Pacific Railroad Company* v. *Northern Pacific Company*, 139 U. S. 1, 5, and *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241, 247, cited by the plaintiff. In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a preëmption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold or silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold the reservation of the minerals then undiscovered would be eliminated? Would any one uphold the reasoning, or the doctrine, which would assert such a conclusion? And can any one see the difference between the case now before us and the case supposed? Not a word was said or suggested in the cases cited about the elimination of the reservation for that cause; and not only in the cases cited by the plaintiff, but in a multitude of other cases, almost without number, a like silence

was observed. In none of them was it ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of the minerals then undisclosed. The grant did not exist without the exception of minerals therefrom, and Congress has declared, in positive terms, that the act shall not be construed to embrace them, and there is nothing in any of the cases cited in the plaintiff's contention which indicates in the slightest degree that the original exception was subsequently qualified.

It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from preëmption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultural lands, in odd sections, nearest to the line of the road, might be selected.

There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located they could not pass under the grant. Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that *at the time of the location* of the road other lands should be excepted, viz., those previously sold, reserved, or to which a homestead or preëmption right had attached.

It is difficult to perceive the principle upon which the term

"known" is sought to be inserted in the act of Congress, either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee and enhance the value of its grant. But to change the meaning of the act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited. Besides the impossibility, according to recognized rules of construction, of incorporating in a statute a new term — one inconsistent with its express declarations — there are many reasons for holding that the omission of the word "known," as defining the extent of the mineral lands excluded, was purposely intended.

The grant to the railroad company was, as we have already mentioned, two thousand miles in length and forty miles in width, making an area of eighty thousand square miles, a territory nearly equal in extent to that of Ohio and New York combined. This territory was known to embrace in its hills and mountains great quantities of minerals of various kinds, and among others those of gold and silver. It was sparsely inhabited and in many districts of large extent was entirely unoccupied. The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862, c. 120, 12 Stat. 489, and of July 2, 1864, c. 216, 13 Stat. 356, making grants to the Union and Central Pacific Companies; act of July 4, 1866, c. 165, 14 Stat. 83, making a grant to the Iron Mountain Railroad Company; act of July 13, 1866, c. 182, 14 Stat. 94, making a grant to the Placerville &c. Railroad; act of July 25, 1866, c. 242, 14 Stat. 239, making a grant to the California and Oregon Railroad, sections 2 and 10; act of July 27, 1866, c. 278, 14 Stat. 292, making a grant to the Atlantic and Pacific Railroad and to the Southern Pacific Railroad; act of March 2, 1867, c. 189, 14 Stat. 548, making a grant to the Stockton and Copperopolis Railroad; act of March 3, 1871, c. 122, 16 Stat. 573, making a grant to the Texas Pacific Railroad. In all of these cases, and in all grants

of public lands in aid of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such a grant been held to pass them. Patents issued after an examination and determination of the fact by the government whether portions of the land embraced in such grants did or did not contain other minerals have been held as conclusive in subsequent controversies, and of this we shall speak more fully hereafter; but grants in aid of railroads (and we speak of no other grants) before such determination and issue of a patent have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case.

When the act was passed making the grant to the plaintiff, it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful explorations, and it is not reasonable to suppose that Congress would have left that important fact dependent upon the simple designation by the plaintiff of the line of its road, and the possible disclosure of minerals by the way, instead of leaving it to future and special explorations for their discovery. To suppose that Congress intended any such limitation would be to impute to it a desire that its exclusion of minerals from the grant should be defeated, which it is impossible to admit. It is conceded that in the interpretation of statutes like the one before us, reference may be had not only to the physical condition of the country and its surroundings, but that its political conditions and necessities may also be considered. The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens, engaged in the struggle, looked forward hopefully and confidently to this source for relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have de-

liberately designed in this hour of sore distress and fearful pressure upon their finances, to give away to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lie buried in the mineral regions covered by 80,000 square miles. They knew that the mineral belt over which the proposed railroad was to pass was almost entirely unexplored. They, therefore, retained from their grant the mineral lands, whether known or unknown, and left the discovery of the minerals to future explorations, and their disposition to future legislation. We can never admit that, at the time and under the circumstances upon which the grant was made, Congress intended that its clear words of exclusion of minerals should be interpreted to mean the exact reverse — that when it declared that "no act of Congress granting lands in aid of railroads" passed during the session of 1864 (the session at which the grant under consideration was made) should "be construed to embrace minerals," it meant that such act might be so construed. Never has it as yet fallen to Congress to deceive by its legislation and juggle in this way.

To incorporate the term "known" into the act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed. As justly observed by counsel for the defendant in their very able brief, "the reservation in the grant of mineral lands was intended to keep them under government control for the public good, in the development of the mineral resources of the country, and the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation and ultimately succumb to such terms, subject to such conditions, and amenable to such servitudes as it might see proper to impose. The government has exhibited its beneficence in reference to its mineral lands as it has in the disposition of its agricultural lands, where the

claims and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time."

Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject. In *Cole* v. *Markley*, (2 Decisions Dept. of the Interior relating to Public Lands, 847–849,) Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the notations of surveyors, and says: "Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land." The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the

Interior. Under their direction and supervision the actual character of the land may be determined and fully established. The effect of a patent issued by them under the authority of Congress, as to such matters, we shall presently consider. In the present case the mineral character of the lands in controversy is conceded. They are alleged in the complaint to be mineral lands containing gold and silver and other precious metals.

Nor is there any force in the averments that in November, 1868, the plaintiff listed the section embracing the mineral lands in controversy, with other sections, as portions of its grant, and filed the lists in the local land office at Helena and paid the receiver's fees for filing the same; and that the register and receiver accepted, allowed, and approved the list, and certified the same to the Commissioner of the General Land Office, and that no part of the fees has ever been refunded. The act of Congress does not provide that selections of the lands by the plaintiff, as a part of its grant, shall in any respect change its purport and effect and eliminate any of its reservations; nor does it empower the officers of the local land office to accept the list as conclusive with respect to such grant in any particular. There was, therefore, no obligation on the part of any one to refund to the plaintiff the fees paid on filing the list mentioned, when an attempt is made to do away with its supposed effect.

There is, in our opinion, no merit in any of the positions advanced by the plaintiff in support of its claim to the mineral lands in controversy. The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of all mineral lands is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants would compel a construction favorable to the grantor.

Some reference should be made here to the language used in the cases of *Deffeback* v. *Hawke*, 115 U. S. 392, and *Davis* v. *Weibbold*, 139 U. S. 507, as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the opinions

in both of the cases cited, must take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

The case of *Deffeback* v. *Hawke* arose in this wise: The plaintiff asserted title to mineral lands under a patent of the United States, founded upon an entry under the laws of Congress, for the sale of mineral lands. The defendant, not having the legal title, claimed a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on a portion of the public lands appropriated and used as a town site — that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose. And it was held by this court that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper could be obtained under the preemption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. These three cases, those under the preëmption and homestead laws and town-site act, were classed together. It was found that under the preëmption and homestead act lands containing known saline deposits and mines could not be purchased. In the town-site act it was provided that by virtue of its provisions no title could be acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws. And under the mineral act of Congress it was provided that in all cases lands valuable for minerals should be reserved from sale except as otherwise expressly provided. The court held that under those acts land could be purchased which was not known to be mineral; and from this the inference was drawn that only lands known at the time of the sale to be valuable for minerals could be excluded, and if they were not thus known to be valuable for minerals a sale might be had.

Opinion of the Court.

This was not a case arising upon a grant like the one under consideration at present; but, inasmuch as the law of Congress authorized lands valuable for minerals to be sold generally under the mineral act, and excluded from sale mineral lands when claimed for homesteads or preëmption or for town sites, it was thought that these conflicting provisions of law would be reconciled by simply excluding from the sale lands known at the time to be mineral. But that case has no bearing upon the present one involving the construction of an act of Congress declaring in express terms that no mineral lands shall be conveyed by the grant made.

The case of *Davis* v. *Weibbold* was an action on the part of a mineral claimant who had obtained a patent in January, 1880, of a parcel of land within the exterior limits of Butte town site, subsequently to the patent for the town site.

When the entry of the town site was had and the patent issued, and a sale was thereafter made to the defendant of the lots held by him, it was not known — at least, it does not appear that it was known — that there were any valuable mineral lands within the town site, and the question was whether in the absence of this knowledge the defendant, who claimed under the town-site patent, could be deprived by the laws of the United States of the premises purchased and occupied by him, because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer under whom the plaintiff claimed. The court said that the declaration that no title could be acquired under the provisions relating to such town sites and the sale of lands therein to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws, would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such was held not to be the necessary meaning of the terms used; in strictness they imported only that the provisions by which the title to the land in such town sites was transferred should not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon; but

that they were to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of Congress of mineral lands from grant or sale. Thus read, the court held that they merely prohibited the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar, or copper, which were known to exist on the issue of the town-site patent and to mining claims and mining possessions, in respect to which such proceedings had been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The patent for the town site was therefore held to cover minerals subsequently discovered in the lands patented. The patent was in law a declaration that minerals did not exist in the premises when it was issued, and the subsequent acquisition of minerals in the town site was within the specific authorization of the act of Congress that all valuable minerals should be open for exploration and sale. There is a marked distinction between that case, under the town-site law, and the present case, under a grant of Congress excluding mineral lands from its operation, although it is conceded that some of the language used is broader than the necessities of the case required. Yet the effect given to the town-site patent will be found not inconsistent with the views hereafter expressed in the present case.

Some effect is also sought to be given to the fact that Congress authorized the Northern Pacific Railroad Company to place a mortgage upon its entire property. Admitting that such is the fact, the conclusion claimed does not follow. Congress thereby only authorized a mortgage upon the property granted to the company, which was the lands without minerals. The mortgage could not cover more than the property granted. So also it is said that the States and Territories through which the road passes would not be able to tax the property of the company, unless they could tax the whole property, minerals as well as lands. We do not see why not.

The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property excluding the minerals could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land.

The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest States, and it must be strictly construed. It would seem from the frequency with which we have announced this doctrine that it should be forever closed against further question, but as the most extravagant pretensions are made in the plaintiff's construction of the present grant, we will venture to refer to one or two of the important judicial declarations on that subject.

The general rule, when grants relate to matters of public interest, is thus forcibly expressed by Chief Justice Taney: "The object and end of all government," said the Chief Justice, speaking for the court, "is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations." *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Pet. 420, 547.

In *Leavenworth Railroad Company* v. *United States*, 92 U. S. 733, this court said: "The rules which govern the interpretation of legislative grants . . . apply as well to grants of lands to States to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines to un-

dertake. . . . If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor."

In *Winona &c.* v. *Barney*, 113 U. S. 618, 625, speaking of the construction of legislative grants, the court said: "They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that titles to lands and to minerals in them shall be settled, and not be the subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended,

it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance.

It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

In *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640, 641, this court thus spoke of the Land Department in the transfer of public lands: "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive,

when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law."

In *Steele* v. *Smelting Co.*, 106 U. S. 447, 450, the language of the court was that: "The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

In *Heath* v. *Wallace*, 138 U. S. 573, 585, it was held that "the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department." And Mr. Justice Lamar added: "It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appro-

priated, or because not free from preëmption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight* v. *Land Association*, 142 U. S. 161, 178, as the "supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States," by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

In the case of the *Central Pacific Railroad Company* v. *Valentine*, 11 Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the

title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property."

It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required

of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company, to assert in the meantime, by possessory action, (as held in *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241,) its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein.

On the other hand, an affirmance of the judgment in this case would enlarge the grant of the government against its oft-repeated exception of mineral lands, and give to the plaintiff the vast mineral wealth of the States through which the grant passes. It would render the plaintiff corporation imperial in its resources — one that would far outshine "the wealth of Ormus and of Ind." And, as counsel justly observes, the same rule would apply to all our transcontinental railroads and give to them nearly all our mineral lands, when Congress has time and again declared that they should have no mineral lands, and that no act of Congress should be construed to give them any; and that they "in all cases shall be and are reserved exclusively to the United States unless otherwise specially provided in the act or acts making the grant."

It is unnecessary to pursue this subject any further. We will only observe that we do not notice the numerous assertions made in the argument of the plaintiff, as to what has been decided by this court and what is the settled rule in cases of railroad grants by Congress embracing mineral lands, the correctness of which we do not admit. The official reports will disclose wherein the errors lie sufficiently for the attainment of accuracy of statement in matters of judicial decision.

The plaintiff in this case, not having a patent, and relying solely upon its grant, which gives no title to the minerals within any of its lands, shows by its complaint no cause of action for the possession of the mineral lands claimed. The demurrer of the defendants should have been sustained, and judgment entered thereon in their favor.

It follows that the judgment of the Circuit Court in this case must be

Reversed and the cause remanded to that court with directions to sustain the demurrer of the defendants and enter judgment thereon in their favor with costs.

Mr. Justice Brewer, with whom concurred Mr. Justice Gray and Mr. Justice Shiras, dissenting.

I dissent from the opinion and judgment of the court in this case. The burden of the opinion seems to be that the magnitude of that which is supposed to pass by the grant, as construed by defendant in error, is so great that it cannot be believed that Congress intended to make such a donation; and, therefore, rules of decision, repeatedly affirmed and hitherto the settled law in the construction of such grants, are set aside and a new rule established, whether applicable to this grant alone, or also hereafter to be considered as applicable to the whole body of law in respect to public lands I know not, nor is it affirmed. I respectfully insist that the magnitude of the loss supposed to result to the government is a mere chimera of the imagination — *ignotum pro magnifico* — and that even if it be ever so great, it furnishes no ground for a departure from settled rules and established law.

Dissenting Opinion: Brewer, Gray, Shiras, JJ.

The grant of land to the Northern Pacific Railroad Company is enormous; no one disputes that; but before being appalled by its magnitude it is fitting that a comparison be made between it and others, accepted and construed without fear of results. If it be said that its total area is vastly in excess of that of any other Congressional grant, it must at the same time be remembered that the length of the road, in aid of whose construction it was made, is also greatly in excess of that of any other road theretofore or since thus aided. The only fair method of comparison is that by mile. Tested in that way it is the same as other grants. Texas Pacific Railroad grant, Act of March 3, 1871, c. 122, 16 Stat. 573. And it is only twice as large as that to the Union Pacific Railroad and the Central Pacific Railroad, and they in addition were aided by the bonds of the nation to the amount of $16,000 a mile, with an increase (in the mountainous portions of the road) to $32,000 per mile. I affirm that the value of the grant, unquestioned hitherto, to the Union Pacific Railroad and the Central Pacific Railroad Companies was greater per mile than that to the Northern Pacific Railroad Company, and that this defendant in error would at any time have been glad to make an exchange therefor mile for mile.

It is true that the country through which this proposed road was to run was, in 1864, an unknown and uninhabited region, but I deduce therefrom a conclusion the very opposite of that drawn in the opinion of the court. The corporation, the recipient of this grant, would never have moved in the construction of the road if it had not supposed that, upon the definite location of its line, it would receive, in accordance with the rulings of this court, an absolute and unquestioned title to all the lands within the limits of its grant, at that time not taken by homestead or preëmption right and not known to be mineral lands, and thus excepted from the operation of the grant; neither would the mortgage placed upon the road and its land grant, as authorized by the act of Congress, have ever successfully appealed to the confidence of the possessors of money except upon like belief. The limits of the place lands were fixed by the terms of the act, and also the limits of the in-

demnity lands. If at the time of the definite location there was no certainty as to what lands within the place limits passed by the grant, there was also an equal uncertainty as to what lands within the indemnity limits could be selected, and an absolute impossibility of making any selection because of ignorance as to the extent of the loss in the place limits; and when it is affirmed that at the time of the definite location there was no certainty as to whether any lands passed by this grant either within the place or indemnity limits, the assertion is necessarily that the mortgagees were invited to loan their money upon a security, of the existence of any part of which there was no certainty, and could not be any certainty, until after Congress by a subsequent act had appropriated money for an exploration, of which there is no hint in the granting act. Such an assertion is equivalent to saying that Congress invited parties to lend upon real estate security, the title to no acre of which no act of mortgagor or mortgagee could ever certainly secure. It may be that in the far days to come (and thirty years have passed since the passage of the act without any effort on the part of Congress in that direction) it shall suit Congress to appropriate money for an exploration of the character of these lands, and it may then be found that every quarter section, though not known to be when the line was definitely located and the road fully constructed, is in fact possessed of minerals, and therefore excepted from the operation of the grant. I respectfully submit that it ought not to be imputed to Congress that it invited a loan on securities which might turn out to be but apples of Sodom — beautiful to the eye, but ashes to the taste.

Much is said of the possible mineral wealth within the area of this grant, and we are told that, when the government was in the financial stress caused by the war, it is not to be supposed that Congress would willingly throw away this enormous mineral wealth; but surely that suggestion has not even the semblance of force. There has been no reservation of mines or minerals to the government. On the contrary, the entire purpose in respect to mines has been and is expressed in the two rules: First, ordinary lands are given to

all willing to make homesteads of them, and sold to others for $1.25 per acre, and when conveyed carried all mines and minerals beneath the surface; second, as to the ungranted and still public lands, they are open to exploration by individuals, and the discoverer of mines is entitled to purchase the land, embracing the mines, on the payment of $5 per acre, if the mine is a lode or vein, and $2.50 an acre if it is a placer mine.

Obviously no visions of an undiscovered "wealth of Ormus or of Ind," out of which the debts of the war were to be paid, floated before the eyes of Congress when this legislation was pending and prompted the exception of mineral lands. The only purpose was to secure to the individual explorer an opportunity to search for the as yet undiscovered mines. But that purpose was no more significant and no stronger than that to secure to the individual emigrant the opportunity to acquire a homestead, or to preëmpt a farm. And this right, as always held, expired when the definite location of the road was made. Under what theory can it be said that it was more important and more within the thought of Congress to give time to the individual to hunt through the country in pursuit of mines than to the emigrant pioneer to locate a home or purchase a farm?

But it is said that Congress never meant that this vast mineral wealth should pass to this corporation, and that the individual must contract with that corporation for the purchase of any mine. And yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared, in effect, that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto. The concession that a patent conveys the mines as incident to the conveyance of the land is a concession that the language of the grant, excluding from the operation of the grant mineral lands, is not to be taken absolutely; and leaves

the only difference between the opinion of the court and my own that of the time as to which the identification of the lands as mineral lands is to be had.

Coming to the matter of identification, the rule uniformly laid down heretofore — in the construction of all railroad grants, including those with like exception of mineral lands — has been that the identification takes place at the time of the definite location. Out of the multitude of cases in which this doctrine has been laid down I quote from one in which this very grant to the Northern Pacific was under consideration.

In *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 5, it was said:

"As seen by the terms of the third section of the act, the grant is one *in præsenti*; that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preëmption or other disposition previous to the time the definite route of the road is fixed. . . .

"This is the construction given to similar grants by this court, where the question has often been considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Leavenworth, Lawrence, &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Missouri, Kansas, &c. Railway* v. *Kansas Pacific Railway*, 97 U. S. 491; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. . . .

"It is contended that they are qualified, and restricted by the provision of the fourth section, that whenever twenty-five miles of the road are completed in a good, substantial, and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road.' This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with

the completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected. See on this point *Langdeau* v. *Hanes*, 21 Wall. 521; *Wright* v. *Roseberry*, 121 U. S. 488, 497."

I refer also to the case of *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 247. That was a case involving the construction of the grant to the Central Pacific Railroad Company, which grant, as the one before us, excluded from its operation mineral lands; no patent had issued for the particular tracts; the plaintiff claimed by lease from the Central Pacific Railroad Company, and brought an action of ejectment against the defendant in possession. The trial court charged the jury that, although no patent had been issued, on the definite location of the line of the road, the title to the lands within the place limits passed to the company unless they had been previously sold, reserved, or otherwise disposed of by the United States, or a preëmption, homestead, swamp-land, or other lawful claim had attached to them, or they were known to be mineral lands or were returned as such. A judgment rendered in favor of the plaintiff upon such an instruction was sustained by this court, and it was distinctly held that a full title had passed to the railroad company. There was no pretence in that case of any ruling as to the character of the land by the Interior Department or any determination by the Secretary of the Interior that this was not mineral land. In disposing of the case this court said:

"By the terms of the act making the grant the contention

of the defendant is not supported. Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered.

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses, they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence & Galveston Railroad* v. *United States*, 92 U. S. 733.

"In *Wisconsin Central Railroad Co.* v. *Price County*, 133 U. S. 496, 507, referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this court for consideration at different times, and of the title they passed we said: 'The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant.'

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a 'float;' but, when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the meantime under its provisions appropriated to other purposes.

Dissenting Opinion: Brewer, Gray, Shiras, JJ.

"That doctrine is very clearly stated in the *Leavenworth case* cited above, where the language of the grant was identical with that of the one under consideration, and the court said: 'There be and is hereby granted,' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the State of Kansas, (the grantee named,) though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specifically described them.

"The terms used in the granting clause of the act of Congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest."

It is a misconstruction of the decision to say that the court only held that an action could be maintained for the possession of lands not mineral. For it was neither alleged nor proved that the lands were not mineral, but simply that at the date of the definite location they were not known to be mineral. The same allegation and proof could have been made in this case if the action had been brought two years before the discovery of the mineral and four years after the definite location, and the court then, under the authority of the *Tarpey case*, would have been compelled to sustain a judgment in favor of the company, declaring it the owner of the land, while now it enters the very opposite judgment that the company is not the owner. So, in the *Tarpey case*, if the day after the opinion of this court had been announced some enterprising explorer had discovered a mine of value within the limits of the tract in controversy in that case, following this opinion the court would have been compelled to hold that

the company had no title, never had had any title, although it had affirmed a judgment declaring that it had the title. It is impossible to uphold such a difference of ruling on anything equivalent to a condition subsequent. For as held in *Schulenberg* v. *Harriman*, 21 Wall. 44, no one can take advantage of the non-performance of such a condition but the grantor or his heirs or successors, and the government has taken no action in respect to the title to this tract since the discovery of the mineral.

These decisions could be supplemented by a score and more in which the same doctrine has been affirmed and reaffirmed until, as said in the quotation first above made, "it is so well settled as to be no longer open to discussion." All these authorities are in effect wholly overthrown by this decision, for there is no identification of the lands passing by the grant unless it is known and can be known at the time what lands pass. Take any particular mile of the road; on either side of the line, as located, there are twenty alternate sections within the place limits. By the rule now laid down, the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location an exploration develops the fact of minerals, and then it is declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non-mineral lands, you say in effect that there is no identification of a single tract. This court has hitherto said that when the line of definite location was fixed the lands granted were identified. That means, if it means anything, that the particular tracts which passed by the grant were disclosed. Now it is said that they are not disclosed, and cannot be identified as passing by the grant until it shall be affirmatively proved that they do not contain mines, or the Secretary of the Interior has determined that they are not mineral lands. There is, therefore, at the time no identification of the particular lands which

pass, as has always heretofore been declared. It is true, as suggested, that it is no uncommon thing to make a grant of lands with a reservation of mines or minerals, and if such were the reservation in this case there would be no question as to the matter of identification; but there is in this case no reservation of mines or minerals; no land passes with a reservation of anything underneath the surface. There is simply an exception of mineral lands from the operation of the grant, and there has got to be something to separate and distinguish one class of lands, to wit, mineral lands, from the other, non-mineral lands, before there is any identification as to any lands. So, unless there is that which, at the time of the definite location, distinguishes lands non-mineral from lands mineral, there is no identification of any particular tract as passing under this grant.

In the case of *Davis's Administrator* v. *Weibbold*, 139 U. S. 507, 524, this court said:

"It would seem from this uniform construction of that department of the government specially entrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and State, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

And again on page 519:

"The exceptions of mineral lands from preëmption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvements are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

It is probably unnecessary, in view of this declaration as to the uniform construction by the Land Department, to refer to

any specific rulings therein, and yet the following illustrations may not be amiss: By the act of March 3, 1853, (10 Stat. 244,) it was provided (sec. 6) "that all the public lands in the State of California, whether surveyed or unsurveyed, . . . excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the preëmption laws of fourth September, 1841, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided." In a circular of instructions issued to the registers and receivers in California, October 12, 1853, construing this act, Commissioner Wilson defines the above exception of "mineral lands" as "lands on which are situated any known salines or mines." (1 Lester's Land Laws, p. 698.)

In *State* v. *Poley & Thomas*, (4 Copp's L. O.,) this question, as stated by Secretary Schurz, was presented, arising under the Congressional grant of school lands to the State of California:

"Did the title to lands in said sections vest in the State, upon survey, if their mineral character was unknown at the time, and the same were regarded by the officers of the government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?"

And this was his answer:

"In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the State at the date of the survey, when the land was not known to be mineral, or was not treated as such by the government. If, following the doctrines of the courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be affected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey, may, many years thereafter, be ascertained, through the improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in

placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion, there is nothing in the act which can thus be interpreted. I must, therefore, hold that the discovery of the mineral character of the land in sections 16 and 36, subsequent to survey, does not defeat the title of the State to the same as school lands."

Again, the Land Department can acquire no knowledge as to whether these lands are mineral or not, except by exploration, and that requires the labor of explorers and the payment of their compensation therefor. That Congress never contemplated that there should be any such exploration, as a condition of passage of title, is evident from the fact that thirty years have passed since the date of this grant; thirty-two years since the date of the grant to the Union Pacific and Central Pacific Railroad Companies, which also excluded mineral lands, and never has an act been passed, or, even so far as we are advised, even a bill offered in Congress, contemplating the appropriation of a single dollar for such an exploration. Aside from an exploration conducted by the government, at its expense, the only way that knowledge could be acquired would be through the personal efforts of individual explorers. Was it contemplated by this act that the Secretary of the Interior should have authority to wait so long as he saw fit for the results of these individual explorations before finding and determining that any particular tract was mineral or not? Assuredly a suggestion of such a purpose on the part of Congress would border closely on disrespect to the intelligence and integrity of that body.

But Congress knew that provision had already been made for ascertaining the character of these lands. Revised Statutes, section 2395, contains these provisions:

"Seventh. Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill seats which come to his knowledge, all watercourses over which the line he runs may pass, and also the quality of the lands.

"Eighth. These field-books shall be returned to the surveyor-general, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale, and to the General Land Office."

By the act of July 26, 1866, c. 262, 14 Stat. 251, the mineral lands of the public domain were declared to be free and open to exploration or occupation, and provision was made for the entry and patenting of a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper.

In a circular of instructions issued under this act, January 14, 1867, the Commissioner says of section 11:

"In order to enable the department properly to give effect to this section of the law, you will cause your deputy surveyors to describe in their field-notes of surveys, in addition to the data required to be noted in the printed Manual of Surveying Instructions, on pages 17 and 18, the agricultural lands, and represent the same on township plats by the designation of "agricultural lands." (2 Lester's Land Laws, 317.)

It is true that such survey and report only give what are the surface indications of the tracts, but any other examination and exploration for discovering minerals beneath the surface, require, as any one can see, a large expenditure of money, and it may well be believed that Congress, knowing that the surveys which were already provided for, would disclose the character of the lands so far as they could be disclosed by the surface appearances, meant that the field-books returned to the Land Department containing that information should be that which should guide in the identification of the tracts at the time of the definite location as mineral or not mineral.

Again, the section by which the land grant was made to the

Northern Pacific Railroad Company, after defining the place limits of the grant and providing for the definite location of the line of the road, contained this clause (13 Stat. p. 368):

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

But unless at the time of that definite location there was an identification of the particular lands within the place limits which passed, how could there be any selection in the indemnity limits? Take this particular tract in controversy before us: If, after the definite location, the company had applied to the Secretary for a selection of land within the indemnity limits in lieu of this tract, would not the Secretary have been compelled to refuse such selection, on the ground that, so far as was known, this was not mineral land, and, therefore, passed by the grant? And if now, after the lapse of six years, mineral is discovered and it is adjudged that the title does not pass, is it not possible — nay, probable — that when selection is sought of lands within the indemnity limits it will be found that all have been taken by homestead or preëmption; or, if not, and a selection is made of any particular tract within those limits, will not the land thus selected and supposed to pass to the company come within the rule here announced that if, before the patent shall issue, mines be discovered, it must be adjudged non-mineral land, and, therefore, not passing by the selection? In other words, the title to no lands within the place limits passes because it is unknown whether they are mineral or not, and no selection can be made within the indemnity limits because it is not known how much the deficiency is.

Again, in section 4 of the same act, it is provided that after the completion of twenty-five consecutive miles of road, commissioners shall be appointed by the President to examine as

to whether the road has been completed in a substantial and workmanlike manner, and if they make a favorable report, "patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company, conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

If language can make anything plain it is that when the commissioners have reported favorably as to the construction of any twenty-five consecutive miles of road, the right to a patent exists. It was said in *Stark* v. *Starrs*, 6 Wall. 402, 418: "The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

When this case was argued before us at the last term it was conceded by the Attorney General that if it was not known that the lands were mineral at the time of that report, the title then passed. Such a concession on the part of the government, if now recognized, would compel an affirmance of this judgment; for, at the time the commissioners made report as to the twenty-five consecutive miles adjacent to this tract, no mineral had been discovered, and so far as known the land was not mineral; but the court in this opinion repudiates such concession, and holds that the matter of determination remains open until the very issue of the patent.

Again, by a resolution of May 31, 1870, 16 Stat. 378, the Northern Pacific Railroad Company was authorized to issue its bonds secured by mortgage upon its entire property. Did Congress mean to imply that at that time no specific tracts passed by the mortgage, but only such as might thereafter be

determined by the Land Department to be non-mineral? That resolution contained also this provision:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preëmption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

How could the company sell any particular tract, unless at the time the purchaser knew that the title of the company was perfect? And if the company had failed to place its mortgage, as it most certainly would have failed if the construction now contended for had been believed to be the true construction of this grant, then by the terms of this provision at the end of five years from the completion of the road any tract would be open to settlement and preëmption as are the public lands of the government.

Again, it is abundantly well settled that lands the title to which remain in the government are not subject to taxation. Can it be that Congress contemplated that the Territories and States which should be organized along the line of this transcontinental highway should not be able to tax any alternate sections within the place limits of this grant until such time as it should appropriate money for an exploration as to their character? Take this particular tract for illustration: In 1872 the line of definite location was fixed; apparently it was within the terms of the grant, but it is now adjudged that no title passed to the Northern Pacific, but remained in the government. Was the land subject to taxation during the six years prior to the discovery of the mines? Will it be said that Congress intended that the Northern Pacific should pay the taxes on all the lands so situated, taking the chances in the future of some of them proving to be non-mineral? Would such injustice be imputed to Congress, even as against a corporation? Suppose the Northern Pacific did not pay, and some party purchased the land at a tax sale; has he lost his money because the land now proves to be mineral lands,

and, therefore, still the property of the government? Or, if the State is under obligation to refund the money thus improperly collected in the way of taxes, what then results? The State or county has regulated its tax levy and its expenditures upon the supposition that these lands were subject to taxation. If the title has not passed from the government they are not taxable, and a new burden must be cast upon the property of individuals within the territorial limits to make good the unexpected deficiency of public funds.

It is well known in the history of this and similar land grants that there was an earnest effort to relieve many of the lands from the burdens of state taxation — an effort which brought to this court the cases of the *Kansas Pacific Railway* v. *Prescott*, 16 Wall. 603, and *Union Pacific Railroad* v. *McShane*, 22 Wall. 444. This litigation was carried on on the part of the railroad companies under the superintendence and direction of Hon. John P. Usher, who was Secretary of the Interior at the time of the passage of these land grant acts, than whom perhaps no one was more familiar with the land laws of the United States; and during all that litigation there was not even a suggestion that the absolute transfer of the title at the time of the definite location was, as to any particular tract, delayed by the question thereafter to be determined as to whether the lands were mineral or not.

Turning to legislation other than that respecting railroad land grants, we find by section 2258 of the Revised Statutes that preëmptions are not allowed of "lands on which are situated any known salines or mines." In section 2302, in reference to homesteads, it is enacted: "Nor shall any mineral lands be liable to entry and settlement under its provisions." Section 2392, in reference to town sites, reads: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws." In one of these three clauses the word "known" is used, but not in the others. Is thereby any difference intended as to what shall be excepted from the scope of the authority to acquire lands? That in reference to town sites, as heretofore decided

in *Davis* v. *Weibbold*, 139 U. S. 507, includes only *known* mines.

I deem it unnecessary to pursue this discussion further. Many other considerations of equal significance might be adduced. It is enough to say in conclusion that the uniform and settled rule of decision heretofore has been that identification of the particular tracts which pass under a grant was complete at the time of the definite location of the line of the road. Congress, with a knowledge of that frequent ruling, has never by any act directed a change. It is to be presumed that the legislation of the various States has been cast upon that as the law of the land. To now overthrow that and establish a new rule not merely unsettles the question of title to the lands within this vast area, but it may produce complications which we do not now perceive in the rights of individuals and counties, and even of the States along the line of this road. If ever there was a case in which the rule *stare decisis* should prevail, this is one.

I, therefore, dissent from the opinion and judgment in this case, and am authorized to say that MR. JUSTICE GRAY and MR. JUSTICE SHIRAS concur in this dissent.

NORTHERN PACIFIC RAILROAD COMPANY *v.* HAMBLY.

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

No. 187. Submitted December 21, 1893.— Decided May 26, 1894.

A common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section "boss" or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow-servant with such engineer and such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted.

Statement of the Case.

THIS was an action by Hambly to recover damages for personal injuries sustained by him while acting as helper to a crew of masons engaged in building a stone culvert for the defendant company on its right of way about two miles west of Jamestown in North Dakota. Upon the trial of the case before a jury, the following facts were proven and admitted to be true by both parties, viz.: "That the plaintiff was a common laborer in the employ of the defendant company, and at the time he received the injury, which is the ground of this action, he was in the service of the defendant, working under the direction and supervision of a section 'boss' or foreman of the defendant company, assisting in building a culvert on defendant's line of railroad, and that while so engaged, the injury complained of and for which he sues, was inflicted upon him by being struck by a locomotive of a moving passenger train on the defendant's road, (said train belonging to the defendant, and being operated by a conductor and engineer in its employ,) and that the injury he received by coming in contact with said passenger train, and which is the injury sued for in this cause, was due solely to the misconduct and negligence of the conductor and locomotive engineer on said passenger train, in operating and conducting the movements of said train."

Upon the foregoing facts, defendant prayed for an instruction to the jury that the engineer and conductor of the passenger train were fellow-servants with the plaintiff, and hence that the defendant company was not liable for the injury received by the plaintiff through their negligence. Upon the question of giving such instruction the opinions of the judges were opposed, and the Circuit Judge being of opinion that the plaintiff and said conductor and engineer were not fellow-servants in the sense that would exempt the defendant from liability, so instructed the jury, which returned a verdict for the plaintiff in the sum of $2500, upon which judgment was entered. Defendant thereupon moved for a new trial, upon the granting of which the judges were opposed in opinion. The motion was denied, and the judges certified the following questions for the opinion of this court:

Argument for Defendant in Error.

"1. Whether, on the admitted facts of this case hereinbefore set out, the jury should have been instructed that the plaintiff and said conductor and engineer were fellow-servants, and that they should return a verdict for the defendant.

"2. Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case and granted defendant a new trial.

"3. Whether the plaintiff, who was a common day laborer in the employ of the defendant, (which is a railroad company owning and operating a line of railroad,) and who was at the time he received the injury complained of working for the defendant under the order and direction of a section 'boss' or foreman on a culvert on the line of defendant's road, was a fellow-servant with the engineer and conductor operating and conducting a passenger train on the defendant's road, in such a sense as exempted the defendant from liability for an injury inflicted upon plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train."

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

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

In *Chicago*, *Milwaukee &c. Railway* v. *Ross*, 112 U. S. 377, it is assumed that the conductor of a train of cars has entire control and management of the train to which he is assigned, and is the superior of the engineer. On the other hand, *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, holds the engineer to be a fellow-servant of a brakeman of another train, working a switch. It is therefore important to know whether the negligence in this case is to be charged to the engineer or to the conductor, and in what it consisted. In the certificate the negligence is attributed to them jointly; but the facts constituting negligence are not stated; and this court is called upon to give an opinion upon a purely hypothetical question which may be wide of the real question at

issue. How can the conductor and engineer be jointly guilty of the proximate act which resulted in the injury to defendant in error? If the fault was that of the conductor, then is the railroad company liable as for the acts of its representative or vice-principal; but if the fault was that of the engineer, then he is held to be a fellow-servant.

The maxim, respondeat superior, does not apply so as to make a master responsible for injuries caused to one servant by the negligence of another in the same common employment, but this exception to a general rule has been subjected to various limitations.

As a limitation upon the fellow-servant rule, the exception has been made and is now quite well established, that when servants are engaged in distinct and separate departments of service, where their employment does not require coöperation, and does not result in mutual contact or bring them together in such relation that they may exercise upon each other an influence promotive of caution or safety, the rule does not apply.

The reasons for the fellow-servant rule do not fit the facts of this case. There are two principal reasons urged for exempting the master from liability to one servant for an injury caused by the negligence of another servant in the same employment: (1) That the servant contracted his services with reference to and assumed the risk resulting from the negligence of his fellow-servant. (2) The expediency of throwing the risk on those who can best guard against it.

The first reason is inapplicable here, because it applies only to the ordinary risks of the service. *Baird* v. *Pettit*, 70 Penn. St. 477.

The second reason was first declared by Shaw, C. J., in *Farwell* v. *Boston & Worcester Railroad*, 4 Met. (Mass.) 49. But it was not a good reason when enunciated; and when applied to railroad corporations of the present day it is entirely unfounded and misleading.

To say, as in the *Farwell case*, that the engineer who was injured was an observer of the conduct of the switchman who negligently left a switch open, and could best guard against

Argument for Defendant in Error.

such negligence, is unwarranted by common knowledge of railroad business.

Assuming in the present case that the negligence was that of the conductor or persons having the care and control of a moving passenger train, can it be said that such a reason will fit the facts of this case? Can Hambly, a common laborer working on a culvert on the line of a railroad be said to be an observer of the conduct of the person or persons in charge of the passenger train? Does he have any opportunity to guard against their negligence? Does he come in contact with them so as to learn their habits, methods, or recklessness? He has nothing to do with train service, may never before have seen the conductor or engineer. It is manifest that one in his position could have no influence over the persons in charge of the passenger train since their business did not bring them together.

That persons in charge of trains are not fellow-servants in the same common employment with persons working along the track, see *Garrahby* v. *Kansas City, St. Joseph &c. Railroad*, 25 Fed. Rep. 258; *Pike* v. *Chicago & Alton Railroad*, 41 Fed. Rep. 95; *Chicago & Northwestern Railroad* v. *Moranda*, 93 Illinois, 302; *Sullivan* v. *Missouri Pacific Railway*, 97 Missouri, 113; *Richmond & Danville Railroad* v. *Normont*, 4 S. E. Rep. 211; *King* v. *Ohio &c. Railroad*, 14 Fed. Rep. 277.

The rule laid down in the *Farwell case* was grounded on public policy, the court saying that, "in considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned."

Not being founded in exact justice, the reasons for the rule have failed in a variety of cases and a number of limitations have arisen or sprung from the hardships of a general application of a rule founded solely on alleged public policy. *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Ross* v. *Chicago, Milwaukee &c. Railroad*, 112 U. S. 377; *Ryan* v. *Chicago &*

Northwestern Railway, 60 Illinois, 171; *Chicago & Alton Railroad* v. *Kelley*, 21 N. E. Rep. 203; *St. Louis & San Francisco Railway* v. *Weaver*, 11 Pac. Rep. 408; *Madden* v. *Chesapeake & Ohio Railway*, 28 W. Va. 610; *Northern Pacific Railroad* v. *O'Brien*, 21 Pac. Rep. 32; *Cooper* v. *Mullins*, 30 Georgia, 146; *O'Donnell* v. *Allegheny Valley Railroad*, 59 Penn. St. 239; *Moon* v. *Richmond & Allegheny Railroad*, 78 Virginia, 745; *Nashville &c. Railroad* v. *Carroll*, 6 Heisk. 347; *Louisville & Nashville Railroad* v. *Sheets*, 13 S. W. Rep. 248 (Ky.); *Donaldson* v. *Miss. & Mo. Railroad*, 18 Iowa, 280.

If the reasons which influenced the Farwell decision do not exist; if one of these employés did not assume the risk of the conductor's negligence more than or differently from the other, and it would be absurd to say that such is the case, if the employé on another train has no better opportunity of observing the conduct of the conductor than one on the same train with such conductor, then there is no theory or principle to distinguish between the two cases, and the master would be liable in both.

With greater force can it be asked, upon what theory can it be held that the conductor of the passenger train in the case at bar was a fellow-servant with the laborer at work on a culvert on the railroad? Under the authority of the *Ross case*, if the brakeman on the train had been injured in the same negligent circumstance, the company would be held liable. Yet the brakeman was acquainted with the conductor, made the run with him frequently, knew his habits and had a better opportunity to observe his actions than the laborer working on the culvert.

Hambly was not engaged in and had no such knowledge of train service as was possessed by the brakeman. His duties did not bring him to work at the same place and at the same time as the conductor. Their separate service did not have a common object. While they were both servants of the same master, the one was engaged in the train department and the other in the bridge department. Unless the entire operations of an extensive and widespread railroad corporation can be

grasped in the expression, general business or common employment, then these men were not fellow-servants. While it may be said that the conductor represented the master as a vice-principal, and was for that reason not a fellow-servant with the defendant in error, yet it seems the better reason that he was not a fellow-servant because not in the same common employment.

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

The third question certified to this court, and the only one it is necessary for us to consider, involves the inquiry whether the plaintiff Hambly and the conductor and engineer of the passenger train were, either by the common law or the statute of Dakota, fellow-servants in such sense as to exempt the defendant railway from liability.

There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow-service. The authorities are hopelessly divided upon the general subject as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several States, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said in general that, as between laborers employed upon a railroad track and the conductor or other employés of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold the relation of fellow-servants to exist. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. (Mass.) 49; *Clifford* v. *Old Colony Railroad*, 141 Mass. 564; *Brodeur* v. *Valley Falls Co.*, 17 Atl. Rep. 54; *Harvey* v. *New York Central Railroad*, 88 N. Y. 481; *Gormley* v. *Ohio & Mississippi Railway*, 72 Indiana, 31; *Collins* v. *St. Paul & Sioux City Railroad*, 30 Minnesota, 31; *Pennsylvania Railroad* v. *Wachter*, 60 Maryland, 395; *Houston &c. Railway* v. *Rider*, 62 Texas, 267; *St.*

Louis & Iron Mountain Railway v. *Shackelford*, 42 Arkansas, 417; *Blake* v. *Maine Central Railroad*, 70 Maine, 60; *Ryan* v. *Cumberland Valley Railroad*, 23 Penn. St. 384; *Sullivan* v. *Miss. & Mo. Railroad*, 11 Iowa, 421; *Fowler* v. *Chicago & Northwestern Railway*, 61 Wisconsin, 159; *Kirk* v. *Atlantic &c. Railway*, 94 N. C. 625; *Quincy Mining Co.* v. *Kitts*, 42 Michigan, 34; *Keystone Bridge Co.* v. *Newberry*, 96 Penn. St. 246: while in Illinois, Missouri, Virginia, Ohio, and Kentucky the rule is apparently the other way. *Chicago & Northwestern Railroad* v. *Moranda*, 93 Illinois, 302; *Sullivan* v. *Missouri Pacific Railway*, 97 Missouri, 113; *Richmond & Danville Railroad* v. *Normont*, 4 S. E. Rep. 211; *Dick* v. *Railroad Co.*, 38 Ohio St. 389; *Louisville &c. Railroad* v. *Caven*, 9 Bush, 559; *Madden* v. *Chesapeake & Ohio Railway*, 28 W. Va. 610. The cases in Tennessee seem to be divided. *East Tennessee &c. Railroad* v. *Rush*, 15 Lea, 145; *Louisville & Nashville Railroad* v. *Robertson*, 9 Heisk. 276; *Haley* v. *Mobile & Ohio Railroad*, 7 Baxter, 239; *Nashville & Decatur Railroad* v. *Jones*, 9 Heisk. 27; *East Tennessee &c. Railroad* v. *Gurley*, 12 Lea, 46.

In this court the cases involving the question of fellow-service have not been numerous nor, perhaps, altogether harmonious. The question first arose in the case of *Randall* v. *Baltimore and Ohio Railroad Company*, 109 U. S. 478, in which a brakeman, working a switch for his train on one track in a railroad yard, was held to be a fellow-servant of an engineer of another train upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had as a common object the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general and not of local law, it does not fall directly within the ruling of the *Randall case*. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of train men are concerned, from those of a laborer engaged in keeping the track in repair;

neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the "immediate common object" of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them. The case of *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642, is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismark, where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow-servants. See also *Hough* v. *Railway Co.*, 100 U. S. 213; *Union Pacific Railway* v. *Daniels*, 152 U. S. 684. Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow-service, it has been held that agents who are charged with the duty of supplying safe machinery are not to be regarded as fellow-servants with those

who are engaged in operating it. *Ford* v. *Fitchburg Railroad*, 110 Mass. 240.

Directly in line with the case of *Randall* v. *B. & O. Railroad Co.* is that of the *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375, in which the stewardess of a steamship belonging to a corporation brought suit to recover damages for personal injuries sustained by her by reason of a defective railing at a gangway, which gave way as she leaned against it, and precipitated her into the water. The railing had been recently removed and the gangway opened to take off some freight, and had not been properly replaced by the porter and carpenter of the ship whose duty it was to replace them. It was held that, as the porter and carpenter were fellow-servants with the stewardess, the corporation was not liable. Said Mr. Justice Blatchford: "As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow-servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow-servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. . . . There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative." The division of the crew into departments was treated as evidently for the convenience of administration upon the vessel, but having no effect upon the question of fellow-service. See also *Baltimore & Ohio Railroad* v. *Andrews*, 50 Fed. Rep. 728.

The case of the *Chicago, Milwaukee &c. Railway* v. *Ross*, 112 U. S. 377, is claimed to have laid down a different doctrine, and to be wholly inconsistent with the defence set up by the railroad in this case. This action was brought by the engineer of a freight train to recover damages occasioned by the joint negligence of the conductor of his own train and

that of a gravel train with which it came in collision. The case was decided not to be one of fellow-service upon the ground that the conductor was "in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." The court drew a distinction "between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. Under such circumstances he was held not to be a fellow-servant with the fireman, brakeman, and engineer, citing certain cases from Kentucky and Ohio, which maintained the same view.

It may be observed that quite a different question was raised in that case from the one involved here, in the fact that the liability of the company was placed upon a ground which has no application to the case under consideration, viz., that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused. That it was not, however, intended in that case to lay down as a universal rule that the company is liable where the person injured is subordinate to the person causing the injury, is evident from the latest deliverance of this court in *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, in which an engineer and fireman were held to be, when engaged in their respective duties as such, fellow-servants of the railroad company, and the firemen precluded by principles of general law from recovering damages from the company for injuries caused by the negligence of the engineer.

Neither of these cases, however, is applicable here, since they involved the question of "subordination" of fellow-

servants and not of "different departments." Of both classes of cases, however, the same observation may be made, viz., that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow-service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals.

We think this case is indistinguishable in principle from *Randall's case*, which was decided in 1883, and has been accepted as a sound exposition of the law for over ten years; and that, unless we are prepared to overrule that case, the third question certified must be answered in the affirmative. The authorities in favor of the proposition there laid down are simply overwhelming.

We have thus far treated this case as determinable by the general and not by the local law, as was held to be proper both in the Ross case and in the case of Baugh. In so holding, however, the court had in view only the law of the respective States as expounded by their highest courts. Wherever the subject is regulated by statute, of course the statute is applied by the Federal courts pursuant to Revised Statutes, section 241, as a "law" of the State.

By section 3753, Compiled Laws of Dakota Territory, in one of the courts of which this case was originally com-

menced, "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." In the case of *Elliot* v. *Chicago, Milwaukee &c. Railroad*, 41 N. W. Rep. 758, a case which arose after the enactment of the above statute, the Supreme Court of the Territory held that a section foreman and a train conductor were co-employés within the purview of this statute, and were "engaged in the same general business." While this construction, given by the Supreme Court of a Territory, is not obligatory upon this court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. The opinion is a very elaborate one, reviews a large number of cases, and follows those of New York, Pennsylvania, and Massachusetts, as founded upon sounder principles. We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two States which have succeeded the Supreme Court of the Territory, without most cogent reasons for their action.

The third question certified must be answered in the affirmative.

The CHIEF JUSTICE, MR. JUSTICE FIELD, and MR. JUSTICE HARLAN dissented.

REAGAN *v.* FARMERS' LOAN AND TRUST COMPANY.

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

No. 928. Argued April 4, 5, 1894. — Decided May 26, 1894.

Without passing upon the validity of the 5th and 14th sections of the act of the legislature of Texas of April 3, 1891, establishing a railroad commission with power to classify and regulate rates, the remainder of the act is a valid and constitutional exercise of the state sovereignty, and the commission created thereby is an administrative board, created for carrying into effect the will of the State, as expressed by its legislation.

A citizen of another State who feels himself aggrieved and injured by the rates prescribed by that commission may seek his remedy in equity against the commissioners in the Circuit Court of the United States in Texas, and the Circuit Court has jurisdiction over such a suit under the statutes regulating its general jurisdiction, with the assent of Texas, expressed in the act creating the commission.

Such a suit is not a suit against the State of Texas.

It is within the power of a court of equity in such case to decree that the rates so established by the commission are unreasonable and unjust, and to restrain their enforcement; but it is not within its power to establish rates itself, or to restrain the commission from again establishing rates.

On April 3, 1891, the legislature of the State of Texas passed an act to establish a railroad commission. The first section provides for the appointment and qualification of three persons to constitute the commission; the second for the organization of the commission, while the third defines the powers and duties of the commission, and is as follows:

"Sec. 3. The power and authority is hereby vested in the railroad commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges, and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction.

"(*a*) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this State into such general and special classes or subdivisions as may be found necessary and expedient.

"(*b*) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this act for the transportation of each of said classes and subdivisions.

"(*c*) The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this act.

"(*d*) The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

"(*e*) The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this State reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

"(*f*) If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the *pro rata* part of such charges to be received by each of said connecting lines.

"(*g*) Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

"(*h*) The commission shall have power, and it shall be its duty from time to time, to alter, change, amend, or abolish

any classification or rate established by it when deemed necessary; and such amended, altered, or new classifications or rates shall be put into effect in the same manner as the originals.

"(*i*) The commission may adopt and enforce such rules, regulations, and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations, and determinations of the commission.

"(*j*) The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays.

"(*k*) The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls, or charges for all other services performed by any railroad subject hereto."

The first paragraph of the fourth section is in these words:

"SEC. 4. Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The remaining paragraphs give power to adopt rules of procedure. The fifth, sixth, and seventh sections are as follows:

"SEC. 5. In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair,

and just, and in such respects shall not be controverted therein until *finally found* otherwise in a direct action brought for that purpose in the manner prescribed by sections 6 and 7 hereof.

"SEC. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: *Provided*, That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"SEC. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

Sections 8, 9, 10, 11, 12, and 13 contain special provisions which are not material to the consideration of any question presented in this case.

Section 14 reads:

"SEC. 14. If any railroad company subject to this act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm, or corporation a greater rate, charge, or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers, or cars, or for the use of any car on

the line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than $100 nor more than $5000."

Section 15 defines unjust discrimination, and imposes a penalty of not less than $500 nor more than $5000 upon any railroad company violating any provision of the section.

Section 16 is levelled against officers and agents of railroads, and imposes a penalty of not less than $100 nor more than $1000 for certain offences denounced therein.

Section 17 declares that any railroad company violating the provisions of the act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the act, shall pay, in addition to such damages to the person injured, a penalty of not less than $125 nor more than $500.

In sections 18 and 19 are further provisions as to penalties. The remaining sections, 20 to 24, inclusive, contain matter of detail which is unimportant in this case.

Three of the plaintiffs in error, Reagan, McLean, and Foster, were duly appointed and qualified as members of said railroad commission, and organized it on the 10th day of June, 1891. The other plaintiff in error, Culberson, is the attorney general of the State, who, by section 19 of the act, was charged with the duty of instituting suits in the name of the State for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals under the authority of section 17.

After the commission had organized on June 10, it proceeded to establish certain rates for the transportation of goods over the railroads in the State, and also certain regulations for the management of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan and Trust Company filed its bill in the Circuit Court of the United States for the Western District

of Texas, making as defendants the railroad commissioners, the attorney general, the International and Great Northern Railroad Company, and Thomas M. Campbell, the receiver thereof, duly appointed by the District Court of Smith County, Texas. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating $7,054,000, bearing interest at the rate of 6 per cent per annum; and that there was a prior issue of bonds to the amount of $7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the railroad commission act heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the attorney general from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International and Great Northern Railroad Company appeared, filed an answer and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the attorney general at first filed answers, but, after a certain amount of testimony had been taken, (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record,) they withdrew their answers and filed demurrers, leave being given at the same time to the complainant and cross-complainant to amend the bill and cross-bill before the filing of the demurrer. The amendments to the bill and cross-bill were similar, and contained allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate theretofore exist-

ing; and also setting forth certain contract rights under an act of the legislature of the State of Texas, passed on February 7, 1853. Thereafter the cause was submitted to the court on the bills and cross-bills and demurrers, and on March 23, 1893, a decree was entered in favor of the plaintiff as follows:

"This cause having been set down for final hearing on the pleadings and evidence, and being called for hearing thereon, the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross-complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted, and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross-bill in this cause, as also to all amendments thereto, and were, by complainant and cross-complainant, set down for argument by consent, and were by all parties forthwith submitted; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled; and the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint as amended, and the cross-bill of complainant as amended, in the above-entitled cause, be, and the same are hereby, sustained and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

"First. That the injunctions heretofore issued in this

cause be, and the same are hereby, made perpetual, and accordingly.

"Second. That defendant, the International and Great Northern Railroad Company be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein and in 'Exhibit C' thereto and therewith filed, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders, or either or any of them.

"Third. It is further ordered, adjudged, and decreed that the defendants, the railroad commission of Texas and the defendants, John H. Reagan, William P. McLean, and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant, Charles A. Culberson, acting as attorney general of the State of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the State of Texas, approved April 3, 1891, and fully described in the bill of complaint; or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined, and said defendants Reagan, McLean, and Foster and the railroad commission of Texas are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs, or circulars, or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson or any other party, and from furnishing the said Culberson, or any other party, any information of any character for the purpose of inducing, enabling, or aiding him or any other party to institute or prosecute any suit or suits against the said defendant

railroad company for the recovery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged, and decreed that the said railroad commission of Texas and the said Reagan, McLean, and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railroad company, or causing to be made, issued, or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty, or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission, and fully described in 'Exhibit C' to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair, and unjust as to complainant and cross-complainant, and they are hereby cancelled and declared to be null, void, and of no effect.

"Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean, Culberson, and Foster and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the attorney general have appealed to this court.

Mr. Charles A. Culberson, Attorney General of the State of Texas, for appellants, to the point that the suit was against the State of Texas, said:

This being a suit by a citizen of the State of New York

against the Attorney General and the Railroad Commission, it is in effect a suit against the State of Texas, and is inhibited by the eleventh amendment to the Constitution of the United States.

(1) It must now be accepted as settled law that a suit by a citizen against the attorney general of one of the States of the Union in his official capacity is prohibited by this amendment, if the law under which he purports to do the act complained of is valid and constitutional. Assuming the validity of the commission law for present purposes, it follows that the proceedings and decree against the attorney general are void. This is true whether the law is valid in its entirety or with the exception of section 5, because in suits by the attorney general in the name of the State the justness of the rates may be inquired into. *In re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10; *In re Tyler*, 149 U. S. 164, 190, 191.

As the injunction is sought against the attorney general solely for the purpose of arresting proceedings in the state courts in the name of the State alleged to be contemplated by him, the suit is expressly forbidden by statute. That the law under which he proposes to act may be invalid is not material. Rev. Stat. § 720; *Rensselaer & Saratoga Railroad* v. *Bennington & Rutland Railroad*, 18 Fed. Rep. 617.

It is not urged that the attorney general can take part in the establishment of rates, or in any other manner is interfering with the property of the railroad company, or contemplating any other act save the institution of suits in which the company may, under the theory of complainant, contest in the courts the reasonableness of the rates fixed by the commission. It is only in suits instituted by private parties that the law makes the rates conclusively reasonable until otherwise determined in a direct action. In every action authorized to be brought by the attorney general the defence that the rates are unreasonable may be interposed. Under such conditions the language of Mr. Justice Field in the case where it was attempted to enjoin the attorney general of Virginia from instituting suits in the name of that Commonwealth is

particularly pertinent: "There is a wide difference between restraining officers of the State from interfering in such cases with the property of the citizen, and restraining them from prosecuting a suit in the name of the State in her own courts to collect an alleged claim. Her courts are at all times as open to her for the prosecution of her demands as they are open to her citizens for the prosecution of their claims." *In re Ayers*, 123 U. S. 509; *Mc Whorter* v. *Pensacola & Atlantic Railroad*, 24 Florida, 417.

(2) Still assuming the validity of the law, the suit as to the railroad commission is in effect against the State, and therefore prohibited. I am aware that in some cases (*Mc Whorter* v. *Pensacola &c. Railroad*, 24 Florida, 417; *Chicago & Northwestern Railroad* v. *Dey*, 35 Fed. Rep. 866, 870; *Chicago & St. Paul Railway* v. *Becker*, 35 Fed. Rep. 883, 885; *Richmond & Danville Railroad* v. *Trammel*, 53 Fed. Rep. 196) it is denied generally that suits against a railroad commission are suits against the State, but the application of principles announced in the best considered of them will sustain our contention. In the *Florida case* it is said "that the rule which forbids a suit against officers, because in effect a suit against the State, applies only where the interest of the State is *through some contract* or some property right of hers, or where her interest is in a suit brought or threatened by her officers, in her own name, to enforce some alleged claim of hers." In the *Dey case* Judge Brewer said: "And in all the cases in which, where the State was not a party to the record, and yet the judgment of the Supreme Court was that it was a real party in interest, and therefore the Federal court without jurisdiction, it will, I think, be found that some *contract of the State* was the foundation of the litigation, and that those suits, though nominally against state officers, were construed by that court as in fact suits to compel performance by the State of its contract, or to prevent it from carrying into effect measures intended to work a repudiation." Here both the complainant and cross-complainant allege that the law passed the 7th day of February, 1854, "entered into and formed a part of the charter contract between said railway company, the

State of Texas, and the bondholders aforesaid," and this is in effect a suit to restrain the State of Texas, through the commission, from violating the alleged contract by establishing rates which will yield less revenue than that authorized by the act of 1854. It is also said in these opinions that to constitute suits against the State, when its officers are the nominal defendants, the State must have a pecuniary interest involved. Such is this case. The commission law provides penalties for its violation, directs in sections 19 and 21 thereof that the commission shall cause them to be recovered and that they shall be paid into the treasury of the State. The right to these penalties is a property right; they are debts and demands due the State by the companies, and to restrain the commission and the attorney general from recovering them is a denial of the right of the State to collect its debts and reduce its property to possession.

But the principle of these cases, it is submitted, is too narrow. They lay down the rule that suits, though against officers through whom alone it may perform its sovereign functions, are not against the State unless a contract with the State is involved in the litigation or unless the State has a property interest in the controversy. Such a construction is destructive of the larger purpose of the Eleventh Amendment. From its terms and history it is clear that this purpose was to protect the State against Federal judicial interference with its administrative affairs as well as with its mere property rights. It is thereby declared that the "judicial power shall not be construed to extend to *any* suit in law or equity" against a State by a citizen of another State. The character of the suit is immaterial (1 Kent Com. 297). The inhibition attaches if by the decree the property rights of the State may be affected or if the State through its officers may be compelled to do or abstain from doing any act in its governmental capacity. It is inconceivable that the people of the United States, at that period intensely watchful and jealous of the rights of the States, intended by this broad and comprehensive amendment to protect the States against judicial interference with their property and leave unprotected the vital, undelegated powers of government.

By the Constitution, as originally adopted, the judicial power of the United States did not extend to controversies between a State and its own citizens; nor does it now. It only extended to controversies "between a State and citizens of another State." This court, however, decided in 1793 that a State could be sued by a citizen of another State. *Chisholm* v. *Georgia*, 2 Dall. 419. This decision produced great concern among the States. Intense feeling was aroused, which led to the adoption of the Eleventh Amendment. As the Constitution then stood suits against the State could not be maintained by their own citizens, and consequently it was only necessary to deny the right to citizens of other States, as was done by the amendment. It is an indisputable truth of history that this amendment was dictated by considerations of state sovereignty and had for its purpose the restoration of state immunity from suit by individuals as it existed prior to the formation of the Union. 2 Hare's Amer. Const. Law, 1055; 1 Bryce, Amer. Comm. 231.

"The adoption of the first eleven amendments to the Constitution, so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war." *Slaughter-house Cases*, 16 Wall. 36, 82; *Davidson* v. *New Orleans*, 96 U. S. 97, 101.

What, then, is this immunity from suit restored by the amendment? Is it limited to mere pecuniary and property rights, or does it extend to those of administration and government? The exemption of the United States and the several States of the Union from being impleaded without their consent is as absolute as that of the Crown of England, *Cohens* v. *Virginia*, 6 Wheat. 264, 411, and "*no* suit or action can be brought against the King even in civil matters, because no court can have jurisdiction over him." 1 Bl. Com. 241.

The foundation of the doctrine shows it to be applicable to governmental affairs. In *Nichols* v. *United States*, 7 Wall. 122, 126, Mr. Justice Davis said: "Every government has an inherent right to protect itself against suits, and if, in the

liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and, but for the protection which it affords, *the government would be unable to perform the various duties for which it was created.*" In *Briggs* v. *Light Boats*, 11 Allen, 157, 162, Mr. Justice Gray thus stated the rule: "It is an elementary and familiar principle of English and American constitutional law that no direct suit can be brought against the sovereign in his own courts without his consent. In the older books this is often put upon the technical ground that, all judicial writs being in the name of the King as the fountain of justice, the King cannot by his own writ command himself. But the broader reason is that it would be inconsistent with the very idea of supreme executive power and would endanger the performance of the public duties of the sovereign to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on the government in war and peace and the money in his Treasury." In the case of *Ayers* Mr. Justice Matthews said: "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." *In re Ayers*, 123 U. S. 505.

It thus appears that immunity from suit rests upon the broad ground that suability is incompatible with sovereignty; that but for the rule "the government would be unable to perform the various duties for which it was created;" that

any other rule "would endanger the performance of the public duties" of the State and place under the control of the judiciary "the instruments and means of carrying on the government," and that without it "the course of their public policy and the administration of their public affairs" would be subject to and controlled by the mandates of judicial tribunals. The constitutional amendment adopted by the people of Texas in 1890 and under which the commission law was enacted contains this provision: "The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable." No rates were fixed directly by the legislature, but authority to establish rates is vested in the commission. The commission is the agency and means adopted by the legislature to perform the duty enjoined by the Constitution. It is given a superintending authority over the railways of the State, and in effect is directed to take care that the laws relating thereto are faithfully executed. It is required to establish rates, to enforce the same by having the penalties inflicted, to report violations of the law to the attorney general and request prosecutions, to investigate all complaints against railroad companies, and, generally, it may be said, the most important functions of government relating to the establishment and enforcement of rates are entrusted to it. The commission is the representative of the State and within the limits of the law its acts are the acts of the State. The same is true of other state officers in the various divisions of government, and the principle which would extend judicial power over one would finally encompass the whole, and in the end the entire administrative machinery of the State would pass under the control and domination of the judiciary. These proceedings, if sustained, will interfere with or prevent the State from exercising its undoubted power to regulate commerce, one

of the most important functions and duties of government, through the agency of a commission, and it is idle to say that to enjoin the officers through whom alone it can perform these duties, or through whom it lawfully elects to perform them, does not enjoin the State. A construction which places its administrative agencies under the control of the judiciary of a distinct government degrades a State, and is utterly destructive of its independence in all the powers not delegated to the United States and which are reserved to it by the Constitution. Compared with the independent exercise of that "large residuum of sovereignty" remaining in the States, mere property rights are of small consequence, and to narrow the amendment to these would not accomplish the aims and aspirations of its authors or reflect the spirit of their time. They would have repelled the suggestion that their conception and purpose were limited to the lesser consideration of property and took no heed of the autonomy of the States. Their plan contemplated and embraced all of these. What would have been the answer then and what should it be now to the proposition that States may not be sued on contracts or for property, but may be enjoined from exercising the powers and duties of government? What would it avail the States to save their property and lose their independence? Let me not be misunderstood. It is conceded that if the law is void the suit as against the commission is not, under the decisions, against the State. The contention is that the law is constitutional, that the commission in effect and in respect of the powers and duties conferred and enjoined by it is the State, and a suit against it which interferes with the performance of these duties or which wholly restrains such performance is against the State. Any other conclusion, it is submitted, is illogical and indefensible. It is attested by the pronounced theory of this case. The very basis and foundation of the suit, the corner-stone of the complaint, is that the State, through the commission, is depriving the trustee of property without due process of law, in violation of the Fourteenth Amendment; for this amendment, in declaring "Nor shall any State deprive any person of life, liberty, or property without due process of law," is levelled

only against state action, and is not infringed unless the State is the actor. An injunction against the commission under that amendment is necessarily against the State, because if the commission does not act for the State the amendment is not violated. "To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 505, 506.

Mr. John F. Dillon and *Mr. E. B. Kruttschnitt*, (with whom were *Mr. Herbert B. Turner* and *Mr. John J. McCook* on the brief,) for appellee, upon the effect of the Fourteenth Amendment upon the power of the States to regulate and control railway fares and charges, said:

The underlying question in this case is whether at this time, railway companies and the holders of their shares and bonds have any effectual protection against legislative invasion and destruction of the values of their properties. In 1891 the legislature of Texas passed a railroad commission act, which empowers three citizens of Texas who, by the appointment of the governor, constitute the commission, to fix rates for railway transportation, and provides that the rates so fixed shall be in all cases presumptively, and in certain cases conclusively, reasonable and lawful.

It enacts that if any railway company shall charge or receive a greater rate than that fixed and established by the commission, it shall be guilty of extortion and liable to double penalties, one to the State and one to the passenger or shipper, ranging from $100 to $5000 for each offence. Under the authority of this act the commission have, as alleged, both

generally and circumstantially, in the bill and amended bill of complaint, fixed tariffs of rates which are unreasonable and unjust, and have coerced the companies to put these rates into effect under the menaces contained in the act of a vast multiplicity of suits to enforce the provisions thereof as to damages and penalties.

The shareholders and the bondholders, as well as the railway companies, are remediless unless they can obtain judicial relief. And they can obtain no such relief in this and the like causes unless the act itself, or the orders of the commission establishing such rates, are in conflict with the act or with the provisions of the constitution of the State, or of those provisions of the Constitution of the United States, which protect private property from state legislative spoliation, and which guarantee to every person the equal protection of the laws of the land.

The founders of our democratic, or rather republican institutions were neither visionaries nor socialists. It is among the eternal lessons of history, which they well knew, that the mass of the people were subject to the influence of supposed temporary interests, and of "violent and casual forces" which might be in conflict with their own vital and permanent welfare. Realizing this truth, and the necessity of safe-guarding these vital and permanent interests, the founders of our political and legal institutions devised — and the device has been supposed to be the crowning proof of their wisdom — the American polity of constitutional restraints upon all the departments of the governments which the people established. All the original States undertook to secure the inviolability of private property. This they did, either by extracting and adopting, in terms, the famous 39th article of Magna Charta, securing the people from arbitrary imprisonment and arbitrary spoliation, or by claiming for themselves, compendiously, all of the liberties and rights set forth in the Great Charter. We make this statement as to the action of the original States after a careful examination of their charters and constitutions.

When the Federal constitution was formed, there was in-

serted in it the provision, also original and unique, "that no State shall pass any law impairing the obligation of contracts."

Encroachments from the general government were feared, and this fear led to the speedy adoption of the first amendments to the constitution. Justice Miller, in the *Slaughter-house cases* says: "The adoption of the first eleven amendments to the Constitution, so soon after the original instrument was accepted, shows prevailing sense of danger at that time from the Federal power."

The Fifth Amendment was borrowed from the Magna Charta, where it had stood for more than five centuries as the bulwark of the ancient and inherited rights of Englishmen to be secure in their personal liberty and in their possession. It was a limitation only on the general government; but it showed a settled purpose, from the beginning, in both State and Federal constitutions to protect and secure personal liberty and private property.

With these guarantees — the inviolability of contracts and the sacredness of private property — the Republic set out on its untried course. One hundred years and more have vindicated the necessity and the wisdom of these organic limitations.

The result of the provision ordaining contracts to be inviolable has been, says Mr. Justice Miller, "to make void innumerable acts of state legislatures intended in times of disastrous financial depression and suffering to protect from the hardships of a rigid and prompt enforcement of the law in regard to their contracts, and to prevent the States from repealing, abrogating, or avoiding by legislation, contracts fairly entered into with other parties." Miller on Const. 393.

Hundreds of acts of state legislation have been declared void under this clause by this court, and attempted repudiation, with its consequent dishonor, prevented. Who is not glad that the States have not the power to destroy or impair contracts?

So, likewise, the provisions in the state and national constitutions protecting private property have, up to this time,

been effective. These have been, indeed, the great triumphs of our popular system of government, for these were supposed to be its vulnerable spots. Disbelievers in republican institutions had predicted early shipwreck on these rocks, and when it came not they simply postponed the period of fulfilment.

The history and general purpose of the Thirteenth, Fourteenth, and Fifteenth Amendments are set forth in the *Slaughter-house cases* and in other cases decided by this court. We have no occasion to offer any specific criticism on these decisions; for, so far as concerns the question of state power over railway rates, a review of all the cases on this subject from *Munn* v. *Illinois* and the *Granger cases*, decided in 1876, to the *Michigan Passenger Rate case*, decided in 1892, establishes the doctrine that the States have the power to regulate rates, but that such power must be exercised subject to the prohibitions of the Fourteenth Amendment, and, if the regulations thus made are unreasonable, they are void; and the question whether or not they are unreasonable is a judicial question, to be determined by the courts in suits commenced and conducted therein, under and in accordance with the laws of the land.

We contend for nothing more. As thus understood, the doctrine is, as we believe, just and sound.

We must say, however, that it has seemed to us that the principles and purpose of the Fourteenth Amendment have not always been appreciated to the full. We agree that it was not intended to effect structural changes as between the state and Federal governments, but we do not agree that its language or scope are to be limited by the special causes which occasioned its adoption.

It may be that the oppressions of the freedmen by the States in which they had been slaves was the immediate cause of the amendment, but its language is not confined to color or to class. It is general and unlimited. Motley expresses a great truth when he says: "So close is the relationship of the whole human family that it is impossible for a nation, even when struggling for itself, not to acquire something for all mankind." Preface to Dutch Republic. And it is the special glory of those who framed and secured this amendment that

they purposely made its language and provisions universal and undistinguishing in their application. It is, in fact, a reaffirmation, in the most impressive and solemn form, of the sacredness and stability of private property, as one of the fundamental and indestructible rights of the people of the United States.

Thus it is effectual to protect railway properties against any action or legislation of the States, the effect of which is to deprive the companies of a right to a reasonable compensation for services in the transportation of freight or passengers. In this aspect the question of what is a reasonable compensation is a judicial question to be determined in the courts.

The Texas Railroad Commission Act, in respect of fixing and enforcing rates of charges, is in violation of the Constitution of the United States, for the reason that provisions of the Texas act in that behalf not only limit but effectually deny to railway companies subject to the act, the right to a judicial inquiry into the reasonableness of the rates fixed by the commission, and thereby deny to the companies the equal protection of the laws; and if the Texas act is enforced in the manner provided therein, (and it cannot, of course, be otherwise enforced,) it deprives the companies of their property without due process of law.

We understand and maintain that the decisions of this court on the subject of the power of the States over railway tariffs or charges establish the following principles:

As to railways created by a State, or doing business in a State under state authority, the result of the decisions of this court is that, as to interstate commerce, the several States are without any authority whatever to touch or regulate the same in any degree. As to domestic commerce — that is, such as "begins and ends within a State, disconnected from a continuous transportation through or into other States," *Wabash &c. Railway* v. *Illinois*, 118 U. S. 557, 564 — the State may establish maximum rates of charges, either immediately by legislative act or mediately through a commission, but this power is not unlimited: like all other legislative powers, it is subject to the prohibitions of the Constitution of the United States, and particularly to those of the Fourteenth Amend-

ment. The constitutional limitation is that the rates thus fixed, although they are *prima facie* valid, because presumptively reasonable, are nevertheless void if the carrier affected thereby can establish in a proper judicial proceeding that they are unreasonable. The question of reasonableness or unreasonableness is in all cases "ultimately a judicial question, requiring due process of law for its determination" — that is, judicial investigation in a suit in the courts of justice "under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy." It is not competent, therefore, for the State to enact that the rates fixed by a commission, whether *ex parte* or after notice and investigation are conclusive or final, for such an act would be unconstitutional, since it denies to the company due process of law, and, by depriving it of the lawful use of its property deprives it of the property itself, and of the equal protection of the laws. *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418, 458. As the result of all this we contend (*a*) that the provisions of the Texas Railroad Commission act as to fixing and enforcing rates are unconstitutional; and (*b*) that the complainants are entitled, on the averments in the bill and the amended bill, to an injunction and decree against the enforcement of those rates.

The justice of this contention will be shown by an examination of the decisions of this court on the subject of the extent of legislative power over railway tariffs.

The earliest decisions were in *Munn* v. *Illinois*, and what are known as the *Granger cases*. These cases were decided in 1876, and are reported in 94 U. S. 113; 155–180.

In each of the cases the state legislatures had fixed a maximum rate. The elevator owner and the railway companies denied the existence of any such power in the States. This was the great overshadowing question, and the one to which the attention of the court was given, and the one which was adjudged. The judgment was that such a power existed, but the scope and extent of the power were not determined, for the cases did not require it.

In 1883, the general question of the scope of state legislative power, under special provisions of the state constitution and statutes, to fix rates for a public water supply came before the court in a case from California.

The case of *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347 (1883), above referred to, was this:

The Spring Valley Water Works Company was incorporated under the General Incorporation act of the State of California, and under a constitution which provided that all laws passed might be from time to time altered and repealed. The act under which the company was incorporated provided that rates for water should be fixed by a board of commissioners to be appointed in part by the corporation and in part by the municipal authorities. Afterwards the constitution and laws were changed so as to take away from the corporations which had been organized and put into operation under the old constitution and laws, the power to name members of the boards of commissioners, and so as to place in the municipal authorities the sole power of fixing rates for water. The precise and sole point decided was that these changes did not violate any provisions of the Constitution of the United States. There was no question in the record *as to the reasonableness of rates fixed for water.* This is most material.

The next case in the order of time bearing upon the subject is the *Wabash Railway case*, entitled *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557 (1886).

In this case the Wabash Railway Company charged Elder & McKinney for transporting a carload of goods from Peoria, Illinois, to New York City, $39, being at the rate of 15 cents per hundred pounds for said carload. On the same day the said company charged Bailey & Swannell on another carload of goods from Gilman, Illinois, to New York City, $65, being at the rate of 25 cents per hundred pounds, though the carload transported for Elder & McKinney was carried 86 miles further in the State of Illinois than the other. The Supreme Court of Illinois held that this was an unjust discrimination, and violated the Illinois statute which prohibited unjust discriminations. The Supreme Court of the United States

reversed this judgment, and held that these shipments were commerce among the States, the regulation of which is confided *exclusively* to Congress, and that such transportation was not in any degree or to any extent subject to regulation by the State; and that the statute of Illinois as applied to any part of such shipments — even the part of the distance within the State of Illinois — was forbidden by the Constitution of the United States.

In the next year there came before the court the Arkansas case of *Dow* v. *Beidelman*, 125 U. S. 680 (1887). Here it appeared that the Memphis and Little Rock Railroad Company had been recently reorganized, and there was no proof of the amount of the capital invested in the reorganized company, or the amount of its capital stock, or the price paid by such reorganized company for the road. The State passed an act fixing in the act itself three cents a mile as the maximum fare for carrying passengers. There was *no proof in the case that this was an unreasonable rate*, and the court decided that it could not presume it to be unreasonable, and affirmed the judgment below against Dow, Matthews, and Moran, trustees and owners in possession, for a violation of the state statute fixing a maximum rate of three cents per mile for passenger fare.

This case thus fell within the general principle of the *Granger cases*, viz., that a legislative regulation of fares was presumably reasonable, and, there being no proof to the contrary, the carrier violating the statute would be liable to the penalties denounced by the state enactment.

The next case in order of time in the Supreme Court is the Minnesota case, *Chicago Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418 (1889).

The principles established by this case, are that the legislative regulation of fares and rates, whatever its scope, is limited by the line of reasonableness; that if unreasonable they deprive the company of its property without due process of law, and that the question whether they are unreasonable is a judicial question which must be decided in a suit upon pleadings and issues, and upon proofs, (if the facts are controverted,) by the judicial tribunals.

It has been hastily thought by some that the decision of the Supreme Court in the more recent New York Elevator case of *Budd* v. *New York*, 143 U. S. 517 (1891), modified, if it did not overrule, the Minnesota case. But it does not touch or impair in any degree the doctrines of the Minnesota case. It does not profess to do so, and it does not.

The next and latest case in this court is that of the *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339 (1892).

The facts were these: In 1889 the legislature of Michigan passed an act fixing the amount per mile to be charged by railways for the transportation of passengers. The act provided a maximum passenger rate of two cents a mile for railroads whose annual gross earnings from passenger business equalled or exceeded $3000 per mile, in which class fell the Chicago and Grand Trunk Railway Company. On the day the law took effect, Wellman, the plaintiff below, went to the railway company's office and tendered $3.20 for a ticket from Port Huron to Battle Creek — that being the rate fixed by the statute — which was refused. He thereupon brought this action in damages under the statute against the railway company. The railway company answered. There were no other parties to the cause. On the trial it was agreed that the company's capital stock was $6,600,000 and had been fully paid in; that its bonded debt was $12,000,000 at 5 and 6 per cent interest; that the capital stock and mortgage debt represented the actual amount paid in to the corporation; that the railroad property was worth more than the capital stock and mortgage debt; that there was a floating debt of $896,906.40; that the entire gross earnings of the company from all sources were absorbed in the payment of operating expenses and interest on the indebtedness, and that the stockholders received no dividends whatever. The traffic manager and the treasurer of the railway company were introduced as witnesses by the company, and testified at the trial that by reason of competition with other lines it was impossible to increase their rates without losing their business.

On such agreed statement and testimony, and that alone, the railway company asked an instruction that the Michigan

act referred to was unconstitutional, which the court refused to give. Your Honors said, "The single question presented on the record is whether the trial court, on the facts presented, erred in refusing to instruct, as a matter of law, that the act of 1889 was unconstitutional." The opinion comments on the generality of the facts shown and the omission to show other facts, as, for example, that while it was agreed that the defendant's operating expenses for 1888 were $2,404,516.54, no showing was made of what such operating expenses consisted. The court decided simply that, under these circumstances, it was not error peremptorily to refuse the instruction asked.

Mr. Alexander G. Cochran, *Mr. Winslow S. Pierce*, and *Mr. R. S. Lovell* filed a brief for the International and Great Northern Railroad Company, cross-complainant and appellee.

Mr. J. W. Terry and *Mr. George W. Peck* filed a brief in the interest of the Gulf, Colorado and Santa Fé Railroad Company.

Mr. Henry C. Coke, (with whom was *Mr. W. S. Simkins* on the brief,) closed for appellants, contending:

I. The act of 1859 did not create any contract between the State of Texas and the railway company, and those interested therein, the obligation of which is impaired by the railway commission law of Texas.

II. The penalties prescribed by the Commission Act for violations thereof were not immoderate, excessive, and contrary to the constitution of Texas.

III. The act does not deny to the railroad company in actions between itself and private parties the right to a trial by jury of the issue of reasonableness or unreasonableness of any rate, rule, regulation, etc., fixed and adopted by the commission, contrary to the constitution of the State of Texas.

IV. The Commission Act does not deny to appellees the equal protection of the laws.

V. The Commission Act does not deprive appellees of

their property without due process of law and without just compensation.

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

The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is in effect a suit against the State of Texas, brought by a citizen of another State, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this court, especially in the cases of *In re Ayers*, 123 U. S. 443, by Mr. Justice Matthews, and *Pennoyer* v. *McConnaughy*, 140 U. S. 1, by Mr. Justice Lamar. In the former of these cases it was said (p. 505):

"To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

And in the latter (p. 9):

"It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that 'no State shall pass any law impairing the obligation of contracts.' This immunity

of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, 123 U. S. 443; *Louisiana* v. *Jumel*, 107 U. S. 711; *Antoni* v. *Greenhow*, 107 U. S. 769; *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial — is not, within the meaning of the Eleventh Amendment, an action against the State. *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Tomlinson* v. *Branch*, 15 Wall. 460; *Litchfield* v. *Webster County*, 101 U. S. 773; *Allen* v. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270."

Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part.

Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the State, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or

collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 452, it was said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him. See *Mitchell* v. *Harmony*, 13 How. 115; *Bates* v. *Clark*, 95 U. S. 204; *Meigs* v. *McClung*, 9 Cranch, 11; *Wilcox* v. *Jackson*, 13 Pet. 498; *Brown* v. *Huger*, 21 How. 305; *Grisar* v. *McDowell*, 6 Wall, 363."

Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts. *Cowles* v. *Mercer County*, 7 Wall. 118; *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529.

We need not, however, rest on the general powers of a Federal court in this respect, for in the act before us express authority is given for a suit against the commission to accom-

plish that which was the specific object of the present suit. Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis County, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language differing from that which ordinarily would be used to describe a court of the State was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is "a court of competent jurisdiction in Travis County." Not only is Travis County within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. Act of June 3, 1884, c. 64, 23 Stat. 35. It comes, therefore, within the very terms of the act. It cannot be doubted that a State, like any other government, can waive exemption from suit. Were this in terms a suit against the State, if by express statute the State had waived its exemption and consented that suit might be brought against it by name in any court of competent jurisdiction in Travis County, it might well be argued that thereby it consented to a suit, brought by a citizen of another State, in the Circuit Court of the United States for the Western District of Texas, sitting in Travis County, on the ground that the limitations of the Eleventh Amendment to the Federal Constitution simply create a personal privilege which can at any time be waived by the State. However, it is unnecessary to go so far as that, for this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the State.

Still another matter is worthy of note in this direction. In the famous *Dartmouth College case*, 4 Wheat. 518, it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a State from passing any law impairing the obligation of contracts. The International and Great Northwestern Railroad Company is a corporation created by the State of Texas. The

charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand, one obligation assumed by the State was that it would not prevent the company from so constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the State which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes, and one in which the corporation has a right to invoke the judgment of the courts; and if the corporation, a citizen of the State, has the right to maintain a suit for the determination of that question, clearly a citizen of another State, who has, under authority of the laws of the State of Texas, become pecuniarily interested in, equitably indeed the beneficial owner of, the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the State in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States.

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a State to regu-

late the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. *Railroad Commission Cases*, 116 U. S. 307. No valid objection, therefore, can be made on account of the general features of this act; those by which the State has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.

Specific objections are made to the act, on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from reëstablishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

It is enough to say in respect to these matters, at least so

far as this case is concerned, that it is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. So that if in any case, there should be any mistaken action on the part of a State, or its commission, injurious to the rights of a railroad corporation, any citizen of another State, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions; and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged — that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power.

Applying this rule, the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a viola-

tion of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation — a tax law. There may be incorporated into such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the State depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

Opinion of the Court.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155, and *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller, in *Wabash &c. Railway* v. *Illinois*, 118 U. S. 557, 569, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331, and while the right of control was re-

affirmed a limitation on that right was plainly intimated in the following words of the Chief Justice:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow* v. *Beidelman*, 125 U. S. 680, 689. Again, in *Chicago & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 458, it was said by Mr. Justice Blatchford, speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339, 344, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. *New York*, 143 U. S. 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility

of handling, etc.; it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross-bill. Each of these bills contains a general averment that the rates are unjust and unreasonable. That in the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

"Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust, and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver, without serious and irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights, and interests of your orator and the beneficiaries of its trust as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and

are unreasonably low, and that the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues derived from the operation of said International and Great Northern Railroad, aggregating more than $200,000 per annum, and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof shall at all times be conducted with safety to person and property, and with due expedition."

It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates, yet it is not to be ignored. There are often in pleadings general allegations of mixed law and fact, such as of the ownership of property and the like, which standing alone are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. Yet it must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion

can be drawn from that action, and that is that upon the taking of their testimony defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts which, if proved, might induce a different conclusion, and compel a different result.

What, then, are the special facts disclosed in the several bills? It appears that there is a bonded indebtedness of over $15,000,000, and in addition capital stock to the amount of $9,755,000; that the bonds and stock were issued for and represent value, and that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to $7,054,000, drawing 6 per cent interest; the second mortgage bonds to $7,954,000, drawing also 6 per cent interest. The stockholders had never received any dividends whatever upon their investment, but on the contrary (as appears from the cross-bill filed subsequently to the commencement of the suit) they had been forced to pay a cash assessment of over a million of dollars, or about 12 per cent of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds; the holders of those bonds had been compelled to accept, and had accepted, in payment of one-half of the accrued and defaulted interest — a sum exceeding $750,000 — deferred certificates of indebtedness bearing interest at the rate of 5 per cent; the holders of the second mortgage bonds had been called upon to fund, and substantially all had consented to fund, passed due interest, amounting to upwards of $1,250,000, in third mortgage bonds, bearing 4 per cent interest, and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to 4½ per cent per annum for the period of six

years, and thereafter to 5 per cent per annum. For about three years the road had been in the hands of a receiver, appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross-bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

"1889:	Earnings	$3,488,185 14
	Operating expenses, exclusive of taxes	2,629,452 90
	Surplus	858,732 24
1890:	Earnings	3,646,422 33
	Operating expenses, exclusive of taxes	3,148,245 09
	Surplus	498,177 24
1891:	Earnings	3,648,641 79
	Operating expenses, exclusive of taxes	3,093,550 20
	Surplus	555,091 59
Three months of 1892:		
	Earnings	759,176 18
	Operating expenses, exclusive of taxes	829,074 87
	Deficit	69,898 69"

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

"Revenue per ton per mile for			1883.....(in cents)..	2.03
"	"	"	1884.....	1.90
"	"	"	1885.....	1.71
"	"	"	1886.....	1.65
"	"	"	1887.....	1.38
"	"	"	1888.....	1.33
"	"	"	1889.....	1.44
"	"	"	1890.....	1.38
"	"	"	1891, (first nine months)	1.30"

The mileage owned and operated by the company within the State of Texas amounts to 825 miles. There had been necessarily expended in cash in the construction and equipment of its road more than $50,000 per mile, and it could not be replaced for less than $30,000 per mile. There is also this allegation in the cross-bill:

"That the lines of railway of your orator's company have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated. That for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of $12.64, and, exclusive of its general officers, all of its employés during and for the year ending June 30, 1892, received an average daily compensation of $2.01, and that at all times your orator has secured the service of its officers and employés as cheaply as practicable, and has employed no more than necessary, and that the above were fair and reasonable rates of pay. That at all times the International and Great Northern Railroad Company has secured all supplies, material, and property, of whatever character, for the operation of its road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross-bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to $159,694.51, and also a table showing the per cent of reductions as to different articles — varying from 5 per cent on cement to 54.90 per cent on grain in carloads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the amended bill as to the

actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the State.

As against these facts the attorney general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item several times repeated, "balance of income account," and this on September 30, 1891, is stated at $3,795,785.68. Of what this account is composed we are not informed, (possibly there was included within it the proceeds of the land grant, which, as we are told, was made by the State to the corporation,) but, whatever it includes, it was on January 1, 1889, as stated, $2,612,118.68, which would make the increase of that account during the two years and nine months to be $1,183,667. Confessedly no interest was paid during those years, and that amounted each year to something like $900,000, or nearly two millions and a half for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much or from what sources in prior years the road had accumulated this balance, the increase during the time stated did not equal the accruing interest. The attorney general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross-bill, and from that he tabulates a statement which, as he contends, shows that the earnings during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

"Gross earnings from operation		$3,568,690 26
Less operating expenses		2,986,204 12
Income from operation		$582,486 14
To which should be added amounts expended for 'cost of road, equipment, and permanent improvements,' admitted to have been included in operating expenses		302,085 77
Dividends on (compress) stocks owned		8,020 00
Total income		$892,591 91
Deductions from Income.		
Interest on funded debt accrued during the year, viz.:		
On $7,954,000 first mortgage bonds at 6%	$477,240 00	
On $7,054,000 second mortgage bonds, one month, at 6%	35,270 00	
On $7,054,000 second mortgage bonds, eleven months, at 4½%	290,977 50	
Total interest accrued	$803,487 50	
Rental paid Colorado River Bridge Company	14,583 32	
Taxes	28,951 35	
Total deductions		$847,022 17
Surplus after paying operating expenses proper, interest accrued on bonds, taxes, etc.		$45,569 74"

But this table ignores that which is disclosed in the cross-bill, to wit, $750,000 in certificates of indebtedness, bearing interest at five per cent and $1,250,000, third mortgage bonds, bearing four per cent interest, the interest on which sums would exceed all the apparent surplus. These items

also appear in the report, under the head of current liabilities, the total balance of which on July 1, 1892, is given as $3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of $302,085.77 appears in that table, under the description "Cost of road, equipment and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails and a constant necessity for replacing old with new. The purchase of these rails may be called permanent improvements, or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "renewals of rails and ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions, it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly the mere title, under which these expenditures are once stated, is not sufficient to overthrow the facts so fully and clearly shown that the stockholders have never received any dividends; that in order to meet the accumulating interest on the bonds they have had to put their hands in their pockets and advance a million and over of dollars. Those are facts whose significance cannot be

destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney general asserts that there are five trunk lines, of which the International and Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the State of Texas had made large donations of land to railroad companies, and that, as appears from its executive documents, this railroad company had received a donation of 3,352,320 acres to aid in its construction, as well as exemption of all its property from taxation for twenty-five years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the Commissioner of Agriculture of Texas, showing as to different articles produced in that State an increase in the amount of product and a decrease in the prices received therefor; all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

None of the matters mentioned in the foregoing paragraph appear in the pleadings, or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International and Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to prevent any of the business of the other roads from ever coming to the International and Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of the business of the International and Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judicial

notice that the State made a grant of three million and odd acres to the company, must we also take notice of the value of that land, of its sale, and the amount realized therefrom? While undoubtedly there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the State; and is the report of the Commissioner of Agriculture of the State to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in railroad transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the State of Texas have been operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury; in the other it is used to work injury. Counsel suggest that the State itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States which, carried on for the common welfare, not infrequently results in a loss which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportionate share of that loss which is incurred in

securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws — the spirit of common justice — forbids that one class should by law be compelled to suffer loss that others may make gain. If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

The act of 1853, to which reference has already been made, contained a section looking to the acquisition by the State of the title to railroad property. Section 17 of the act of February 7, 1853, c. 46, General Laws of Texas, 1853, page 58, is as follows:

"If the legislature of this State shall at any time make provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels, and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money, and all moneys received from the sale of lands donated by the State to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands donated to the same by the State and remaining unsold, shall vest in and revert to the State: *Provided*, That the State shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this State than the State shall have received for the same from such company."

This section, as will be perceived, provides for the payment

of interest at the high rate of 12 per cent on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the State that justice required the return to the builders of railroads of something more than the actual cost as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the State at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road would do so with the knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was $40,000,000; it cannot be replaced to-day for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employés have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000. Can it be that a tariff which under these circum-

stances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to

Counsel for Appellants.

pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

REAGAN *v.* MERCANTILE TRUST COMPANY.

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

No. 1167. Submitted April 13, 1894. — Decided May 26, 1894.

Reagan v. *Farmers' Loan and Trust Co.*, *ante*, 362, affirmed, followed, and applied to the facts in this case.

The fact that the Texas and Pacific Railway Company is a corporation organized under a statute of the United States, receiving therefrom the corporate power to charge and collect tolls and rates for transportation, does not remove that company from the operation of the act of the legislature of Texas of April 3, 1891, establishing a railroad commission, as to business done wholly within the State; but such business is subject to the control of the State in all matters of taxation, rates, and other police regulations.

As the case does not present facts requiring it, no opinion is expressed on the power of the commission as to rates on points on the railway outside of Texas.

THE case is stated in the opinion.

Mr. C. A. Culberson, Attorney General of the State of Texas, *Mr. H. C. Coke*, and *Mr. W. S. Simkins* for appellants.

Mr. John F. Dillon, *Mr. E. B. Kruttschnitt*, and *Mr. John J. McCook* for the Mercantile Trust Company, appellee.

Mr. Winslow S. Pierce, *Mr. R. S. Lovett*, and *Mr. T. J. Freeman* for the Texas and Pacific Railway Company, appellee.

Mr. Justice Brewer delivered the opinion of the court.

The case is similar to that just decided, in which the same parties were appellants and the Farmers' Loan and Trust Company and the International and Great Northern Railroad Company, appellees. It was commenced by the Mercantile Trust Company in the same court against the appellants and the Texas and Pacific Railway Company, with like purpose to restrain the enforcement of the railroad commission act, and with like result. The Mercantile Trust Company was trustee in a deed of trust executed by the Texas and Pacific Railway Company to secure an issue of bonds, and, as a citizen of New York, invoked the jurisdiction of the Federal court.

There are some matters of difference between the two cases which call for special notice. The Texas and Pacific Railway is a corporation organized under the laws of the United States, (16 Stat. 573,) and by reason of that fact it is earnestly insisted by counsel for it and the Trust Company that it is not subject to the control of the State, even as to rates for transportation wholly within the State. The argument is that it receives all its franchises from Congress; that among those franchises is the right to charge and collect tolls, and that the State has not the power, therefore, in any manner to limit or qualify such franchise. This is an important question and deserves consideration, even though in respect to other matters the facts should present a case exactly parallel to that just decided and calling for a like decision; because if the State has no control in the matter the decree should not be affirmed in part but *in toto*.

We are of the opinion that the contention of the railway

and Trust Companies cannot be sustained, and that the reasoning in the cases of *Thomson* v. *Pacific Railroad*, 9 Wall. 579, and *Railroad Company* v. *Peniston*, 18 Wall. 5, 36, leads to this conclusion.

In the first of those cases these facts appeared: The Union Pacific Railway Company, (Eastern Division,) a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system. After its construction, the legislature of Kansas having enacted a law laying certain taxes upon its property, a bill was filed to restrain the collection of those taxes, on the ground that the property of the company was mortgaged to the United States, and that it, under the Congressional grant, was bound to perform certain duties and ultimately pay five per cent of its net earnings to the United States, an obligation which would be greatly hindered if the taxes imposed should be collected. But this contention was not sustained, and while it was said by the Chief Justice, delivering the opinion of the court, that Congress had the power to provide an exemption from state taxation in such a case, there was no exemption in the absence of legislation to that effect. This decision was followed by that in the other case, in which a like exemption was sought of the property belonging to the Union Pacific Railroad Company, a corporation created, like the Texas and Pacific Railway Company, by an act of Congress, and also like the Kansas Company, aided by the government in lands and bonds, but here, too, by a majority of the court, the claim of exemption was denied. Mr. Justice Strong, in delivering the opinion of the court, said:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of

their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* v. *Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and, if it is not, it is prohibited by no constitutional implication."

Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corpora-

tion demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations.

Another matter of difference between the two cases is this: The entire mileage of the International and Great Northern Railway was within the limits of the State of Texas, while the Texas and Pacific Railway Company owns and operates several hundred miles of road outside the limits of the State. No reference is made in the briefs of counsel to this difference, and probably there is nothing in the facts stated in the bill and cross-bill in respect to the earnings, operating expenses, and encumbrances of the property which would in any way affect the conclusion as to the reasonableness of the rates imposed; and we only notice the difference now to guard against the inference that such a fact is always without significance in the consideration of questions as to the reasonableness of rates imposed in one of the States within which the line of the carrier runs.

Beyond these two matters of difference we see nothing that calls for any comment. It is true the figures in respect to earnings, operating expenses, encumbrances, reduction of revenue, etc., are not the same in this as in that case, but still, relatively to each other, they have the same significance, and there are in the bills and cross-bills the same general averments. It would be useless, therefore, to encumber the record with a mass of figures for the sake of making it clear that the same conclusion must be reached here as in that case.

In this case also, as in that, the decision is that

So much of the decree of the Circuit Court as restrains the defendants from proceeding under the railroad commission act to establish reasonable rates and regulations is set aside, but so much of it as restrains the enforcement of the rates already established is affirmed. The costs in this court will be divided between the parties.

REAGAN *v.* MERCANTILE TRUST COMPANY.

REAGAN *v.* MERCANTILE TRUST COMPANY.

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

Nos. 1168, 1169. Submitted April 13, 1894. — Decided May 26, 1894.

Reagan v. *Farmers' Loan & Trust Co.*, *ante*, 362, followed.

THE case is stated in the opinion.

Mr. C. A. Culberson, Attorney General of the State of Texas, *Mr. H. C. Coke*, and *Mr. W. S. Simkins* for appellants in both cases.

Mr. John F. Dillon, *Mr. E. B. Kruttschnitt*, and *Mr. John J. McCook* for the Mercantile Trust Company, appellee, in both cases.

Mr. Alexander G. Cochran and *Mr. Winslow S. Pierce* for the St. Louis Southwestern Railway Company, appellee in No. 1168, and for the Tyler Southeastern Railway Company, appellee in No. 1169.

MR. JUSTICE BREWER delivered the opinion of the court.

These are cases in which, as in those just decided, the tariff established by the Texas Railroad Commission was challenged, and with like result. The St. Louis Southwestern Railway

Company, named in the first of these cases, is called by counsel for defendants in their brief "a reorganized bankrupt concern." Its road has a total mileage, including main line and branches, of 572 miles. It would seem to be a railroad which was unwisely built, and one whose operating expenses have always exceeded its earnings. Counsel say that "it is familiarly known in Texas as a 'teazer,' and, if it ever passes beyond this interesting but unprofitable stage, even its friends will be surprised." We are not advised, and we can hardly be expected to take judicial notice of what is meant by the term "teazer," but it is clearly disclosed by the record that this was an unprofitable road.

The Tyler Southeastern Railway Company, named in the second suit, has a short road of ninety miles, and also appears as a "reorganized bankrupt concern," and one whose road has been operated with constant loss. In the record in each case is found two annual reports returned to the railroad commission, one for the year ending June 30, 1891, and the other for that ending June 30, 1892. Comparing the statements in these reports, appellants' counsel say that the business of the roads has largely increased since the establishment of the rates made by the commission, and urge that no complaint can be made of action which has resulted so favorably. But an examination shows that the report for the year ending June 30, 1891, includes only the earnings and operating expenses for the single month commencing June 1, 1891, when the new company took possession and commenced operations; and so the enormous increase spoken of is simply the difference between the earnings and expenses for twelve months and those for one month. The bills, with their amendments, allege a decrease in the tonnage as well as a decrease in the rates.

We think, therefore, the cases come within the reasoning of the prior opinions, and that it will not do to hold that, because the roads have been operating in the past at a loss to the owners, it is just and reasonable to so reduce the rates as to increase the amount of that loss. Hence,

The decrees here will be like those ordered in the prior cases.

REAGAN *v.* FARMERS' LOAN AND TRUST COMPANY.

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

No. 1170. Submitted April 13, 1894. — Decided May 26, 1894.

Reagan v. *Farmers' Loan & Trust Company*, *ante*, 362, followed.

THE case is stated in the opinion.

Mr. C. A. Culberson, Attorney General of the State of Texas, *Mr. H. C. Coke*, and *Mr. W. S. Simkins* for appellants.

Mr. John F. Dillon, *Mr. John J. McCook*, *Mr. H. B. Turner*, and *Mr. E. B. Kruttschnitt* for the Farmers' Loan and Trust Company, appellees.

Mr. George R. Peck and *Mr. J. W. Terry* for the Gulf, Colorado and Santa Fé Railway Company, appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is controlled by the opinions in the four preceding cases. There are one or two differences of fact, but nothing affecting the merits of the controversy. The Gulf, Colorado and Santa Fé Railroad Company was incorporated by the State of Texas, but a part of its line was constructed through the Indian Territory under authority of an act of Congress. The figures as to earnings, etc., are also different, but they tend to the same result as to the reasonableness of the rates.

A like decree will be entered in this as in the former cases.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* BACKUS.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 899. Argued March 27, 28, 1894. — Decided May 26, 1894.

The act of the legislature of Indiana of March 6, 1891, concerning taxation, is not obnoxious to the constitutional objections made to it, since the Supreme Court of that State has decided:

(1) That the constitution of that State authorizes such a method of assessing railroad property, which decision is binding on this court; and

(2) That the act gives the railroad companies the right to be heard before final determination of the question, which construction is conclusive on this court; and, further, since

(3) A tax law which grants to the taxpayer a right to be heard on the assessment of his property before final judgment provides a due process of law for determining the valuation, although it makes no provision for a rehearing.

When a railroad runs into or through two or more States, its value, for taxation purposes, in each is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part in that State to that of the whole road.

The judgment of a state board empowered to fix a valuation for taxation, cannot be set aside by the testimony of witnesses that the valuation was other than that fixed by the board, where there is no evidence of fraud or of gross error in the system on which the valuations were made.

On March 6, 1891, the legislature of the State of Indiana passed an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," Laws 1891, c. 99, pp. 199 to 291, which, expressly repealing "all laws and parts of laws within the purview of this act," provided in itself a complete and comprehensive system of taxation. By it all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a state board of tax commissioners, composed of the governor, secretary of State, auditor of State, and two appointees of the governor. To this board, in addition to

the assessment of railroad property, was given the duty of equalizing the assessment of real estate throughout the State, as well as of entertaining appeals from the decisions of the several county boards. This method of assessing railroad property by a state board, as distinguished from the assessment of ordinary property through county officers, was not by this act for the first time introduced into the legislation of Indiana, though by it some changes were made in the organization of the state board, and in the details of procedure.

By section 129 the board was required to " convene in the office of the auditor of State, on the first Monday of August each year, for the purpose of assessing railroad property and equalizing the assessment of real estate, as provided in this act," and " is hereby given all the powers given to county boards of review." By section 132 authority was given to adjourn from time to time, with a proviso that " the duration of their sessions shall not exceed forty days." Section 3 is in these words:

" SEC. 3. All property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

In section 4 it is provided: " Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder."

By section 8 personal property was to be listed for taxation as of the first day of April in each year.

The property of railroad corporations was divided into two classes — railroad track and rolling stock — and by sections 78 and 80 defined as follows:

" SEC. 78. Such right of way, including the superstructures, main, side or second track and turnouts, turn-table, telegraph poles, wires, instruments and other appliances, and the stations and improvements of the railroad company on such right of way, (excepting machinery, stationary engines, and other fixtures, which shall be considered personal property,) shall be held to be real estate for the purpose of taxation, and denominated ' railroad track.'

" SEC. 80. The movable property belonging to a railroad

company shall be held to be personal property, and denominated, for the purpose of taxation, 'rolling stock.'"

Between the first of April and the first of June of each year the railroad companies were required to make certain reports to the county auditors. Section 85 is as follows:

"SEC. 85. At the same time that the lists or schedules as hereinbefore required to be returned to the county auditor the person, company, or corporation running, operating, or constructing any railroad in this State shall, under the oath of such person, or the secretary or superintendent of such company or corporation, return to the auditor of State sworn statements or schedules, as follows:

"*First.* Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the State.

"*Second.* The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this State.

"*Third.* Showing the number of ties in track per mile, the weight of iron or steel per yard used in the main and side tracks, what joints or chairs are used in track, the ballasting of road, whether gravelled, stone, or dirt, the number and quality of buildings or other structures on 'railroad tracks,' the length of time iron or steel in track has been used, and the length of time the road has been built.

"*Fourth.* A statement or schedule showing:

"1st. The amount of capital stock authorized and the number of shares into which such capital stock is divided.

"2d. The amount of capital stock paid up.

"3d. The market value, or, if no market value, then the actual value of the shares of stock.

"4th. The total amounts of all indebtedness except for current expenses for operating the road.

"5th. The total listed valuation of all its tangible property in this State. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of State."

Counsel for Parties.

Section 137 provides:

"SEC. 137. Said board shall also assess the railroad property, denominated in this act as 'railroad track' and 'rolling stock,' at its true cash value, and said board is hereby given the power and authority, by committee or otherwise, to examine persons or papers."

Between April 1, 1890, and April 1, 1891, the plaintiff in error, plaintiff below, was created by the consolidation of several corporations theretofore existing. Its entire length of main track was 1145.87 miles, of which 647.42 miles were in Indiana, 27.99 in Illinois, 403.33 in Ohio, 19.48 in West Virginia, and 47.65 in Pennsylvania. The Indiana portion of the property belonging to this corporation, including both railroad track and rolling stock, was assessed in 1890 at $8,538,053. The assessment of the like property under the act of 1891 amounted to $22,666,470. Thereafter and on April 19, 1892, the company commenced this suit in the Superior Court of Marion County, to restrain the collection of taxes based upon the assessment of 1891, on the double ground that the act of 1891 was unconstitutional, and that if constitutional it had been so administered as to create an illegal assessment of the company's property. A tender was made of the amount which would be due according to the valuation placed upon the property in 1890, and, as we understand, this amount has been, under an arrangement between the parties, paid into the different county treasuries. Issue having been joined, the case was heard and a decree rendered finding the equity of the case with the defendants, and denying the application for an injunction. On appeal to the Supreme Court of the State this ruling was sustained. To reverse the final decree of that court the plaintiff sued out this writ of error.

Mr. John M. Butler (with whom were *Mr. S. O. Pickens*, *Mr. Alpheus H. Snow*, and *Mr. John M. Butler, Jr.*, on the brief,) for plaintiff in error.

Mr. Alonzo Greene Smith, Attorney General of the State of Indiana, and *Mr. William A. Ketcham* for defendant in error.

Mr. John W. Kern and *Mr. Albert J. Beveridge* were with them on the brief.

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

The decision of the Supreme Court of the State removes from this case all questions of conflict between the act and the constitution of the State, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights which the Federal Constitution secures to the plaintiff. Notwithstanding the elaborate attack made both in brief and argument upon this act, it seems to us that its constitutionality has been practically settled by decisions of this court, especially those in *State Railroad Tax Cases*, 92 U. S. 575, and *Kentucky Railroad Tax Cases*, 115 U. S. 321. In both of those cases legislation providing for the assessment of railroad property by a state board, while all other property in the State was assessed by county officials, was held to be obnoxious to no provision in the Federal Constitution. Counsel deny the applicability of those two cases, on account of differences between the constitutions of Illinois and Kentucky and that of Indiana, the constitution of Illinois expressly authorizing the legislature to classify property for taxation, and only requiring uniformity as to the class of property upon which the particular law operates, and that of Kentucky containing no provision requiring taxes to be levied by a uniform method upon all descriptions of property. A sufficient answer to this is that the decision of the Supreme Court of Indiana in this case is conclusive upon us that the constitution of that State authorizes just the method of assessment adopted in this case.

It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form, before

the final adjudication. But the difficulty with this argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary. In *State Railroad Tax cases*, page 610, are these words, which are also quoted with approval in the *Kentucky Railroad Tax cases:*

"This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

Again, it is said that the act does not require the state board to grant to the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board, and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board, and was heard, by its counsel and through its officers, and the construction placed by the Supreme Court of the State on the act — a construction which is conclusive upon this court — is that the railroad companies are given the right to be present and to be heard.

It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment,

satisfies the demand of the Constitution in this respect. It not unfrequently happens in this, as in all other courts, that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?

Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so; and the power of a State to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals act by Congress, in 1891, a litigant in the Circuit Court, if the amount in dispute was less than $5000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one that such classification carried with it any denial of due process of law?

Again the act is challenged as permitting and requiring the assessment and valuation of property outside the State. This contention is based largely on the provision in section 80 that the "rolling stock shall be listed and taxed in the several counties . . . in the proportion that the main track used or operated in such county . . . bears to the length of the main track used or operated by such person, company, or corporation," and the requirement in the schedule to be returned to

the auditor of State of a statement of the amount of capital stock and indebtedness. We do not think that the matters referred to justify any such imputation. It is not to be assumed that a State contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the State. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property the language expressing such intention must be clear. Section 79, which refers to the matter of "railroad track," in terms provides that "the value of 'railroad track' shall be listed and taxed in the several counties, townships, cities, or towns in the proportion that the length of the main track in such county, township, city, or town bears to the whole length of the road in this State, except the value of the side or second track, and all the turnouts, and all station-houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county, township, city, or town in which the same are located." And while section 80, treating of rolling stock, does not repeat this express limitation, yet it is manifestly implied, not merely from its following immediately after section 79, and from the general scope of the act, but also from the schedule required to be returned to the auditor of State, the first and second clauses of which are as follows:

"*First.* Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the State.

"*Second.* The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this State."

It is obvious that the intent of this act was simply to reach the property of the railroad within the State, and these provisions in respect to apportionment relate simply to apportionment between the different counties, townships, towns, cities, etc., within the State. No intent to the contrary can be deduced

from the provision requiring the corporation to file a statement of its total stock and indebtedness, for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the State. The stock and the indebtedness represent the property. As said by Mr. Justice Miller in *State Railroad Tax cases*, (page 605):

"When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *Franklin County* v. *Nashville, Chattanooga &c. Railway*, 12 Lea, 521, 539, the Supreme Court of Tennessee, in a well-considered opinion, which was quoted with approval by this court in *Columbus Southern Railway* v. *Wright*, 151 U. S. 470, 479, thus referred to the means of ascertaining the value of a railroad track:

"The value of the roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Counsel sought in argument to narrow the meaning of

the words "railroad track" and "rolling stock" as though the two did not include the entire railroad property; but evidently the Supreme Court of the State construed, and as we think properly, the two terms as embracing all which goes to make up what is strictly railroad property. By section three of the act, it is provided that all property in the State shall be subject to taxation unless expressly exempted. By section four, that when the property of a corporation is taxed to the corporation the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms, "railroad track" and "rolling stock." Obviously it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the State to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called "railroad property." And when the statute provides that such property shall be assessed at its "true cash value," it means to require that it shall be assessed at the value which it has, as used, and by reason of its use.

When a road runs through two States it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two States is ascertained the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times

as eminently fair. Thus, in *State Railroad Tax cases*, on page 608, it was said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

And again, on page 611:

"This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *The Delaware Railroad Tax Case*, 18 Wall. 206; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492."

The mileage basis of apportionment was also sustained in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Columbus Southern Railway* v. *Wright*, 151 U. S. 470. It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not re-

quire that the valuation of the property within the State shall be absolutely determined upon a mileage basis.

Our conclusion, therefore, is that this act is not obnoxious to any of the constitutional objections made to it. There remains the further question whether, in the actual administration thereof in this case, there has been any illegal assessment of the property of the plaintiff. It is charged that the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891, and it is not to be denied that such a great increase suggests that which is unfortunately too common — an effort to cast an unreasonable proportion of the public burdens upon corporate property. It is stated by counsel for plaintiff in their brief that the increase from 1890 to 1891 in the valuation of all other than railroad property in the several counties through which its road extends was only 43 per cent, while, as appears, that of the property of the plaintiff was more than 150 per cent. Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal.

The bill of exceptions discloses these proceedings on the hearing: The plaintiff offered the record of the action of the state board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevant and immaterial. Thereupon the plaintiff offered the record of the proceedings of the board in 1891, which was admitted. This recited the appearance of the plaintiff by its officers, and that they were heard as to the proper valuation. It also contained a table by counties of the assessment as made by the board, closing with this certificate:

"Making liberal allowances for all proper deductions, the state board of tax commissioners has fixed the values of the respective railroads and parts of roads within the State of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth.

"In arriving at the basis for the estimate of said values the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same."

The return made by the plaintiff to the auditor of State for the year 1891, in accordance with the requirements of the statute, was also given in evidence, which return was upon a blank furnished by the auditor, and shows an aggregate valuation of about $8,000,000. This return was sworn to by the general manager and secretary of the company. The second vice-president and general counsel of the plaintiff was called as a witness, and, after testifying to his familiarity with the property, and its value, was asked the value in 1890, but, on objection, this testimony was ruled out. He was permitted, however, to give testimony as to the value in 1891, and his answer fixed that value in the aggregate at $8,538,053, the same value that was placed upon the property by the state board in 1890. He was asked to state the average cash value per mile of the company's property in Indiana, and in the other States into which the company's road extended, treating the portion in each State as constituting a unit, separate and distinct from those of the portions in the other States, but an objection to this was sustained, and the testimony offered ruled out. He then testified as to the terminal facilities in the cities of Chicago and Pittsburgh belonging to the plaintiff, and their great value, and the absence of terminal facilities of any particular value in any of the cities in Indiana. He was then asked if the plaintiff owned any rolling stock which was used exclusively in any one of the five States in which it did business, but this question was ruled out. In response to further questions he testified that the plaintiff had no rolling stock used exclusively within the State of Indiana for special purposes. Certain questions were also asked as to the notice or knowledge which the plaintiff had of the determination made by the state board in 1891 as to the valuation, but we have heretofore held that it is immaterial whether it had any

notice thereof after the decision and prior to the adjournment of the board. The assistant engineer of the plaintiff was also called as a witness, and producing a written statement which he had presented to the state board prior to its determination, which statement goes at length into the mileage in the different States, the gross earnings, per cent of earnings, and the value of the track, testified that the facts in such written statement were true. Another witness, the assistant comptroller of the plaintiff, was asked what per cent of the gross receipts of its Indiana business was derived from commerce, beginning and ending wholly within the State and what from interstate business; but, on objection, this testimony was ruled out. The secretary of State, who was a member of the state board, was also called, and testified that the members of the board did not make an official examination or inspection of the railroad track and rolling stock of the plaintiff, being personally acquainted therewith; that they did not summon before them, or examine under oath, any person or persons acquainted with the true cash value of the property. The plaintiff also offered the return made by the Terre Haute and Indianapolis Railroad Company to the auditor of State for the year 1891, prepared upon the same form as that upon which the plaintiff's return was made, but it was ruled out as irrelevant and immaterial, as well as the action taken by the state board in respect to the valuation of the property of such road. This was, in substance, all the testimony offered by the plaintiff.

The defendant simply called the secretary of State, who testified that in assessing the plaintiff's property no assessment was made, except upon the railroad track and rolling stock of plaintiff within the State, and no assessment was made of any property of value outside the State.

Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the state board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the state board. Whenever a question of fact is thus submitted

to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the state government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the State, and gave to the property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention.

The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first ascertaining the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the State of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the

general line of the road does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificate is affirmatively that it took into consideration "all other matters appertaining thereto that would assist the board in arriving at a true cash value" of the parts of the road within the State of Indiana. That the aggregate value of the entire property of the company was evidence properly receivable and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both on reason and authority. There is no evidence that the board had before it or considered any matter in reaching its determination which was not properly receivable and properly to be considered. A comparison of the assessment placed by the board upon the property of this plaintiff with that placed by it upon other roads, or portions of roads, within the State is immaterial unless coupled with an offer to show an identity in value, so that the case narrows itself down to this: Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the State were of largely greater value than any similar length of road within the State, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the State, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meagre testimony.

These are all the questions presented in this record, and notwithstanding the shadow cast upon the action of the board by this large increase in valuation, we are forced to the conclusion not only that the act is not open to the objections

made to its constitutionality, but also that there is no sufficient testimony to impeach the conclusion and determination of the state board. The judgment of the Supreme Court of the State of Indiana is, therefore,

Affirmed.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BROWN, dissenting.

The statute of Indiana of March 6, 1891, as construed by the Supreme Court of that State, authorized the State Board of Tax Commissioners, in assessing the "railroad track" and "rolling stock" of the company in the State, to ascertain the market value of its property and interests of every kind, within and without the State, including capital stock, bonds, earnings, franchise, equipment, etc.; and, that being done, to take as the value of the company's track and rolling stock in Indiana for taxation such proportion of that aggregate amount as the number of miles of its road in that State bore to the aggregate miles of its road or roads within and without the State. And by this rule of valuation the State Board of Tax Commissioners seems to have been governed. In the official report by the board of its proceedings for 1891, showing the basis on which the values of the railroads and parts of roads within the State had been fixed, it is said that, "in arriving at the basis for the estimate of said values the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same." The forms of printed returns supplied to railroad companies show that they were required to report such values and earnings in respect of all their property of every kind, wherever situated. Under the mode of assessment pursued, property was taxed in Indiana that had no situs there, which was used in interstate commerce outside of Indiana, and could not properly be included in the company's railroad track and rolling stock in that State. I am of opinion that the statute as construed and

enforced by the State imposed illegal burdens upon interstate commerce under the guise of a valuation for purposes of taxation of property within the State. The board had no authority to impart to the value of railroad track and rolling stock, within the State, any part of the value of the company's various interests and property without the State.

There was some contention at the bar as to whether the state board, in fact, proceeded according to the rule of valuation to which I have referred. If I am in error in saying that it appears, affirmatively, from the record, that the board applied that rule, there can be no doubt that the state court construed the statute as authorizing the adoption of such a rule. It is equally clear that evidence to prove that the board acted upon that rule was offered and excluded, and that a proper exception was taken. Such action upon the part of the court was itself sufficient to raise the question whether the statute, as interpreted by the state court, and as administered by the state authorities, was not obnoxious to the objection that it permitted illegal burdens to be imposed, under the guise of local taxation, upon interstate commerce, and the taxation of property not within the jurisdiction of Indiana.

Without referring to other grounds discussed at the bar, I dissent from the opinion and judgment in this case upon the grounds above stated.

I am authorized by Mr. Justice Brown to say that he also dissents.

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

Indianapolis and Vincennes Railroad Company *v.* Backus, No. 900. Error to the Supreme Court of the State of Indiana. Argued March 27, 28, 1894. Decided May 26, 1894.

Mr. Justice Brewer delivered the opinion of the court.

Syllabus.

Case No. 900, brought by the Indianapolis and Vincennes Railroad Company to impeach the assessment made by the same board, in the same year, of its property, is so nearly like this in its material features that no separate statement of the special facts is necessary, and in that case, too, the judgment of the Supreme Court of the State of Indiana will be

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE BROWN dissented from the opinion and judgment upon the ground stated in their dissenting opinion in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Backus*, No. 899, *ante*, 421, 437.

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

Mr. John M. Butler for plaintiff in error.

Mr. Albert Greene Smith, Attorney General of the State of Indiana, and *Mr. William A. Ketcham* for defendant in error.

CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* BACKUS.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 908. Argued March 27, 28, 1894. — Decided May 26, 1894.

If an assessing board, seeking to assess for purposes of taxation a part of a railroad within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, that is not a valuation of property outside of the State; and the assessing board, in order to keep within the limits of state jurisdiction, need not treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road.

Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a State forming part of a line of road

running into another State, and assesses those miles of road at their actual cash value determined on a mileage basis, this does not place a burden upon interstate commerce, beyond the power of the State, simply because the value of that railroad as a whole is created partly — and perhaps largely — by the interstate commerce which it is doing.

THE case is stated in the opinion.

Mr. John T. Dye for plaintiff in error.

Mr. Alonzo Greene Smith, Attorney General of the State of Indiana, and *Mr. William A. Ketcham* for defendant in error. *Mr. Albert J. Beveridge* and *Mr. John W. Kern* were with them on their brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is similar to the two just decided, in that it was a suit brought by this plaintiff in the same court, challenging an assessment of its railroad property for the same year, by the same board, with the same result both in the trial and Supreme Court of the State. Hence it is useless to reconsider the questions decided in those cases as to the constitutionality of the act itself, or those which depend solely upon like testimony. There was, however, in the trial of this case a more elaborate effort to show that the state board included in its assessment the value of property outside the State, and also that the valuation placed nominally upon the property within the State was largely based upon interstate business done by the plaintiff, and thus, as is claimed, to that extent, placed a direct burden upon interstate commerce, which, it is conceded, is beyond the power of the State to cast. It becomes necessary, therefore, to notice a little in detail the testimony which was received, as well as that which was excluded on the hearing.

It may be premised that there was much testimony of a character similar to that given in the other cases. Beyond that, there was a large amount of testimony received as well as some offered and rejected for the purpose of showing what was presented to the board for consideration, the method by

which it reached its conclusions, and the elements which entered into its estimate of value. The principal witness relied on in respect to these matters was the secretary of State, a member of the board. By him it was proved that no witness was sworn and examined, and no inquiry made in that way, as to the value of this property. It appeared that the return made by the company was before the board for consideration. The court ruled out an offer to prove that outside of such return no books, papers, or documents, except Poor's Manual and the Investors' Guide, were produced before the board, or considered by it in making the assessment; that Poor's Manual was used by it for data upon which to base the assessment; and specifically that this was the only evidence which it had as to the number of miles owned and leased by the plaintiff, the State in which they were located, and the various encumbrances upon the different lines of road included in the system belonging to the plaintiff. It was shown that the plaintiff appeared before the board by its officers, with such statements as they desired to make, and also that other individuals (especially an attorney representing Marion County, one of the counties through which the road of the plaintiff runs) appeared and made arguments. A series of questions was put to the witness, of which this is a sample:

"Q. In the assessment of the Cincinnati, La Fayette and Chicago Railway, extending from Templeton, Indiana, to the Illinois state line," (one of the lines in plaintiff's system and included in the assessment,) "in arriving at the basis for the estimate of the value which you placed upon the main line of that road, did you consider the market value of any stocks; and, if so, of what stocks did you consider the market value?"; but the court ruled the question out on the ground that it was an attempt to inquire into the mental processes of members of the board. At the time counsel for the defendant stated:

"We desire to let the record show at this point, may the court please, that the defendant will interpose no objection to any question asked by the plaintiff as to whether or not the state board of tax commissioners assessed and valued any

bonds, stocks, or anything else outside of the State, and that we will not object to any question asked any member of the state board of tax commissioners as to whether or not that board assessed anything else than railroad track and rolling stock inside of the State of Indiana."

The plaintiff did not, however, apparently care to take advantage of this offer. Other questions were put to the witness, like the following:

"Q. In assessing the Indianapolis and St. Louis Railroad, you placed the main track at $27,900 per mile, while you assessed the main track of the Terre Haute and Indianapolis Railroad at $21,800 per mile, being $6000 per mile less than the track of the St. Louis division of the three C.'s & St. L. or the I. & St. L. railroad. Now, in making this assessment, $21,800 per mile, or $27,900 per mile upon the main track of the St. Louis division of the three C.'s & St. L., did you or not consider the gross earnings of the three C.'s & St. L. railway, including earnings derived from carrying freight and passengers from points within to points without the State of Indiana, or through the State of Indiana, while engaged as a common carrier in interstate commerce?"; but the court sustained objections to all of them.

The witness was also asked, but not permitted to answer:

"Q. Did you fix the value upon the St. Louis division of the three C.'s & St. L. railway — I mean did the board — as returned to the auditor of State separately or did you value that road as a part of the three C.'s & St. L. system in Ohio and in Indiana, and did you, having reached a unit of value by considering the whole system, distribute that unit of value according to mileage over the operated and leased lines and parts of roads in Indiana of the plaintiff?"

Another series of questions was propounded, of which the following is one:

"Q. Did you or not, in assessing and fixing the value of the St. Louis division and of the Chicago division and of the leased and operated lines of the three C.'s & St. L. Railway in the State of Indiana, place or add anything to the value of said lines by reason of the fact that it had a franchise?"

Objections were made by the defendant to these questions, which were sustained, but afterwards, when the witness was again on the stand, the objections were withdrawn, whereupon the plaintiff withdrew all the questions except the one which we have last quoted, and to that the witness answered, "We did not; no, sir."

These references are probably sufficient to fully present the questions for consideration. It will not be claimed that it is within the province of this court to review any question as to the admission or rejection of testimony which does not bear directly upon some matter of a Federal nature. It will be noticed that no testimony was ruled out showing, or tending to show, what was in fact valued and assessed by the state board. There was also direct testimony that no franchise belonging to the plaintiff was estimated in making the assessment. The inquiry, therefore, in view of the testimony received and that offered and rejected is narrowed to these two matters: First. If an assessing board, seeking to assess for purposes of taxation a part of a road within a State, the other part of which is in an adjoining State, ascertains the value of the whole line as a single property and then determines the value of that within the State, upon the mileage basis, is that a valuation of property outside of the State, and must the assessing board, in order to keep within the limits of state jurisdiction, treat the part of the road within the State as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road? Second. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a State forming part of a line of road running into another State, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a burden upon interstate commerce, beyond the power of the State, simply because the value of that railroad as a whole is created partly — and perhaps largely — by the interstate commerce which it is doing?

With regard to the first question, it is assumed that no special circumstances exist to distinguish between the condi-

tions in the two States, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed. A notable illustration of this was in the New York Central Railroad consolidation. Many years ago the distance between Albany and Buffalo was occupied by three or four companies, each operating its own line of road, and together connecting the two cities. The several companies were united and formed the New York Central Railroad Company, which became the owner of the entire line between Albany and Buffalo, and operated it as a single road. Immediately upon the consolidation of these companies, and the operation of the property as a single, connected line of railroad between Albany and Buffalo, the value of the property was recognized in the market as largely in excess of the aggregate of the values of the separate properties. It is unnecessary to enter into any inquiry as to the causes of this. It is enough to notice the fact. Now, when a road runs into two States each State is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the State were

operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each State has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the States, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the State.

The second question must also be answered in the negative. It has been again and again said by this court that while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among many other cases, *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18.

The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An at-

tempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio between the States of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either State, assessing that portion of the bridge within the State for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this court, a ruling demanded by the harmonious relations between the States and the national government, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no State shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for the carrying on of such commerce. It is enough for the State that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws,

and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the State. Neither is this an attempt to do by indirection what cannot be done directly — that is, to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden upon its free exercise. We answer this question, therefore, in the negative.

These are the only matters which seem to distinguish this case from the two preceding, and, therefore, the judgment of the Supreme Court of Indiana is

Affirmed.

Mr. Justice Harlan and Mr. Justice Brown dissented from the opinion and judgment in this case upon the grounds stated in their dissenting opinion in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company* v. *Backus*, No. 899, *ante*, 421, 437.

Mr. Justice Jackson did not hear the arguments in this case, or take any part in its decision.

INTERSTATE COMMERCE COMMISSION *v.* BRIMSON.

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

No. 883. Argued April 16, 1894. — Decided May 26, 1894.

The twelfth section of the Interstate Commerce Act authorizing the Circuit Courts of the United States to use their process in aid of inquiries before the Commission established by that act, is not in conflict with the Constitution of the United States, as imposing on judicial tribunals duties not judicial in their nature.

A petition filed under that section in the Circuit Court of the United States against a witness, duly summoned to testify before the Commission, to compel him to testify or to produce books, documents, and papers re-

lating to the matter under investigation before that body, makes a case or controversy to which the judicial power of the United States extends.

As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, the power conferred upon the Interstate Commerce Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents relating to a matter under investigation by it, imposes upon any one summoned by that body to appear and testify the duty of appearing and testifying, and upon any one required to produce such books, papers, and documents the duty of producing them, if the testimony sought and the books, papers, etc., called for relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused by the law on some personal ground from doing what the Commission requires at his hands.

Power given to Congress to regulate interstate commerce does not carry with it authority to destroy or impair those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen.

It was open to each of the defendants in this proceeding to contend before the Circuit Court that he was protected by the Constitution from making answer to the questions propounded to him or that he was not bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for related to the particular matter under investigation, nor to any matter which the Commission was entitled under the Constitution or laws to investigate. This issue being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits.

Hayburn's Case, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Todd's Case*, 13 How. 52; *Gordon* v. *United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222, examined and distinguished.

The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for *final* determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment.

Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 6 Wheat. 204, and in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be

Argument for Appellees.

exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.

A proceeding under the twelfth section of the Interstate Commerce Act is not merely ancillary and advisory, nor is its object merely to obtain an opinion of the Circuit Court that would be without operation upon the rights of the parties. Any judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant, and furnish a precedent for similar cases. The judgment is none the less one of a judicial tribunal dealing with questions judicial in their nature and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

The issue made in such a case as this is not one for the determination of a jury, nor can any question of contempt arise until the issue of law in the Circuit Court is determined adversely to the defendants, and they refuse to obey, not the order of the Commission, but the final order of the court. In matters of contempt a jury is not required by due process of law.

The case is stated in the opinion. See *post*, pages 456 to 468.

Mr. Solicitor General for appellant. *Mr. Attorney General* and *Mr. George F. Edmunds* filed a brief for same.

Mr. E. Parmalee Prentice, (with whom were *Mr. J. C. Hutchins* and *Mr. C. S. Holt* on the brief,) for appellees.

I. This investigation was in its nature judicial, and authority to make it could not lawfully be conferred by Congress upon the Interstate Commerce Commission, which is in its nature an administrative and not a judicial body.

Whether Congress could create a judicial body charged with any or all of the duties that pertain to the Interstate Commerce Commission need not be considered. Those Commissioners are appointed for a term of years, and not during good behavior, as the Constitution requires for Federal judges. This question received most thorough and careful examination by Mr. Justice Jackson in *Kentucky Bridge Co.* v. *Louisville & Nashville Railroad*, 37 Fed. Rep. 567, 612, *et seq.*

The inquiry which the Commission was pursuing was judicial. We assert with entire confidence, that it is not one

of the constitutional means included in the power to regulate interstate commerce, to delegate to a non-judicial body the duty of inquiring whether such commerce "is carried on according to the requirements of law." The proposition thus laid down by counsel is that Congress may authorize compulsory inquiry by a non-judicial body for the purpose of discovering and punishing past violations of law. A more startling proposition has seldom been asserted in this court. These violations are, if anything, crimes, punishable by heavy penalties of fine and imprisonment, and the investigation of the question whether crime has been committed is not an administrative act within any possible construction of the language. Such an inquiry is a function of the courts, with their historic appropriate machinery of the grand jury. Cooley, Const. Lim. (5th ed.) 109, 110. See also *Commonwealth* v. *Jones*, 10 Bush, 725, where the Supreme Court of Kentucky held that the legislature even of a State, could not empower election boards to decide whether a citizen by dueling has forfeited his right to vote or hold office, since that determination involves a judicial question. Authorities might be multiplied on this point, but we do not think it necessary.

That the inquiry in this case is judicial and only judicial, it seems impossible to doubt. We are at a loss to know how counsel expects to make it appear otherwise. Tried by any test with which we are familiar, the result is the same. The language of the order entered by the Commission, and of the "informal complaints" on which that order was based, is susceptible of no other construction. The wrong complained of was that the Illinois Steel Company, by means of the "switching roads" as the device, was violating the provisions of the Interstate Commerce Act by obtaining unjust preferences over other shippers. The law makes one and only one provision in such a case, viz., the punishment of the persons responsible for such violation.

It is obvious that no special sanctity attaches to the name, the number, or the personality of the body in which this power is attempted to be lodged. If Congress may authorize such inquiry by a commission of five distinguished citizens

appointed for a term of years, it may, under the same constitutional warrant, confer like power on a single individual for the entire country, or on a different individual for each State or county or railroad, or may attach it as a duty to an existing office, such as that of postmaster or United States marshal. It may thus constitute an indefinite number of irresponsible citizens into detectives, armed with inquisitorial authority and a roving commission. For the safety and liberty of the citizen, Congress ought not to have any such power. It is gratifying to discover that wherever the question has been presented, the courts have decided that it has no such power.

A clearer or more emphatic statement could hardly be made, than has been made by the Interstate Commerce Commission itself on this precise point. We should almost be willing to submit this branch of the case upon its annual report of the Commission for 1893.

Turning from principle to authority, we find discussion practically foreclosed by the vigorous and decisive opinion of Mr. Justice Field in *In re Pacific Railroad Commission*, 32 Fed. Rep. 241. The act creating that commission conferred power in terms as broad and as plausible as those of section 12 of the Interstate Commerce Act, directing an inquiry into the management of certain railroad companies and into the relations of the directors, officers, and employés of said companies with other concerns having contracts with the companies under investigation, and also whether the companies, or their officers or agents, had paid money or done anything else for the purpose of influencing legislation. These powers, like the powers attempted to be conferred on the Interstate Commerce Commission, contained two elements. Some of them were purely and offensively inquisitorial, searching into business which was wholly private. For the rest, the information sought could only be material as a foundation for subsequent judicial (*i.e.* criminal) proceedings. In the first part of his opinion Mr. Justice Field, with great power and unanswerable logic, demonstrates that this is a judicial inquiry; that the Commission is in no respect a judicial body, and that under our

system of government such a body cannot conduct such an inquiry. He cites the decision of this court by Mr. Justice Miller in *Kilbourn* v. *Thompson*, 103 U. S. 168, and the case of *Boyd* v. *The United States*, 116 U. S. 616, which equally with the *Kilbourn case* in his language, is "a bulwark against the invasion of the right of the citizen to protection in his private affairs," adds, "the courts are open to the United States as they are to the private citizen, and both can there secure by regular proceeding, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

II. Even if Congress could empower the Commission to make this investigation, still it could not empower the court to grant the order applied for; because, whether the character of the inquiry is judicial or non-judicial, the question does not here arise in a case or controversy as required by the Constitution.

If this investigation by the Interstate Commerce Commission is other than judicial in its character, then by the very terms of its organization a judicial tribunal has no power over it. But that it is a judicial inquiry we have sufficiently shown by argument and authority. It remains to show that, as here presented, it is such an inquiry as does not fall within the constitutional province of this court.

The Federal Constitution provides that: "The judicial power shall extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made, or which shall be made under their authority, . . . to controversies to which the United States shall be a party, . . . etc."

The two clauses cited are the only ones under which, by any possible construction, the present application could fall. No power is granted except under the two categories of "cases" and "controversies." It was early decided, and has never been seriously questioned, that these words not only express, but limit the judicial power of the United States, and that only "cases" and "controversies" can find an entrance into the Federal courts. What these words mean, and

how strictly they define the power of the Federal judiciary may be seen from a few citations. Justice Field, in the case above cited, says:

"The term 'controversies,' if distinguishable at all from 'cases,' is in that it is less comprehensive than the latter, and includes only suits of a civil nature." Citing *Chisholm* v. *Georgia*, 2 Dall. 432.

What, then, are "cases"? Judge Story answers as follows: "Another inquiry may be, what constitutes a *case* within the meaning of this clause? It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." Story Const. § 1646.

In *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819, Chief Justice Marshall says: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."

So, also, this court, by Mr. Justice Field, has compactly defined "cases and controversies" in the following language: "By those terms are intended the claims or contentions of litigants, brought before the courts for adjudication by regular

proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." *Smith* v. *Adams*, 130 U. S. 167, 173.

The courts have uniformly and repeatedly refused to recognize as "cases" or "controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them. Under the first head falls *United States* v. *Ritchie*, 17 How. 525. The language of the act creating the California Land Claims Commission seems to be framed with a studious purpose of making the Commission an adjunct of the court, and provides *eo nomine* an "appeal" from its decision. This court decided that the Commission could only be supported at all by treating it as a purely administrative body, and that the so-called "appeal" was, in legal effect, the institution of a new suit, the judicial power being then for the first time invoked.

In *Ferreira's Case*, 13 How. 40, 45, the proceeding was held not to be a constitutional "case," because there was a similar discretion lodged in the Secretary of State after the court should have rendered its decision upon the validity of any given claim.

The precise objection here urged was recognized by Mr. Justice Gray, now of the United States Supreme Court, speaking as Chief Justice for the Supreme Court of Massachusetts, in the case of *Supervisors of Elections*, 114 Mass. 247. The Massachusetts constitution defined and limited very strictly the division of powers between the legislative, executive, and judicial departments. It was held by the Supreme Court that an act of the legislature, requiring the court on petition to appoint supervisors of elections, was unconstitutional, as imposing non-judicial duties upon the court. Judge Gray says: "These supervisors, although entrusted with a certain discretion in the performance of their duties, are strictly executive officers. They make no report or return to the court or any judge thereof. Their duties relate to no judicial suit or proceeding. . . . We are unanimously of the opinion that the power of appointing such officers cannot be con-

ferred upon the justices of this court without violating the constitution of the Commonwealth. We cannot exercise this power as judges, because it is not a judicial function, nor as commissioners, because the constitution does not allow us to hold any such office."

This decision is not weakened in any way by the acts of Congress authorizing the Federal Judges to appoint supervisors of election. The grounds of distinction pointed out by Judge Gray are unnecessary to be considered, since the Federal Constitution, article 2, section 2, clause 2, expressly authorizes Congress to "vest the appointment of such inferior officers as they shall think proper, in the President alone, in the courts of law, or in the heads of departments." It is held by this court, in *Ex parte Siebold*, 100 U. S. 371, that the appointment of Federal supervisors by the courts is warranted by this clause of the Constitution. The reasoning of Judge Gray in the Massachusetts case is strictly applicable here.

We come back finally to the proposition, which counsel does not state in terms, but which is involved in all of his argument, that any petition to a court, however non-judicial in form, asserting a right, however non-judicial in character, on one side, and an answer denying the right on the other, constitute a case or controversy, even though, as here, the denial is based upon the ground that there is no case or controversy. But if every unfounded assertion of a right, in a non-judicial form, could make a "case," the whole constitutional limitation would be meaningless and void. This will readily appear if we leave out of sight for a moment the congressional authority on which the asserted right is here supposed to be based, and test the question as between private parties. A duty imposed by Congress has no higher sanctity than the obligations of a private contract. Suppose, then, that some years ago a private individual had filed a petition, setting up that by contract a senator of the United States, upon good consideration, had agreed to make known to the petitioner the reasons which influenced the senator to support the Compromise of 1850, which agreement the senator was now refusing to perform, and praying that performance be

ordered by summary process, subject to the pains and penalties of contempt; and that the senator, being served with process or notice, had come into court and denied that the subject-matter of the application was a case or controversy within the Constitution. The situation would be in legal effect precisely what is said to exist in the case at bar — the right of petitioner to have the information asserted on the one side and denied on the other.

Does this make a case of judicial cognizance? Obviously not, for the reason that the court, looking into the subject-matter of the application, discovers that it is of a non-judicial character. But the right of the court to examine into the nature of the subject-matter is fatal to the argument in question. If a right, asserted on the one side and denied on the other, is judicial or otherwise according to the nature of the right, then it is idle to argue that the assertion and denial alone make a constitutional "case."

That the court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration, is abundantly settled by authority. See *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 282; *Ferreira's Case*, 13 How. 45; *Scott* v. *Neeley*, 140 U. S. 106; *Puterbaugh* v. *Smith*, 131 Illinois, 199; *Kilbourn* v. *Thompson*, 103 U. S. 168; *Langenberry* v. *Decker*, (Indiana,) 31 N. E. Rep. 190.

Mr. Justice Harlan delivered the opinion of the court.

This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission under the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev. Stat. 529, 684, 891.

The petition was based on the twelfth section of the act authorizing the Commission to invoke the aid of any court of

the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The Circuit Court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. Rep. 476, 480.

The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one State and not shipped to a foreign country from any State or Territory, or from a foreign country to any State or Territory. But they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad" as used in the act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered in

the transportation of passengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provisions of the act, directly or indirectly, by special rate, rebate, drawback, or other device, charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property, than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect. And carriers subject to the provisions of the act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines; but this regulation does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. § 3.

It is made unlawful for any carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and con-

ditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the Commission, the carrier may in special cases after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section. § 4.

It is also made unlawful for any carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance is deemed a separate offence. § 5.

Another section of the act provides for the printing and posting by carriers of their rates, fares, and charges for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares, and charges, including the rates established and charged for freight received in this country to be carried through a foreign country to any place in the United States; forbids any advance or reduction in such rates, fares, and charges, so established and published, except upon public notice, of which changes the Commission shall be notified; requires every carrier to file with the Commission copies of all contracts, agreements, or arrangements with other carriers relating to any traffic affected by the provisions of the act, as well as copies of schedules of joint tariffs of rates, fares, or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of

persons or property, or for any services in connection therewith between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time; authorizes in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares, and charges, a writ of mandamus to be issued by any Circuit Court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offence may be committed, and if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic, and has an agent to perform such service, to compel compliance with the above provisions of the section relating to schedules of rates, fares, and charges — such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the act, and the failure to comply with its requirements being punishable as and for a contempt; and empowers the commissioners, as complainants, to apply, in any such Circuit Court of the United States, for a writ of injunction against the carrier, to restrain it from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of the act, until the carrier shall have complied with the provisions last referred to. § 6.

So a common carrier subject to the provisions of the act is forbidden to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some

necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the act. § 7.

By the eleventh section a commission is created and established, to be known as the Interstate Commerce Commission, and to be composed of five commissioners, appointed by the President, by and with the advice and consent of the Senate. § 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute; prescribe penalties against carriers for illegal exactions and discriminations; and indicate how the provisions of the statute may be enforced against carriers by the Commission.

The twelfth section, 26 Stat. 743, c. 128, the validity of certain parts of which is involved in this proceeding, provides as follows: "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to

take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with Commission. All depositions must be promptly filed with the Commission.

"Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States." § 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause:

Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that State the Calumet and Blue Island Railroad Company, the Chicago and Southeastern Railway Company of Illinois, the Joliet and Blue Island Railway Company, and the Chicago and Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and

places without to cities and places within Illinois, in connection, respectively, with the Baltimore and Ohio Railroad Company, the Baltimore and Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore and Michigan Southern Railway Company, the Chicago, Rock Island and Pacific Railway Company, the Pittsburgh, Fort Wayne and Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago and Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka and Santa Fé Railway Company, the Elgin, Joliet and Eastern Railway Company, the Chicago and Northwestern Railway Company, and the Chicago, Milwaukee and St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, for the purpose of operating its switches and side tracks at or near Milwaukee, in that State, and engaging in traffic or traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee and St. Paul Railway Company, and the Chicago and Northwestern Railway Company; and that said Illinois Steel Company owned and controlled the above-named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the act to regulate commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give to the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the States of Illinois and Wisconsin to divers cities and towns within those States.

It was made to appear to the Commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had

been and were still engaged in the transportation of property by railroad in connection with the other companies named "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the States of Illinois and Wisconsin, and that none of the companies, so owned, controlled, and operated, had filed with the Commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges as required by the act of Congress.

The Commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the Commission the above contracts, agreements, and tariffs.

An order was thereupon made by the Commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of and responding to the following questions:

1. Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

2. Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company? and if so, to what amount?

The order further required all of the companies named to appear before the Commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the Commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the State and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet and Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreasonable rates in interstate traffic or in securing to that company illegal, undue, or unreasonable preferences.

The Commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpœnaed to testify before the Commission was William G. Brimson, the president and manager

of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching — switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them; mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet and Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the Commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet and Blue Island Railway Company, but refused, upon the demand of the Commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Stirling, first vice-president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the Steel Company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the Commission issued a *subpœna*

duces tecum, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpœna was issued to William R. Stirling, as first vice-president of the Steel Company, commanding him to appear before the Commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpœnas, but refused to produce the books or either of them so ordered to be produced.

The Commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the Commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorized the Circuit Court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instru-

ment or under the laws of the United States, as well to all controversies to which the United States shall be a party, (Art. 3, sec. 2,) and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress, 25 Stat. 434, c. 866, the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offence punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial body." *In re Interstate Commerce Commission*, 53 Fed. Rep. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offence against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended;

while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument.

The Constitution expressly confers upon Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Art. 1, § 8. While the completely internal commerce of a State is reserved to the State itself, because never surrendered to the general government, commerce, the regulation of which is committed by the Constitution to Congress, comprehends traffic, navigation, and every species of commercial intercourse or trade between the United States, among the several States, and with the Indian tribes. *Gibbons* v. *Ogden*, 9 Wheat. 1, 193, 194. "It may be doubted," this court has said, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown* v. *Maryland*, 12 Wheat. 419, 446; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 346. "In the matter of interstate commerce," this court, speaking by Mr. Justice Bradley, has declared, "the United

States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494. The same principle was announced by the present Chief Justice in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148.

What is the nature of the power thus expressly given to Congress, and to what extent, and under what restrictions, may it be constitutionally exerted?

This question was answered when Chief Justice Marshall said that it was the power "to prescribe the rule by which commerce is to be governed." "This power," the Chief Justice continued, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments." *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 196–7.

Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several States is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?

The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423, it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Guided by these principles, we proceed to inquire whether the twelfth section of the Interstate Commerce Act, so far as it authorizes the present proceeding, assumes to invest the Circuit Courts of the United States with functions that are not judicial.

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one State to another, is a proper regulation of interstate commerce, or that the object that Congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several States. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same obser-

vation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." 4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry

without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. *Sinking Fund Cases*, 99 U. S. 700, 718.

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

It is to be observed that independently of any question concerning the nature of the matter under investigation by the Commission — however legitimate or however vital to the public interests the inquiry being conducted by that body — the judgment below rests upon the broad ground that no *direct* proceeding to compel the attendance of a witness before the Commission, or to require him to answer questions put to him, or to compel the production of books, documents, or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which, under the Constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial. And the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because

and only because its road is a public highway established primarily for the convenience of the people and to subserve public objects, and, therefore, subject to governmental control. *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657.

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument, which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice Marshall, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819. And in *Murray* v. *Hoboken Co.*, 18 How. 272, 284, Mr. Justice Curtis, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith* v. *Adams*, 130 U. S. 173, Mr. Justice Field, speaking for the court, said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings estab-

lished for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision — assuming it to be applicable to a matter that may be legally entrusted to an administrative body for investigation — is, we repeat, not disputed and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those

who dispute the validity of an act of Congress and seek to obstruct its enforcement. And these issues, made in the form prescribed by the act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an act of Congress declaring it to be an offence against the United States for any one to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offence or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form, and *direct in its operation*, for the prompt and conclusive determination of this dispute.

As the Circuit Court is competent under the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for non-compliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the States is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the act of Congress is clear and strong. *Fletcher* v. *Peck*, 6 Cranch, 87, 128. In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn* v. *Thompson*,

103 U. S. 168, 190. We said in *Boyd* v. *United States*, 116 U. S. 616, 630, — and it cannot be too often repeated, — that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employés of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. This court has already spoken fully upon that general subject in *Counselman* v. *Hitchcock*, 142 U. S. 547. We need not add anything to what has been there said. Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a Circuit Court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits.

It may be proper to state in this connection that after the decision in *Counselman* v. *Hitchcock*, the Interstate Commerce Act was amended by an act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offence, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. 443, c. 83. But that act was not in force when this case was determined below. Nor does it reach the question whether a proceeding like the present one can be maintained in a Circuit Court of the United States.

In the course of the argument at the bar our attention was

called to *Hayburn's Case*, 2 Dall. 409, and *United States* v. *Ferreira*, 13 How. 40, 46, as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's case was an application for a mandamus to be directed to the Circuit Court of the United States for the District of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension list of the United States in conformity with an act of Congress, approved March 23, 1792, c. 11, 1 Stat. 243, which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims to invalid pensions. This court took the case under advisement, but as Congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to *Hayburn's case*, we are informed of the views expressed at the circuit by different members of this court in relation to the act of 1792. They concurred in holding that it was not in the power of Congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned to the Circuit Courts were not of that description, and were not contemplated by the act of Congress as of that character; and, consequently, that the act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by Chief Justice Taney, under the direction of this court, and found in 13 How. 51, 52, an account is given of *Todd's case*, which also involved the validity of the act of 1792, so far as it imposed upon the Circuit Courts duties relating to pensions. And it is there stated that Chief Justice Jay and Justice Cushing, upon further reflection, became satisfied that the power conferred by the act of 1792 on the Circuit Court as a court could not be construed as giving such power to the judges of the court as commissioners.

The same general principles were announced in *Ferreira's case*, which arose under the treaty of 1819 between Spain and

the United States, and under certain acts of Congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of jurisdiction in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. Chief Justice Taney, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission." 13 How. 40, 46, 47.

It thus appears that the act of 1792, above referred to, attempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of Congress involved in *Ferreira's case* conferred no authority upon the district judge to determine finally any questions of a judicial nature, and, without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding, or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the Secretary of the Treasury.

Some allusion should be made in this connection to *Gordon* v. *United States*, 117 U. S. 697, and *In re Sanborn*, 148 U. S. 222.

In *Gordon's case*, the question was whether this court had jurisdiction to review the action of the Court of Claims in respect to a claim examined and allowed in the latter court under an act of Congress, 12 Stat. 765, c. 92, §§ 5, 7, 14, which, among other things, provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims, until after an appropriation therefor should be estimated by the Secretary of the Treasury, and an appropriation to pay it be made by Congress. Under that act neither the Court of Claims nor this court could do anything more than certify their opinion to the Secretary of the Treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims, and if he decided in favor of the claimant, it rested with Congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor this court could, by any process, enforce its judgment; and whether the claim was paid or not, did not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

The appeal of Gordon was dismissed upon the ground that Congress could not "authorize or require this court to express

an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said Chief Justice Taney, "is a part, and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." p. 702. See *De Groot* v. *United States*, 5 Wall. 419.

In *Sanborn's case*, above cited, the same principles were announced. That case arose under an act of Congress of March 3, 1887, 24 Stat. 505, c. 505, one section of which provided that "when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted." § 12. This court dismissed an appeal from a finding of the Court of Claims, under this act. Referring to the cases of *Hayburn*, *Todd*, *Ferreira*, and *Gordon*, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported — certainly not so in terms — and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion

reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress." p. 226.

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the Circuit Courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 6 Wheat. 204, and in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnessess, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One

mode, as already suggested, — the validity of which is not questioned, — of compelling a witness to testify before the Interstate Commerce Commission, to answer questions propounded to him relating to the matter under investigation and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offence against the United States punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the 12th section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual

effort, would subject commerce among the States to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's case*, one in which the United States seeks from the Circuit Court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court. And that judgment may be enforced by the process of the Circuit Court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's case*, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

This view is illustrated by the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728, which arose under the act of May 5, 1892, c. 60, prohibiting the coming of Chinese persons into the United States. That act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such person shall establish, by affirmative proof, to the satisfaction of a justice, judge, or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue, or United States marshal, and taken before a United States judge. This court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case — a complainant, defendant, and a judge — *actor, reus et judex.* 3 Bl. Com. 25; *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."

Another suggestion thrown out in argument against the validity of the twelfth section of the Interstate Commerce Act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding makes a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case, the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the Commis-

sion; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands. Rev. Stat. § 725; 1 Stat. 83; 4 Stat. 487; *United States* v. *Hudson*, 7 Cranch, 32; *Anderson* v. *Dunn*, 6 Wheat. 204, 227; *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303; *Cartwright's Case*, 114 Mass. 230, 238. Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.

We are of opinion that a judgment of the Circuit Court of the United States determining the issues presented by the petition of the Interstate Commerce Commission, and by the answers of the appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. A final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

Opinion of the Court.

In view of the conclusion reached upon the only question determined by the Circuit Court, what judgment shall be here entered? The case was heard below upon the petition of the Commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the Circuit Court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Chief Justice Fuller, Mr. Justice Brewer, and Mr. Justice Jackson dissented.[1]

Mr. Justice Field was not present at the argument of this case, and took no part in the consideration and decision of it.

[1] The dissenting opinion, by Mr. Justice Brewer, had not been filed when this volume went to press. It will appear in Vol. 155.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1893, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 271. ABRAM *v.* WINSTON. Error to the Circuit Court of the United States for the Eastern District of Virginia. March 9, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William L. Royall* for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

No. 428. ADAMS *v.* BUCK. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. May 14, 1894: Dismissed, with costs, per stipulation. *Mr. J. H. Raymond* for appellant. *Mr. E. Smith* and *Mr. George H. Knight* for appellees.

No. 1018. AH CHING *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. December 18, 1893: Dismissed on motion of *Mr. J. Hubley Ashton* for appellant. *Mr. J. Hubley Ashton*, *Mr. Joseph H. Choate*, *Mr. Harvey S. Brown*, and *Mr. Thomas D. Riordan* for appellant. *Mr. Attorney General* for appellees.

No. 1014. AH SING *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. December 18, 1893: Dismissed on motion of *Mr. J. Hubley Ashton* for appellant. *Mr. J. Hubley Ashton*, *Mr. Joseph H. Choate*, *Mr. Harvey S. Brown*, and *Mr. Thomas D. Riordan* for appellant. *Mr. Attorney General* for appellees.

No. 1033. ALABAMA IRON AND RAILWAY COMPANY *v.* ANNISTON LOAN AND TRUST COMPANY. Petition for a writ of

certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. October 16, 1893. Petition denied. *Mr. Henry B. Tompkins*, for The Alabama Iron and Railway Company *et al.*, in support of petition. *Mr. John B. Knox*, for The Anniston Loan and Trust Company, in opposition thereto.

No. 540. ALBANY COUNTY BANK *v.* DROVERS' NATIONAL BANK. Error to the Circuit Court of the United States for the Northern District of New York. October 10, 1893: Dismissed, per stipulation, on motion of *Mr. Alexander Porter Morse* for plaintiff in error. *Mr. Francis Kernan* and *Mr. Alexander Porter Morse* for plaintiff in error. *Mr. S. W. Rosendale* for defendant in error.

No. 151. AMERICAN RAPID TELEGRAPH COMPANY *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY. Appeal from the Circuit Court of the United States for the District of Connecticut. December 5, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. G. Ingersoll* for appellant. *Mr. W. G. Wilson* and *Mr. Morris W. Seymour* for appellee.

No. 146. AMERICAN TUBE AND IRON COMPANY *v.* DAVIS. Error to the Circuit Court of the United States for the Northern District of Ohio. December 4, 1893: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. A. J. Woolf* for defendant in error. *Mr. T. W. Sanderson* and *Mr. M. A. Norris* for plaintiff in error. *Mr. A. J. Woolf* for defendant in error.

No. 425. ANDERSON *v.* MINNESOTA IRON COMPANY. Error to the Circuit Court of the United States for the District of Minnesota. April 4, 1894: Dismissed, per stipulation. *Mr. J. N. Castle* for plaintiff in error. *Mr. C. K. Davis*, *Mr. J. H. Chandler*, and *Mr. Frank B. Kellogg* for defendant in error.

Cases not Otherwise Reported.

No. 911. ARNOLD *v.* CHESEBROUGH. Appeal from the Circuit Court of the United States for the Eastern District of New York. April 23, 1894: Dismissed for the want of jurisdiction. *Mr. John H. V. Arnold* for appellants. *Mr. Walter S. Logan* and *Mr. Charles M. Demond* for appellees.

No. 1152. ARNOLD *v.* CHESEBROUGH. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. March 26, 1894: Petition denied. *Mr. Roger Foster*, *Mr. Joseph H. Choate*, and *Mr. J. H. V. Arnold*, for Arnold *et al.*, in support of petition. *Mr. Walter S. Logan*, for Chesebrough *et al.*, in opposition thereto.

No. 44. ARTHUR'S EXECUTORS *v.* CONSTABLE, and No. 45. CONSTABLE *v.* ARTHUR'S EXECUTORS. Error to the Circuit Court of the United States for the Southern District of New York. October 16, 1893: Judgment reversed, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Attorney General* for Arthur's Executors. *Mr. Stephen G. Clarke* and *Mr. Edwin B. Smith* for Constable *et al.*

No. 46. ARTHUR'S EXECUTORS *v.* CONSTABLE. Error to the Circuit Court of the United States for the Southern District of New York. October 16, 1893: Judgment reversed, with costs, per stipulation, and cause remanded to be proceeded in according to law. *Mr. Attorney General* for Arthur's Executors. *Mr. Stephen G. Clarke* and *Mr. Edwin B. Smith* for Constable *et al.*

No. 1. ASHENFELTER *v.* TERRITORY OF NEW MEXICO *ex rel.* WADE. Appeal from the Supreme Court of the Territory of New Mexico. October 18, 1893: Dismissed, with costs, on authority of counsel for appellant on motion of *Mr. Lawrence Maxwell, Jr.*, in behalf of counsel. *Mr. Henry L. Warren*, *Mr. S. W. Pennypacker*, and *Mr. C. W. McKeehan* for appellant. *Mr. C. H. Armes* for appellee.

Cases not Otherwise Reported.

No. 953. ASPLEY *v.* MURPHY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. November 6, 1893: Petition denied. *Mr. A. H. Garland*, for Aspley, in support of petition. *Mr. F. M. Etheridge* and *Mr. W. P. Ellison*, for Murphy *et al.*, in opposition thereto.

No. 1095. BAILEY *v.* SUNDBERG. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. January 15, 1894: Petition denied. *Mr. George A. Black*, for Bailey *et al.*, in support of petition. No one opposing.

No. 611. BAIN *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of Ohio. November 27, 1893: Dismissed, pursuant to the 10th rule. *Mr. G. H. Wald* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 250. BARNETT *v.* CITY OF DENISON. Error to the Circuit Court of the United States for the Northern District of Texas. February 1, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Sawnie Robertson* for plaintiff in error. No appearance for defendant in error.

No. 168. BAY CITY STREET RAILWAY COMPANY *v.* TAYLOR. Error to the Supreme Court of the State of Michigan. December 12, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. H. H. Hatch* for plaintiff in error. *Mr. T. A. E. Weadock* for defendants in error.

No. 881. BELMONT PLANTING AND MANUFACTURING COMPANY *v.* SCOTT. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 18, 1893: Dismissed, with costs, on authority of counsel for appellant. *Mr. E. H. Farrar*, *Mr. Benjamin F. Jonas*, and *Mr. E. B. Kruttschnitt* for appellant. *Mr. Henry P. Dart* for appellee.

Cases not Otherwise Reported.

No. 1165. BENTON, *alias* NEWBY, *v.* UNITED STATES. Appeal from the District Court of the United States for the Southern District of Illinois. March 30, 1894: Docketed and dismissed on motion of *Mr. Assistant Attorney General Dodge* for appellee. No one opposing.

No. 513. BOSTON AND MAINE RAILROAD *v.* RAMSEY. Error to the Circuit Court of the United States for the District of Massachusetts. January 8, 1894: Dismissed, with costs, per stipulation, on motion of *Mr. Frank W. Hackett* for defendant in error. *Mr. Solomon Lincoln* for plaintiff in error. *Mr. S. B. Allen* and *Mr. Frank W. Hackett* for defendant in error.

No. 124. BOYD *v.* STEDMAN. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 27, 1893: Dismissed, with costs, on motion of *Mr. Hubert Howson* for appellant. *Mr. Charles Howson* and *Mr. Hubert Howson* for appellant. *Mr. Causten Browne* for appellees.

No. 154. BRITTON *v.* KLEINERT. Appeal from the Circuit Court of the United States for the Southern District of New York. December 6, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Jerome Carty* for appellant. *Mr. James A. Hudson* for appellee.

No. 1147. BROOKS *v.* RAYNOLDS. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. April 23, 1894: Petition denied. *Mr. Francis J. Wing*, for Raynolds, in support of petition. *Mr. Lawrence Maxwell, Jr.*, for Brooks, in opposition thereto.

No. 402. BROWN *v.* JOLIFFE. Error to the Circuit Court of the United States for the Southern District of Ohio. May 14, 1894: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. Edward Colston* for plaintiff in error. No appearance for defendants in error.

Cases not Otherwise Reported.

No. 693. BRUSH ELECTRIC LIGHT COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. November 9, 1893: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. James A. Stranahan* for defendant in error.

No. 781. BUFORD *v.* TAYLOR. Error to the Supreme Court of the Territory of Utah. November 8, 1893: Dismissed, with costs, on motion of counsel for plaintiffs in error. *Mr. John A. Marshall* for plaintiffs in error. No appearance for defendants in error.

No. 806. BUFORD *v.* UNITED STATES. Error to the Supreme Court of the Territory of Utah. November 8, 1893: Dismissed, on motion of counsel for plaintiffs in error. *Mr. John A. Marshall* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 202. CADWALADER *v.* SHULTZ. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. January 3, 1894: Judgment reversed, with costs, per stipulation, and cause remanded to be proceeded in according to law, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Edward L. Perkins* for defendant in error.

No. 333. CELLULOID MANUFACTURING COMPANY *v.* CELLONITE MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. March 27, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Frederic H. Betts* for appellant. *Mr. John R. Bennett* for appellees.

No. 240. CENTRAL OHIO RAILROAD COMPANY *v.* COLUMBUS. Error to the Supreme Court of the State of Ohio. January 18, 1894: Dismissed, with costs, on motion of

counsel for plaintiffs in error. *Mr. John K. Cowen* and *Mr. Hugh L. Bond, Jr.*, for plaintiffs in error. No appearance for defendants in error.

No. 120. CENTRAL TRUST COMPANY *v.* DUFF. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. November 24, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edgar M. Johnson* and *Mr. W. M. Baxter* for appellant. No appearance for appellee.

No. 153. CHICAGO, ST. PAUL AND KANSAS CITY RAILWAY COMPANY *v.* PIERCE. Error to the Circuit Court of the United States for the Northern District of Illinois. December 8, 1893: Judgment reversed, with costs, and cause remanded to be proceeded in according to law, per stipulation, on motion of *Mr. John C. Black* for defendant in error. *Mr. H. A. Gardner* and *Mr. William McFadon* for plaintiff in error. *Mr. John C. Black* for defendant in error.

No. 1015. CHUN SHANG YUEN *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. December 18, 1893: Dismissed, on motion of *Mr. J. Hubley Ashton* for appellant. *Mr. J. Hubley Ashton*, *Mr. Joseph H. Choate*, *Mr. Harvey S. Brown*, and *Mr. Thomas D. Riordan* for appellant. *Mr. Attorney General* for appellees.

No. 372. CLARK *v.* SMITH. Appeal from the Circuit Court of the United States for the Western District of Virginia. January 17, 1894: Dismissed, with costs, on motion of counsel for appellant. *Mr. Richard C. Dale* for appellant. No appearance for appellee.

No. 76. CLEARFIELD BITUMINOUS COAL CORPORATION *v.* PENNSYLVANIA. Error to the Supreme Court of the State

of Pennsylvania. November 9, 1893: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. W. S. Kirkpatrick*, *Mr. J. F. Sanderson*, and *Mr. James A. Stranahan* for defendant in error.

No. 343. CLEVELAND COUNTY *v.* UNITED STATES *ex rel.* SHIRK. Error to the Circuit Court of the United States for the Eastern District of Arkansas. March 29, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Sol. F. Clark* for plaintiff in error. No appearance for defendant in error.

No. 1007. COLE *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of Texas. December 4, 1893: Dismissed, the cause having abated by death of plaintiff in error, on motion of *Mr. Solicitor General Maxwell* for defendant in error. *Mr. Eugene Williams* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 186. CONRAD *v.* BELL. Appeal from the Circuit Court of the United States for the District of Kansas. December 21, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. L. B. Kellogg* for appellant. No appearance for appellee.

No. 24. CONSOLIDATED BUNGING APPARATUS COMPANY *v.* CLAUSEN BREWING COMPANY. Appeal from the Circuit Court of the United States for the Southern District of New York. October 11, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for appellants. *Mr. C. P. Jacobs* for appellee.

No. 11. CONSOLIDATED BUNGING APPARATUS COMPANY *v.* SCHOENHOFEN BREWING COMPANY. Appeal from the Circuit

Court of the United States for the Northern District of Illinois. October 10, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Ephraim Banning*, *Mr. Thomas A. Banning*, and *Mr. Wells W. Leggett* for appellant. *Mr. C. P. Jacobs* for appellee.

No. 308. CONSOLIDATED PATENTS COMPANY *v.* NATIONAL VENTILATION COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. March 19, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William A. Redding* for appellants. No appearance for appellee.

No. 125. CONSOLIDATED PATENTS COMPANY *v.* BERRY. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 27, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. A. Redding* for appellants. *Mr. Causten Browne* for appellee.

No. 201. COREY *v.* TOLAND. Appeal from the Supreme Court of the Territory of Utah. January 15, 1894: Decree affirmed, with costs, by a divided court. *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson*, *Mr. A. A. Hoehling, Jr.*, *Mr. C. W. Bennett*, *Mr. James N. Kimball*, and *Mr. John Paul Jones* for the appellants. *Mr. O. B. Hallam* and *Mr. C. H. Armes* for appellee.

No. 553. CRAIG *v.* MOUNT CARBON COMPANY. Error to the Circuit Court of the United States for the District of West Virginia. April 26, 1894: Dismissed, with costs, per stipulation. *Mr. James F. Brown* for plaintiff in error. *Mr. E. B. Knight* for defendant in error.

No. 269. DALLEMAND *v.* ODD FELLOWS SAVINGS BANK. Error to the Supreme Court of the State of California. March 8, 1894: Dismissed, with costs, pursuant to the 10th rule.

Mr. Samuel F. Phillips and *Mr. Frederic D. McKenney* for plaintiff in error. No appearance for defendants in error.

No. 1103. David Bradley Manufacturing Company *v.* Eagle Manufacturing Company. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. February 5, 1894: Petition denied. *Mr. L. L. Bond* and *Mr. C. E. Pickard*, for The David Bradley Manufacturing Company, in support of petition. *Mr. George H. Christy* and *Mr. Nathaniel French*, for The Eagle Manufacturing Company, in opposition thereto.

No. 279. Davis Sewing Machine Company *v.* Hat Sweat Manufacturing Company. Appeal from the Circuit Court of the United States for the Southern District of New York. March 12, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William A. Jenner* for appellant. *Mr. John R. Bennett* for appellee.

No. 321. Deering *v.* McCormick Harvesting Machine Company. Appeal from the Circuit Court of the United States for the District of Minnesota. March 21, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Ephraim Banning* and *Mr. Thomas A. Banning* for appellant. No appearance for appellee.

No. 1183. Detroit City Railway *v.* Detroit. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. May 14, 1894: Dismissed for the want of jurisdiction. *Mr. John C. Donnelly*, *Mr. Charles M. Swift* and *Mr. Henry M. Duffield* for appellants. *Mr. C. A. Kent* for appellee.

No. 32. District of Columbia *v.* Church. Error to the Supreme Court of the District of Columbia. October 12, 1893: Dismissed, with costs, on motion of counsel for plaintiff in

error. *Mr. A. G. Riddle*, *Mr. H. E. Davis* and *Mr. S. T. Thomas* for plaintiff in error. No appearance for defendants in error.

No. 33. District of Columbia *v.* Johnson. Error to the Supreme Court of the District of Columbia. October 12, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. A. G. Riddle*, *Mr. H. E. Davis* and *Mr. S. T. Thomas* for plaintiff in error. No appearance for defendant in error.

No. 282. Dobson *v.* Graham. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. March 14, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Hector T. Fenton* for appellants. No appearance for appellee.

No. 142. Downing *v.* Wilson. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. November 29, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. H. De Witt* for appellant. No appearance for appellees.

No. 541. Drake *v.* Knox Rock Blasting Company. Appeal from the Circuit Court of the United States for the Southern District of New York. March 5, 1894: Dismissed, with costs, per stipulation. *Mr. Livingston Gifford* for appellants. *Mr. W. Bakewell* for appellee.

No 692. Edison Electric Light Company *v.* Pennsylvania. Error to the Supreme Court of the State of Pennsylvania. November 9, 1893: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. James A. Stranahan* for defendant in error.

No. 232. English *v.* Duval. Appeal from the Circuit Court of the United States for the Northern District of

Florida. January 25, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Francis P. Fleming* for appellant. No appearance for appellee.

No. 300. EQUITABLE ACCIDENT INSURANCE COMPANY *v.* SAWYER. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. October 11, 1893: Dismissed, with costs, per stipulation. *Mr. Charles Barber* for plaintiff in error. *Mr. Charles W. Felker* for defendants in error.

No. 802. FALES *v.* MCMONAGLE. Appeal from the Circuit Court of the United States for the District of New Jersey. March 12, 1894: Dismissed, per stipulation. *Mr. Harry E. Richards* and *Mr. Thomas S. Henry* for appellant. *Mr. Elvin W. Crane* for appellee.

No. 139. FALLS RIVET COMPANY *v.* WOLFE. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. November 29, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Livingston Gifford* for appellants. No appearance for appellees.

No. 22. FARISH *v.* NEW MEXICO MINING COMPANY. Error to the Supreme Court of the Territory of New Mexico. October 11, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. John D. Pope* for plaintiffs in error. *Mr. N. L. Jeffries*, *Mr. William E. Earle* and *Mr. S. B. Elkins* for defendants in error.

No. 1016. FONG LOUIE *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. December 18, 1893. Dismissed on motion of *Mr. J. Hubley Ashton* for appellant. *Mr. J. Hubley Ashton*, *Mr. Joseph H. Choate*, *Mr. Harvey S. Brown* and *Mr. Thomas D. Riordan* for appellant. *Mr. Attorney General* for appellees.

Cases not Otherwise Reported.

No. 1017. FONG WYE *v.* UNITED STATES. Appeal from the District Court of the United States for the Northern District of California. December 18, 1893: Dismissed on motion of *Mr. J. Hubley Ashton* for appellant. *Mr. J. Hubley Ashton*, *Mr. Joseph H. Choate*, *Mr. Harvey S. Brown* and *Mr. Thomas D. Riordan* for appellant. *Mr. Attorney General* for appellees.

No. 218. FRANK *v.* RICHTER. Error to the Circuit Court of the United States for the Northern District of Illinois. November 3, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. A. M. Pence* for plaintiff in error. *Mr. C. H. Remy* for defendant in error.

No. 1171. FRANKLIN SAVINGS BANK *v.* TAYLOR. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. May 14, 1894: Petition denied. *Mr. Edwin L. Harpham*, for Taylor *et al.*, in support of petition. *Mr. Thomas D. Jones* and *Mr. William H. Swift*, for Franklin Savings Bank *et al.*, in opposition thereto.

No. 287. GLASMANN *v.* O'DONNELL. Appeal from the Supreme Court of the Territory of Utah. March 14, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. N. Baskin* for appellant. *Mr. J. L. Rawlins* for appellee.

No. 69. GREENE *v.* WOODHOUSE. Appeal from the Circuit Court of the United States for the Southern District of New York. October 30, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. B. F. Lee* and *Mr. W. H. L. Lee* for appellants. *Mr. Arthur v. Briesen* for appellees.

No. 95. HARRISON *v.* TARBORO OIL MILLS. Error to the Circuit Court of the United States for the Western District of

Pennsylvania. November 22, 1893: Dismissed, with costs, per stipulation. *Mr. H. C. McCormick* for plaintiffs in error. *Mr. Hill Burgwin* for defendant in error.

No. 1034. HARTFORD FIRE INSURANCE COMPANY *v.* BONNER MERCANTILE COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. October 16, 1893: Petition denied. *Mr. T. C. Van Ness*, for the Hartford Fire Insurance Company *et al.*, in support of petition. *Mr. M. Kirkpatrick* and *Mr. J. W. Forbis*, for the Bonner Mercantile Company, in opposition thereto.

No. 392. HEINE SAFETY BOILER COMPANY *v.* ANHEUSER-BUSCH BREWING ASSOCIATION. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. March 5, 1894: Dismissed, with costs, per stipulation. *Mr. Paul Bakewell* for appellant. *Mr. A. C. Fowler* for appellee.

No. 391. HEINE SAFETY BOILER COMPANY *v.* SMITH FEED WATER HEATER AND PURIFIER COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. March 5, 1894: Dismissed, with costs, per stipulation. *Mr. Paul Bakewell* for appellant. *Mr. A. C. Fowler* for appellee.

No. 91. HENLEY *v.* RICHMOND CHECK ROWER COMPANY. Appeal from the Circuit Court of the United States for the District of Indiana. November 16, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. H. Parkinson* for appellant. *Mr. E. E. Wood* and *Mr. Edward Boyd* for appellees.

No. 92. HENLEY *v.* SHOEMAKER. Appeal from the Circuit Court of the United States for the District of Indiana. No-

vember 17, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. R. H. Parkinson* for appellant. *Mr. E. E. Wood* and *Mr. Edward Boyd* for appellees.

No. 80. HENRY *v.* VON LEAR. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. November 10, 1893: Judgment reversed and cause remanded with directions to remand same to state court. Costs in this court and the Circuit Court to be paid by plaintiff in error. *Mr. Silas W. Pettit* and *Mr. H. B. Gill* for plaintiff in error. *Mr. Richard P. White* for defendant in error.

No. 12. HICKIES *v.* PHILES. Appeal from the Supreme Court of the Territory of Arizona. January 22, 1894: Decree affirmed, with costs, for want of prosecution. *Mr. Marcus A. Smith* and *Mr. Patrick O'Farrell* for appellants. *Mr. William H. Barnes* and *Mr. W. P. Montague* for appellees.

Nos. 288 & 289. HUGHES *v.* DUNDEE MORTGAGE AND TRUST INVESTMENT COMPANY. Error to the Circuit Court of the United States for the District of Oregon. October 25, 1893: Dismissed, with costs, on motion of *Mr. J. N. Dolph* for plaintiff in error. *Mr. J. N. Dolph* for plaintiff in error. *Mr. Thomas De Witt Cuyler* for defendant in error.

No. 916. HUGHES *v.* UNITED STATES. Error to the District Court of the United States for the Western District of Pennsylvania. October 23, 1893: Judgment affirmed for want of prosecution. *Mr. E. S. McCalmont* for plaintiffs in error. *Mr. Attorney General*, *Mr. Solicitor General* and *Mr. Charles C. Binney* for defendant in error.

No. 990. HUMES *v.* THIRD NATIONAL BANK OF CHATTANOOGA. Error to the United States Circuit Court of Appeals for the

Fifth Circuit. April 30, 1894: Dismissed, with costs, per stipulation, on motion of *Mr. William A. Maury* in behalf of counsel. *Mr. Joseph Wheeler* and *Mr. Milton Humes* for plaintiffs in error. *Mr. William Richardson* and *Mr. George T. White* for defendant in error.

No. 750. HUNTLEY *v.* MASSACHUSETTS. Error to the Superior Court of the State of Massachusetts. March 26, 1894: Dismissed, per stipulation. *Mr. R. M. Morse*, *Mr. Albert H. Veeder* and *Mr. William J. Campbell* for plaintiffs in error. *Mr. A. E. Pillsbury* for defendant in error.

No. 302. HUSKINS *v.* CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY. Error to the Circuit Court of the United States for the Eastern District of Tennessee. March 16, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. G. W. Pickle* for plaintiff in error. *Mr. Edward Colston* for defendant in error.

No. 987. HYDE *v.* LAMBERT. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. April 9, 1894: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law. *Mr. E. B. Kruttschnitt*, *Mr. E. H. Farrar*, and *Mr. B. F. Jonas* for appellant. *Mr. Frank Johnston* for appellee.

No. 1023. *In re* JAHN AND COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. October 30, 1893: Petition denied. *Mr. Edwin B. Smith* in support of petition. No one opposing.

No. 241. JENNINGS *v.* BAEDER. Error to the Circuit Court of the United States for the District of New Jersey. January

26, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Barker Gummere* for plaintiff in error. No appearance for defendant in error.

No. 40. JOLIET MANUFACTURING COMPANY *v.* KEYSTONE MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the Northern District of Illinois. October 13, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. John W. Munday* and *Mr. Edmund Adcock* for appellant. *Mr. J. G. Manahan* for appellees.

No. 364. KENTUCKY CENTRAL RAILROAD COMPANY *v.* KENTUCKY. Error to the Court of Appeals of the State of Kentucky. August 31, 1893: Dismissed, pursuant to the 28th rule. *Mr. John G. Carlisle* for plaintiff in error. *Mr. W. J. Hendrick* for defendant in error.

No. 403. KEYES *v.* PUEBLO SMELTING AND REFINING COMPANY. Appeal from the Circuit Court of the United States for the District of Colorado. March 19, 1894: Dismissed, per stipulation. *Mr. Robert E. Foot* for appellants. *Mr. Charles E. Gast* for appellee.

No. 133. KNEULE *v.* DELP. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. November 28, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. H. Heverin* for plaintiffs in error. No appearance for defendant in error.

No. 1069. LAKIN *v.* ROBERTS. Petition for a writ of error or a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. December 11, 1893: Petition denied. *Mr. H. L. Gear* and *Mr. William A. McKenney*, for Lakin, in support of petition. No one opposing.

Cases not Otherwise Reported.

No. 205. LAMAL *v.* UNITED STATES. Error to the Circuit Court of the United States for the Eastern District of Louisiana. January 12, 1894: Dismissed, pursuant to the 10th rule. *Mr. Gus A. Breaux* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 290. LAWTON *v.* EAGLESON. Appeal from the Circuit Court of the United States for the Northern District of California. March 14, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. M. A. Wheaton* for appellant. *Mr. James A. Skilton* for appellees.

No. 418. LONG MOY QUE *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the Northern District of California. January 3, 1894: Decree affirmed for want of prosecution. *Mr. E. B. Stonehill* and *Mr. William H. Lamar* for appellant. *Mr. Attorney General* for appellee.

No. 643. LEVY, DREYFUS AND CO. *v.* MACK. Appeal from the Circuit Court of the United States for the Southern District of New York. April 6, 1894: Dismissed, per stipulation. *Mr. James A. Hudson* for appellants. *Mr. H. A. West* for appellee.

No. 65. LE WARNE *v.* MEXICAN INTERNATIONAL IMPROVEMENT COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. October 26, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. H. L. Lazarus* for appellant. *Mr. W. W. Howe* for appellees.

No. 88. LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY *v.* BURNETT. Error to the Seventeenth Judicial District Court of the State of Louisiana. November 15, 1893: Dismissed, with costs, on authority of counsel for plaintiff in

error. *Mr. E. H. Farrar*, *Mr. E. B. Kruttschnitt* and *Mr. B. F. Jonas* for plaintiff in error. No appearance for defendant in error.

No. 1058. McFail *v.* South Carolina. Error to the Supreme Court of the State of South Carolina. November 6, 1893: Docketed and dismissed, with costs, on motion of *Mr. D. A. Townsend* for defendant in error. No one opposing.

No. 219. McGuire *v.* Variety Iron Works Company. Error to the Circuit Court of the United States for the Northern District of Illinois. January 18, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. J. L. High* and *Mr. James Frake* for plaintiff in error. *Mr. E. E. Prussing*, *Mr. J. C. Hutchins* and *Mr. A. A. Goodrich* for defendant in error.

No. 644. Mack *v.* Levy, Dreyfus and Co. Appeal from the Circuit Court of the United States for the Southern District of New York. April 6, 1894: Dismissed, per stipulation. *Mr. H. A. West* for appellant. *Mr. James A. Hudson* for appellees.

No. 748. Marshall *v.* Wheeler. Appeal from the Supreme Court of the District of Columbia. April 9, 1894: Dismissed, with costs. *Mr. Calderon Carlisle* for appellants. *Mr. William A. McKenney* for appellees.

No. 236. Massachusetts Benefit Association *v.* Miles. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. August 12, 1893: Dismissed, pursuant to the 28th rule. *Mr. F. Carroll Brewster* for plaintiff in error. *Mr. James Aylward Develin* and *Mr. Richard P. White* for defendant in error.

Cases not Otherwise Reported.

No. 270. MILLS *v.* WINSTON. Error to the Circuit Court of the United States for the Eastern District of Virginia. March 8, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William L. Royall* for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

No. 104. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* PARSHALL. Error to the Circuit Court of the United States for the District of Minnesota. November 20, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Eppa Hunton* for plaintiff in error. *Mr. William F. Vilas*, *Mr. George C. Squires* and *Mr. F. W. M. Cutcheon* for defendant in error.

No. 1078. MISSOURI PACIFIC RAILWAY COMPANY *v.* BAIER. Error to the Supreme Court of the State of Nebraska. March 26, 1894: Dismissed, per stipulation. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. *Mr. John C. Watson* for defendant in error.

No. 1104. MOLINE PLOW COMPANY *v.* EAGLE MANUFACTURING COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. February 5, 1894: Petition denied. *Mr. L. L. Bond* and *Mr. C. E. Pickard*, for The Moline Plow Company, in support of petition. *Mr. George H. Christy* and *Mr. Nathaniel French*, for The Eagle Manufacturing Company, in opposition thereto.

No. 2. MORAN *v.* PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY. Appeal from the Circuit Court of the United States for the Southern District of Ohio. October 17, 1893: Dismissed, with costs, on motion of *Mr. George Hoadly* for appellant. *Mr. George Hoadly* for appellant. *Mr. R. A. Harrison* and *Mr. Joseph Olds* for appellees.

Cases not Otherwise Reported.

No. 1198. MORGAN *v.* HALBERSTADT. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. May 14, 1894: Petition denied. *Mr. John C. Pennie*, for Morgan, in support of petition. *Mr. Robert G. Ingersoll* and *Mr. Robert H. Griffin*, for Halberstadt, in opposition thereto.

No. 140. MORROW *v.* CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY. Appeal from the Circuit Court of the United States for the Middle District of Tennessee. November 24, 1893: Decree affirmed, with costs, per stipulation. *Mr. S. Watson* for appellants. *Mr. J. M. Dickinson* for appellee.

No. 96. NEEDLES *v.* BROWN. Appeal from the Circuit Court of the United States for the Western District of Arkansas. November 17, 1893: Dismissed, with costs, on motion of *Mr. Solicitor General* for appellants. *Mr. Attorney General* for appellants. No appearance for appellee.

No. 141. NEW ORLEANS CANAL AND BANKING COMPANY *v.* REYNOLDS. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas. October 11, 1893: Dismissed, with costs, on motion of counsel for appellants. *Mr. S. F. Clark* for appellants. No appearance for appellees.

No. 1161. NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY *v.* THOMAS. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. April 4, 1894: Petition denied. *Mr. E. H. Farrar*, *Mr. E. B. Kruttschnitt* and *Mr. B. F. Jonas*, for The New Orleans & Northeastern Railroad Company *et al.*, in support of petition. No one opposing.

Cases not Otherwise Reported.

No. 159. NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY *v.* HENDRICKS. Error to the Supreme Court of the State of Tennessee. January 8, 1894: Dismissed, per stipulation, on motion of *Mr. S. P. Walker* in behalf of counsel. *Mr. Holmes Cummins* for plaintiffs in error. No appearance for defendant in error.

No. 164. PENNSYLVANIA COMPANY *v.* CAMPBELL. Error to the Circuit Court of the United States for the Northern District of Ohio. December 13, 1893: Dismissed, with costs, per stipulation. *Mr. J. T. Brooks* and *Mr. J. R. Cary* for plaintiff in error. *Mr. Thomas W. Sanderson* for defendant in error.

No. 222. PEOPLE OF THE STATE OF NEW YORK, *ex rel.* MERTENS *v.* COOK. Error to the Supreme Court of the State of New York. September 20, 1893: Dismissed, pursuant to the 28th rule. *Mr. Sherman Evarts* for plaintiffs in error. *Mr. Charles F. Tabor* for defendant in error.

No. 118. PERKINS *v.* EATON. Appeal from the Circuit Court of the United States for the Western District of Michigan. September 28, 1893: Dismissed, pursuant to the 28th rule. *Mr. Edward Taggart* for appellant. *Mr. Philip J. O'Reilly* for appellees.

No. 691. PHILADELPHIA COMPANY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. November 9, 1893: Dismissed, with costs, on motion of *Mr. M. E. Olmsted* for plaintiff in error. *Mr. M. E. Olmsted* for plaintiff in error. *Mr. James A. Stranahan* for defendant in error.

No. 757. PLATTE AND DENVER CANAL AND MILLING COMPANY *v.* DOWELL. Error to the Supreme Court of the State

of Colorado. October 11, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. V. D. Markham* for plaintiff in error. No appearance for defendants in error.

No. 769. PRESBREY *v.* KLINE. Appeal from the Supreme Court of the District of Columbia. February 5, 1894: Dismissed, with costs, per stipulation. *Mr. H. H. Wells* for appellants. *Mr. William F. Mattingly* for appellee.

No. 1068. PRESS COMPANY *v.* CITY BANK OF HARTFORD. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. December 4, 1893: Petition denied. *Mr. Hampton L. Carson* and *Mr. James H. Shakespeare*, for The Press Company, in support of petition. *Mr. John Hampton Barnes* and *Mr. George Tucker Bispham*, for the City Bank of Hartford, in opposition thereto.

No. 943. PRICE *v.* PANKHURST. Error to the United States Circuit Court of Appeals for the Eighth Circuit. September 8, 1893: Dismissed, pursuant to the 28th rule. *Mr. Henry Wise Garnett* for plaintiff in error. *Mr. R. S. Morrison* for defendant in error.

No. 404. PUEBLO SMELTING AND REFINING COMPANY *v.* KEYES. Appeal from the Circuit Court of the United States for the District of Colorado. March 19, 1894: Dismissed, per stipulation. *Mr. Charles E. Gast* for appellant. *Mr. Robert E. Foot* for appellees.

No. 344. PULLMAN'S PALACE CAR COMPANY *v.* CAMPBELL. Error to the Circuit Court of the United States for the Northern District of Iowa. April 30, 1894: Judgment affirmed, with costs and interest, by a divided court. *Mr. John S. Runnells* and *Mr. William Burry* for plaintiff in error. *Mr. William L. Joy* for defendant in error.

Cases not Otherwise Reported.

No. 976. RAINEY *v.* HERBERT. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit. November 20, 1893: Petition denied. *Mr. Samuel Dickson*, for Rainey, in support of petition. No one opposing.

No. 249. RAYMOND *v.* REED. Error to the Circuit Court of the United States for the Western District of Pennsylvania. October 11, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. S. Schoyer, Jr.*, for plaintiff in error. *Mr. J. W. Douglass* for defendants in error.

No. 1060. REIS *v.* CLANCY. Error to the Supreme Court of the State of Washington. November 6, 1893: Docketed and dismissed, with costs, on motion of *Mr. H. J. May* for defendants in error. No one opposing.

No. 172. REPUBLIC IRON MINING COMPANY *v.* JONES. Error to the Circuit Court of the United States for the Northern District of Georgia. December 14, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. Reuben Arnold* for plaintiff in error. No appearance for defendant in error.

No. 563. RICHARD *v.* HEDDEN. Error to the Circuit Court of the United States for the Southern District of New York. January 22, 1894: Dismissed, with costs, on motion of *Mr. Edwin B. Smith* for plaintiffs in error. *Mr. S. G. Clarke* and *Mr. Edwin B. Smith* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 272. ROYALL *v.* CHILDREY, and No. 273. ROYALL *v.* GREENHOW. Error to the Circuit Court of the United States for the Eastern District of Virginia. March 9, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William L. Royall* for plaintiff in error. *Mr. R. Taylor Scott* for defendants in error.

Cases not Otherwise Reported.

No. 216. ROYER *v.* SHULTZ BELTING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. January 17, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. James O. Broadhead* and *Mr. M. A. Wheaton* for appellant. *Mr. Chester H. Krum* for appellee.

No. 217. ROYER *v.* SHULTZ BELTING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. January 18, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. James O. Broadhead* and *Mr. M. A. Wheaton* for appellant. *Mr. Chester H. Krum* for appellee.

No. 247. RUBENS *v.* ROBERTSON, COLLECTOR. Error to the Circuit Court of the United States for the Southern District of New York. January 31, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Daniel P. Hays* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 112. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* MARINE INSURANCE COMPANY OF LONDON. Error to the Circuit Court of the United States for the Eastern District of Arkansas. November 23, 1893: Judgment reversed, with costs, per stipulation, and cause remanded for further proceedings to be had therein in conformity with law. *Mr. John F. Dillon* for plaintiff in error. *Mr. U. M. Rose* and *Mr. G. B. Rose* for defendant in error.

No. 103. SCHNEIDER *v.* KEYSER. Error to the Supreme Court of the District of Columbia. November 2, 1893. Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. H. H. Wells, Jr.*, and *Mr. A. A. Birney* for plaintiff in error. No appearance for defendant in error.

No. 1195. SCHWARTZ & SONS *v.* H. B. CLAFLIN COMPANY. Petition for a writ of certiorari to the United States Circuit

Court of Appeals for the Fifth Circuit. April 30, 1894: Petition denied. *Mr. W. Hallett Phillips*, *Mr. E. B. Kruttschnitt* and *Mr. H. L. Lazarus*, for H. B. Claflin Company, in support of petition. *Mr. W. W. Howe*, for Schwartz & Sons *et al.*, in opposition thereto.

No. 1150. SCHWEITZER *v.* BRYGGER. Error to the Supreme Court of the State of Washington. May 14, 1894: Dismissed, with costs, on motion of *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Samuel F. Phillips* and *Mr. Frederic D. McKenney* for plaintiffs in error. *Mr. Charles K. Jenner* and *Mr. Louis Henry Legg* for defendant in error.

No. 275. SEEBERGER *v.* BEST. Error to the Circuit Court of the United States for the Northern District of Illinois. January 3, 1894: Dismissed, with costs, on motion of *Mr. Solicitor General Maxwell* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. P. L. Shuman* for defendants in error.

No. 786. SEEBERGER *v.* DAVIS. Error to the Circuit Court of the United States for the Northern District of Illinois. April 2, 1894: Dismissed, with costs, on motion of *Mr. Solicitor General Maxwell* for plaintiff in error. *Mr. Attorney General* for plaintiff in error. *Mr. Percy L. Shuman* for defendant in error.

No. 132. SHIPMAN *v.* BEEBER. Appeal from the Circuit Court of the United States for the Northern District of New York. November 28, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. W. C. Witter* for appellant. *Mr. John R. Bennett* and *Mr. W. B. H. Dowse* for appellees.

No. 215. SHULTZ BELTING COMPANY *v.* WILLEMSEN BELTING COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. January 17,

1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Chester H. Krum* for appellant. *Mr. S. N. Taylor* for appellee.

No. 1117. SIMMS *v.* COOK. Appeal from the Court of Appeals of the District of Columbia. February 5, 1894: Docketed and dismissed, with costs, on motion of *Mr. Calderon Carlisle* for appellee. No one opposing.

No. 955. SINGER MANUFACTURING COMPANY *v.* BRILL. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. November 13, 1893: Petition denied. *Mr. C. K. Offield* and *Mr. M. A. Wheaton*, for the Singer Manufacturing Company, in support of petition. *Mr. J. J. Scrivner* and *Mr. William A. Maury*, for Brill, in opposition thereto.

No. 525. SKINNER *v.* UNITED STATES. Error to the Circuit Court of the United States for the Northern District of Florida. October 11, 1893: Dismissed, on authority of counsel for plaintiffs in error. *Mr. W. A. Blount* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 200. SMITH *v.* PIRKL. Appeal from the Circuit Court of the United States for the Eastern District of New York. January 3, 1894: Dismissed, per stipulation. *Mr. G. G. Frelinghuysen* for appellant. *Mr. Henry Stockbridge, Jr.*, for appellee.

No. 231. SOWLES *v.* WITTERS. Error to the Circuit Court of the United States for the District of Vermont. January 25, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edward A. Sowles* for plaintiffs in error. *Mr. C. W. Witters* for defendant in error.

No. 636. STANDARD UNDERGROUND CABLE COMPANY *v.* STOCKTON. Error to the Court of Chancery of the State of New Jer-

sey. July 24, 1893: Dismissed, pursuant to the 28th rule. *Mr. A. Q. Keasbey* for plaintiff in error. *Mr. Jno. P. Stockton* for defendant in error.

No. 126. STARKEY *v.* BURNHAM, and No. 127. STARKEY *v.* ENGLEHART. Error to the Supreme Court of the State of Kansas. March 6, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. William Lawrence* for plaintiff in error. *Mr. A. T. Britton* and *Mr. A. B. Browne* for defendants in error.

No. 1115. STEAMSHIP MANHANSET *v.* NELSON. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. March 5, 1894: Petition denied. *Mr. E. B. Convers*, for The Manhanset, in support of petition. *Mr. Edwin G. Davis*, for Nelson, in opposition thereto.

No. 1072. STEAM TUG E. A. PACKER *v.* NEW JERSEY LIGHTERAGE COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. December 18, 1893: Petition denied. *Mr. Edward D. McCarthy*, for The E. A. Packer, in support of petition. *Mr. R. D. Benedict*, for The New Jersey Lighterage Company, in opposition thereto.

No. 866. STEEL *v.* PHŒNIX INSURANCE COMPANY OF BROOKLYN. On writ of certiorari to the United States Circuit Court of appeals for the Ninth Circuit. January 29, 1894: Decree affirmed, with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the District of Oregon, with directions to set aside the decree entered by that court and to enter a decree in favor of complainant, as prayed for in the amended bill. *Mr. George H. Williams* for Steel. *Mr. L. B. Cox* for the Phœnix Insurance Company of Brooklyn.

No. 1081. STEWART *v.* SMITH. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the

Third Circuit. January 22, 1894: Petition denied. *Mr. Hector T. Fenton*, for Stewart *et al.*, in support of petition. No one opposing.

No. 468. SWAYNE *v.* HUMPHREYS. Appeal from the Circuit Court of the United States for the District of Indiana. July 25, 1893: Dismissed, pursuant to the 28th rule. *Mr. F. W. Whitridge* and *Mr. J. M. Butler* for appellants. *Mr. Thomas H. Hubbard* for appellees.

No. 131. SYRACUSE WATER COMPANY *v.* SYRACUSE. Error to the Supreme Court of the State of New York. November 28, 1893: Dismissed, with costs, pursuant to the 16th rule, on motion of *Mr. Carrall McKenney* for defendants in error. *Mr. G. F. Comstock* for plaintiff in error. *Mr. Edwin S. Jenney* and *Mr. Carrall McKenney* for defendants in error.

No. 277. TAYLOR MANUFACTURING COMPANY *v.* HATCHER & COMPANY. Appeal from the Circuit Court of the United States for the Southern District of Georgia. March 12, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Clifford Anderson* for appellant. No appearance for appellees.

No. 725. TEXAS & PACIFIC RAILWAY COMPANY *v.* BRICK. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

No. 726. TEXAS & PACIFIC RAILWAY COMPANY *v.* BRICK. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

Cases not Otherwise Reported.

No. 741. TEXAS & PACIFIC RAILWAY COMPANY *v.* COMSTOCK. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

No. 1107. TEXAS & PACIFIC RAILWAY COMPANY *v.* LAVERTY. Error to the Court of Civil Appeals of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

No. 412. TEXAS & PACIFIC RAILWAY COMPANY *v.* MILLER. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. *Mr. James Turner* for defendant in error.

No. 720. TEXAS & PACIFIC RAILWAY COMPANY *v.* WATTS. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. *Mr. James Turner* for defendants in error.

No. 719. TEXAS & PACIFIC RAILWAY COMPANY *v.* WHITE. Error to the Supreme Court of the State of Texas. May 26, 1894: Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for plaintiff in error. No appearance for defendant in error.

Cases not Otherwise Reported.

No. 179. TOLEDO, ANN ARBOR AND NORTH MICHIGAN RAILWAY COMPANY *v.* EDDY. Error to the Circuit Court of the United States for the Northern District of Ohio. October 11, 1893: Dismissed, with costs, per stipulation. *Mr. E. W. Tolerton* and *Mr. John H. Doyle* for plaintiff in error. *Mr. J. K. Hamilton* for defendant in error.

No. 504. TOWNSHIP OF GILL'S CREEK, LANCASTER COUNTY, SOUTH CAROLINA, *v.* MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY. Appeal from the Circuit Court of the United States for the District of South Carolina. September 19, 1893: Dismissed, pursuant to the 28th rule. *Mr. C. R. Miles* and *Mr. Ira B. Jones* for appellant. *Mr. Samuel Lord* for appellee.

No. 262. TROTTER *v.* LOWENSTEIN. Appeal from the Circuit Court of the United States for the Northern District of Mississippi. October 10, 1893: Dismissed, with costs, on motion of *Mr. A. H. Garland* for appellant. *Mr. F. G. Barry*, *Mr. R. C. Beckett*, *Mr. A. H. Garland* and *Mr. H. J. May* for appellant. No appearance for appellees.

No. 989. TRUSTEES AND FELLOWS OF BROWN UNIVERSITY *v.* RHODE ISLAND COLLEGE OF AGRICULTURE AND MECHANICS' ARTS. Appeal from the Circuit Court of the United States for the District of Rhode Island. May 14, 1894: Dismissed, per stipulation, on motion of *Mr. Alex. Britton* in behalf of counsel. *Mr. Arthur L. Brown* for appellants. *Mr. James Tillinghast* for appellees.

No. 130. VILLAGE OF HOLLY *v.* HUNTER. Error to the Circuit Court of the United States for the Eastern District of Michigan. December 11, 1893: Judgment affirmed, with costs, and interest, by a divided court. *Mr. Fred A. Baker* for plaintiff in error. *Mr. John Atkinson* and *Mr. William L. Carpenter* for defendant in error.

Cases not Otherwise Reported.

No. 457. VIRGINIA BUFFALO LITHIA SPRINGS COMPANY *v.* GOODE. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. March 5, 1894: Dismissed, per stipulation, on motion of *Mr. William A. Maury* for appellee. *Mr. W. W. Henry* for appellant. *Mr. William A. Maury* for appellee.

No. 99. UNITED STATES *v.* BARBER. Appeal from the District Court of the United States for the Middle District of Alabama. October 30, 1893: Decree reversed, per stipulation, and cause remanded to be proceeded in according to law, on motion of *Mr. Solicitor General Maxwell* for appellant. *Mr. Attorney General* for appellant. *Mr. W. W. Dudley* and *Mr. R. R. McMahon* for appellee.

No. 1133. UNITED STATES *v.* EISNER & MENDELSON COMPANY. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. March 26, 1894: Petition denied. *Mr. W. W. Dudley*, *Mr. L. T. Michener* and *Mr. C. A. Ray* for Eisner & Mendelson Company, in support of petition. No one opposing.

No. 975. UNITED STATES *v.* KING. Appeal from the Court of Claims. November 2, 1893: Dismissed, per stipulation, on motion of *Mr. C. C. Lancaster* for appellee. *Mr. Attorney General* for appellant. *Mr. C. C. Lancaster* for appellee.

No. 359. UNITED STATES *v.* MARIX. Appeal from the Court of Claims. October 18, 1893: Judgment reversed, per stipulation, and cause remanded to be proceeded in according to law, on motion of *Mr. Solicitor General Maxwell* for appellant. *Mr. Attorney General* for appellant. *Mr. John S. Blair* for appellee.

No. 952. UNITED STATES *v.* PATTERSON. Appeal from the Court of Claims. March 5, 1894: Dismissed, on motion of

Mr. Solicitor General for appellant. *Mr. Attorney General* for appellant. No appearance for appellees.

No. 349. UNITED STATES *v.* PEOPLE OF THE STATE OF ILLINOIS. Appeal from the Circuit Court of the United States for the Northern District of Illinois. April 9, 1894: Stricken from the docket, on motion of *Mr. Solicitor General*, and it appearing that the United States were not parties to the suit in the court below. *Mr. Attorney General* for appellant. *Mr. James Fentress* for the Illinois Central Railroad Company, one of appellees.

No. 878. UNITED STATES *ex rel.* INTERNATIONAL CONTRACTING COMPANY *v.* ELKINS. Error to the Supreme Court of the District of Columbia. October 23, 1893: Dismissed, with costs, the cause having abated, on motion of *Mr. Solicitor General* for defendant in error. *Mr. A. S. Worthington*, *Mr. W. W. Dudley* and *Mr. Michener* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 105. UNITED STATES *ex rel.* SHERWOOD *v.* WOODRUFF. Error to the Circuit Court of the United States for the Eastern District of Arkansas. October 11, 1893: Dismissed, with costs, on motion of counsel for plaintiff in error. *Mr. F. W. Compton* and *Mr. Fabius M. Clarke* for plaintiff in error. No appearance for defendant in error.

No. 28. WALLACE *v.* MYERS. Appeal from the Circuit Court of the United States for the Southern District of New York. October 23, 1893: Dismissed, per stipulation, on motion of *Mr. George K. French* for appellee. *Mr. Eugene H. Lewis* for appellants. *Mr. S. W. Rosendale* and *Mr. George K. French* for appellee.

No. 184. WILKERSON *v.* RAHRER. Appeal from the Circuit Court of the United States for the District of Kansas. De-

cember 20, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. L. B. Kellogg* for appellant. No appearance for appellee.

No. 185. WILKERSON *v.* SICHER. Appeal from the Circuit Court of the United States for the District of Kansas. December 21, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. L. B. Kellogg* for appellant. No appearance for appellee.

No. 1059. WILLIAMS *v.* CLANCY. Error to the Supreme Court of the State of Washington. November 6, 1893: Docketed and dismissed, with costs, on motion of *Mr. H. J. May* for defendants in error. No one opposing.

No. 1079. WILLIAMS *v.* WILLIAMS. Error to the Supreme Court of the State of New York. February 1, 1894: Dismissed, per stipulation. *Mr. Benjamin F. Tracy* for plaintiff in error. *Mr. Austen G. Fox* for defendant in error.

No. 390. WOOD *v.* CORRY WATER WORKS COMPANY. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. January 19, 1894: Dismissed, with costs, on motion of counsel for appellants. *Mr. Samuel Dickson* and *Mr. Richard C. Dale* for appellants. *Mr. Johns McCleave* for appellees.

No. 1037. WUNDERLE *v.* WUNDERLE. Error to the Supreme Court of the State of Illinois. October 10, 1893: Dismissed, with costs, on motion of *Mr. William A. McKenney* for plaintiffs in error. *Mr. William A. McKenney* for plaintiffs in error. *Mr. Daniel D. Goodell* for defendant in error.

No. 419. YEE AH SHEEN *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the Northern Dis-

trict of California. October 23, 1893: Dismissed, on authority of counsel for appellant, on motion of *Mr. Solicitor General* for appellee. *Mr. E. B. Stonehill* and *Mr. William H. Lamar* for appellant. *Mr. Attorney General* for appellee.

No. 325. YOUNG *v.* JACKSON. Appeal from the Circuit Court of the United States for the Southern District of New York. March 22, 1894: Dismissed, with costs, pursuant to the 10th rule. *Mr. Edwin H. Brown* for appellants. *Mr. George W. Brown, Jr.*, and *Mr. Rollin M. Morgan* for appellee.

No. 1109. YUNG SHEA *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the Eastern District of Michigan. January 29, 1894: Docketed and dismissed, on motion of *Mr. Solicitor General* for appellee. No one opposing.

No. 145. ZIMMERMAN *v.* OLIVER. Error to the Circuit Court of the United States for the Western District of Texas. December 4, 1893: Dismissed, with costs, pursuant to the 10th rule. *Mr. C. W. Ogden*, *Mr. S. M. Ellis* and *Mr. William A. McKenney* for plaintiff in error. No appearance for defendant in error.

Summary Statement of Business of the Supreme Court of the United States for October Term, 1893.

Original Docket.

Number of cases	10
Number of cases disposed of	3
Leaving undisposed of	7

Appellate Docket.

Number of cases on the appellate docket at the close of the October Term, 1892, not disposed of	934
Number of cases docketed during October Term, 1893	280
Total	1214
Number of cases disposed of October Term, 1893	500
Number of cases remaining undisposed of, showing a reduction of 220 cases	714

APPENDIX.

SOME CASES NOT HITHERTO REPORTED IN FULL.

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SOME CASES NOT HITHERTO REPORTED IN FULL.

The Centennial Appendix, at the end of Volume 131, contained two tables of omitted cases. In the first table the cases were reported in full. The second contained only a list of cases, term by term [see pages ccxx to ccxxxi], in which opinions were given which were supposed to decide the case on the facts; or on the authority of some case referred to; or in which the decision was made partly on the facts and partly on such authority; or in which judgment was entered either on the stipulation of the parties, or for incompleteness of the record, or for non-compliance with the rules of court. It was assumed that it was not worth while to occupy the space necessary to report these cases in full. The fact that two or three of them have been referred to in opinions of the court, since rendered, shows that this assumption was not well founded, and calls upon the reporter now to print them in full.

UNITED STATES *v.* HARRISON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 126. Submitted April 21, 1852. — Decided April 23, 1852.

The evidence and principles decided in this case are the same in substance with those in *United States* v. *Philadelphia*, 11 How. 609.

The case is stated in the opinion.

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

The appellees in this case claim title to the land in question under certain instruments of writing executed by the Baron Carondelet in favor of the Baron Bastrop in 1796 and 1797, which are fully set out in the case of *The United States* v. *The Cities of*

Philadelphia and New Orleans, reported in 11 How. 609. It was decided in that case that these instruments of writing did not convey to the Baron Bastrop a title to the lands therein described. The decree in this case in favor of the appellees must therefore be reversed and a mandate issued directing the District Court to enter a decree in favor of the United States and dismiss the petition.

This case not to be reported, the evidence and principles decided being the same in substance with the case referred to in 11 Howard's Reports. *Reversed.*

Mr. Attorney General for appellant.

No appearance for appellees.

UNITED STATES *v.* CARRÈRE.

UNITED STATES *v.* GRAFTON.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Nos. 78 and 80. Submitted March 1, 1853. — Decided March 3, 1853.

Reversed upon the authority of *United States* v. *Philadelphia & New Orleans*, 11 How. 609.

The case is stated in the opinion.

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

The appellees in these two cases claim title under an instrument of writing which they allege was a grant by the Spanish authorities to the Baron de Bastrop. In the case of *The United States* v. *The Cities of Philadelphia and New Orleans and Livingston and Callender's Heirs*, reported in 11 How. 609, the court decided that this instrument of writing conveyed no title to the Baron de Bastrop; and consequently the petitioners can derive no title to themselves under it.

The decree in each of these cases must therefore be reversed and a mandate issued to the Circuit Court, directing the petitions to be dismissed. *Reversed.*

Mr. Attorney General for appellant.

No appearance for appellees.

STEAMBOAT NIAGARA *v.* VAN PELT.

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

No. 69. Stipulation to dismiss filed December 11, 1854. — Decided February 15, 1855.

This case is dismissed in accordance with the stipulation of counsel.

Mr. Chief Justice Taney announced the decree of the court.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and it appearing to the court here by a stipulation on file, signed by the counsel for the respective parties, that the matters in controversy had been agreed and settled between them, and that the case should be dismissed without costs to either party as against the other, it is, thereupon, now here ordered and decreed by this court that this cause be, and the same is hereby, dismissed, and that each party pay their own costs in this court.

Dismissed.

Mr. Alexander Hamilton, Jr., for appellants.

Mr. —— *Marsh* for appellees.

COGGESHALL *v.* HARTSHORN.

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

No. 60. Stipulation to reverse filed December 12, 1856. — Decided December 12, 1856.

A decree is entered by consent of parties, modifying the decree of the court below.

The case is stated in the opinion.

Mr. Chief Justice Taney announced the decree of the court.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts and on the stipulation filed by the counsel of the respective parties that the following decree should be entered, on consideration whereof, and on the motion of Mr. Curtis, of counsel for the appellants, it is now here ordered, adjudged, and decreed that so much of the decree of the Circuit Court as required payment by the appellants to the appellees of the sum of six thousand nine hundred and forty-five dollars and sixty-three cents and interest thereon as profits, and six hundred and ninety-one dollars and seventy-nine cents as costs, be, and the same is hereby,

reversed; and that so much of the said decree as relates to an injunction restraining the appellants, their agents and servants and assigns, from using certain patterns and stoves therein mentioned be, and the same is hereby, affirmed and the injunction made perpetual; and that the said Circuit Court be, and the same is hereby, directed to enter a full satisfaction of all damages and costs in this cause. And it is further ordered and decreed by this court that neither party take any costs in this or the Circuit Court in this cause. *Affirmed in part and reversed in part.*

Mr. G. T. Curtis for appellants.

Mr. J. A. Loring for appellees.

WATTERSON *v.* PAYNE.

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

No. 56. Submitted February 1, 1858. — Decided February 24, 1858.

It appearing that this cause was brought here for delay only, the court dismisses it on motion of the defendant in error, and awards damages at the rate of ten per cent a year.

A motion made by the plaintiff in error after the entry of such judgment to appear and for leave to file a brief comes too late.

THE case is stated in the opinion.

MR. CHIEF JUSTICE TANEY announced the following judgment of the court:

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it appearing to this court that this cause has been brought to this court solely for the purpose of delay, it is thereupon now here ordered and adjudged by this court, that the judgment of the said Circuit Court (which on the 8th day of December, 1855, the date on which it was signed, amounted to $3967.82, including the principal and interest to said date) be, and the same is hereby, affirmed, with costs, in both this and said Circuit Court, and damages at the rate of ten per cent per annum on said $3967.82, from said 8th December, 1855, to this 24th day of February, 1858, and without any further damages or interest upon either the judgment of the said Circuit Court or this court. And it is further ordered and adjudged by this court, that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to issue

an execution in favor of the said Andrew M. Payne and against the said George W. Watterson for the sum of $4845.16 (being the amount of the aforesaid judgment of the said Circuit Court, together with the damages thereon, at the rate of ten per centum per annum, as aforesaid) and for $——, the costs laid out and expended by the said Andrew M. Payne in this case in this court, and also for the costs in this case in the said Circuit Court.

Affirmance so ordered.

Mr. Benjamin for defendant in error.

No appearance for plaintiff in error.

April 12, 1858, Mr. Chief Justice Taney announced the following order of the court:

A motion is made at the present session of the court by counsel for the plaintiff in error to open the judgment in this case, to enable him to file a brief or printed argument.

The case was brought up to this court and entered by the plaintiff in error on the docket at December Term, 1856. The defendant in error appeared at that term, but no appearance was entered for the plaintiff. At the late session of the court at the present term the case was reached in the regular order of the docket and called for trial on the first day of February. The defendant in error appeared and submitted the case on a printed brief, — no counsel appearing on behalf of plaintiff. The judgment of the court was not delivered until Wednesday, February 24, and the court continued in session until Friday, the 26th, when it adjourned to the first Monday in this month; and up to the time of the adjournment no appearance had been entered for the plaintiff in error, nor any motion made to the court in his behalf.

Under such circumstances, a motion at the present session to open the judgment and permit a printed brief or argument in behalf of the plaintiff in error, comes too late, according to the rules and practice of this court, and is therefore *Overruled.*

Mr. Bradley for plaintiff in error.

Mr. Benjamin for defendant in error.

UNITED STATES *v.* OSIO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 74. Argued February 13, 1860. — Decided March 12, 1860.

Two records from the court below being docketed here in the same case and one being heard and disposed of by decree of reversal, the second is dismissed.

THE case is stated in the opinion.

MR. JUSTICE CLIFFORD announced the following order:

This is an appeal from a decree of the District Court for the Northern District of California, affirming a decree of the Land Commissioners.

On examination of the transcript we find it is the same case as the preceding in which the opinion has been delivered reversing the decree of the District Court — by some mistake two transcripts of the record were taken out in the court below, and each has been docketed in this court.

Accordingly, the case is dismissed, but no *procedendo* will issue to the District Court. *Dismissed.*

Mr. Attorney General for appellant.

No appearance for appellee.

RICHARDSON *v.* LAWRENCE COUNTY.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 100. Submitted January 12, 1864. — Decided January 25, 1864.

Woods v. *Lawrence County*, 1 Black, 386, affirmed and applied to this case.

THE case is stated in the opinion.

MR. JUSTICE GRIER delivered the opinion of the court.

The certificate of division of opinion by the judges of the Circuit Court in this case is liable to the objection that one of the points submits the whole case. The first two present, in fact, but a single proposition, arising on the special verdict.

The law authorizing the issue of the bonds by the county, required that the railroad company should not sell them at less than par value. The verdict finds that they were sold by the railroad company for sixty-four cents in the dollar, and submits to the court whether the judgment should be for the interest at the par value of the bonds, or for only sixty-four per cent. On this point the court was divided, and the question is properly presented by the certificate of division.

Since this case was certified, that of *Woods* v. *Lawrence County*, 1 Black, 386, was argued at length by learned counsel and carefully considered by this court. The report of that case shows that all the questions that could arise in this case were decided in that. It

was there decided that the right of the holder of these bonds and coupons to recover their par value is not affected by the fact that the railroad company to whom they were given paid them out to contractors for sixty-four cents in the dollar.

The clerk will therefore certify to the Circuit Court that the motion of plaintiff "to enter a verdict and judgment in his behalf for the sum of $864 with interest, from November 14, 1861," ought to be granted.

This will dispose of the whole case. *So answered.*

Mr. J. Knox for plaintiff.

Mr. R. B. McCombe and *Mr. Lewis Taylor* for defendant.

UNITED STATES *v.* HALLOCK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 113. Submitted January 25, 1864. — Decided February 8, 1864.

A French vessel leaving France for New Orleans in May, 1861, with knowledge of the blockade, and obtaining full knowledge of the same at the Bahamas, continued its voyage and attempted to enter that port. *Held*, that it was subject to capture, and that so much of the cargo as belonged to citizens of New Orleans was subject to condemnation as enemy's property, and so much as belonged to citizens of New York to condemnation for illicit trading with the enemy.

The case is stated in the opinion.

Mr. Justice Grier delivered the opinion of the court.

The questions which affect the decision of this case have all been before this court in the "prize cases" decided at last term, and reported in 2 Black, 665.

On the 7th of July, 1861, the bark Pilgrim was attempting to enter the port of New Orleans, but ran aground in the night near Pass à l'Outre and was captured by the blockading vessels of the United States.

She had left Bordeaux, in France, about the 8th of May, after the news of the blockade of the southern ports had reached that place, and the American Consul would give no more papers to vessels bound for southern ports. In passing the Bahamas she had full information of the blockade. The master persisted, however, to continue his voyage and attempt to enter the port of New Orleans, till arrested by the blockading ships.

The cargo was consigned to owners in New Orleans. Two-

thirds of the vessel belonged to citizens of New Orleans, the other third to the master and another, citizens of New York and Connecticut. The cargo and two-thirds of the vessel were liable to confiscation as "enemy's property," and the remainder for illicit trading with the enemy.

The decree of the court below is therefore reversed, and record remitted with directions to enter a decree in conformity to this opinion. *Reversed.*

Mr. Attorney General and *Mr. Charles Eames* for the appellants.

UNITED STATES *v.* OLVERA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 149. Argued February 19, 1864. — Decided March 7, 1864.

Proceedings to obtain a Mexican grant in California commenced in 1845 and diligently prosecuted up to May, 1847, when judgment is rendered in the applicant's favor, and title issues to him, are held to be binding upon the United States, in the absence of fraud.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is an appeal from the United States District Court for the Southern District of California.

The case involves the title to six square leagues of land, known by the name of Los Alamos and Agua Caliente, in the county of Los Angeles, under a Mexican grant dated 27th May, 1846. It was accompanied by a map designating the out-boundaries of the tract. Proceedings before the Governor, with a view to obtain the grant, commenced as early as the 21st August, 1845. On that day the claimants applied to have the Governor declare the land vacant, notwithstanding a previous grant to one Don Pedro Carillo, as he had failed to comply with any of its conditions. In pursuance of this application, Carillo was called twice before the alcalde to explain the reason of his neglect, and on the 6th September, 1845, at his own solicitation, seven months were allowed him within which to furnish the Governor with a satisfactory explanation. After the expiration of this time, and no explanation having been furnished by Carillo, on the 27th May, 1846, the Governor declared that, taking into consideration the seven months granted to citizen Pedro Carillo to stock the land granted to him in conformity within the colonization laws, and of the injury caused to the industry of

the country on account of his not occupying it, the denunciation of the tract of the Alamos and Agua Caliente in favor of the applicants may take place, to whom the proper title shall be issued, and on the same day a title was issued to them in due form.

The espediente embraces some dozen of documents, extending through a period of nine months, that is, from the 21st August, 1845, to the 27th May, 1846, and which, with the exception of the grant in form, were produced from the public archives. The last document in the espediente and which decreed a denunciation of the tract, directed that the title should issue, and which was issued accordingly, as we have seen, on the same day. All these documents were produced and proved before the board of commissioners, which rejected the claim on the ground the boundaries of the tract given in the grant were not specific enough to separate the land from the public domain, and therefore void for uncertainty.

No question was raised by the government before the board as to the genuineness of the grant. Indeed, the preliminary proceedings growing out of the steps necessary to be taken to procure a denunciation of the land as vacant, would seem to repel any suspicion of fraud against this government in making the grant.

In this connection it may not be improper to refer historically to the fact, that the grant of this tract to Carillo was made by Governor Micheltorena, October 2d, 1843. He presented his claim before the board of commissioners, 24th December, 1852, which was registered on 23d January, 1854, and on appeal to the district court, dismissed for failure to prosecute it, 10th August, 1860. (See Appx. p. 68, No. 498, Hoffman's Land Cases.)

It is true that this grant is not supported by any possession or occupation by the claimants prior to their application to the Governor, nor, indeed, could it have been, as it is founded upon a denunciation of the previous grant to Carillo, and the war existing between Mexico and this government at the time, and which soon afterwards resulted in the acquisition of the country, prevented the possession and occupation immediately after the date of the grant. There might be difficulty in supporting this claim in the absence of possession and occupation if it stood, simply, upon the title of the Governor of the 27th May, 1846. But the proceedings to obtain it commenced in 1845, and were pursued diligently till the 27th May, 1846. They were instituted, not to obtain a grant of a portion of the public domain, but to obtain a denunciation of a title to a tract already granted, and in this respect the claim stands upon a different footing from most of these Mexican grants. The

only questions that can well be raised are, whether or not the documentary evidence is genuine; and, second, whether it is competent to convey the title. The idea of antedating the documents would seem to be repelled by the character of the proceedings, running through a period of nine months, as well as from the fact that Carillo, and not the Mexican or American government, had the chief interest in them. Certainly it would be a very forced conclusion to predicate a fraud upon the American government in the denunciation of Carillo's title, and the re-grant of it to these claimants, which is all that there is of the case.

Decree of the District Court affirmed.

Mr. Attorney General and *Mr. John A. Wells* for appellants.

Mr. John B. Williams for appellees.

MILWAUKEE AND MINNESOTA RAILROAD CO. *v.* SOUTTER.

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

No. 267. Argued February 1–9, 1864. — Decided February 23, 1864.

The removal or appointment of a receiver rests in the sound discretion of the court making the order, and is not revisable here.

The case is stated in the opinion.

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from an order of the court below overruling a motion on the part of the Milwaukee and Minnesota Railroad Company, the appellants, to remove the receiver in possession of the La Crosse and Milwaukee Railroad, and put the petitioners in the possession and control of the eastern division, extending from Milwaukee to Portage; and which order overruled, also, an application in behalf of the applicants to remove the Milwaukee and St. Paul Railway Company from the possession and control of this division, which had been given to them by a previous order of the court, under date of June 12, 1863. These applications by the appellants were made in a suit of foreclosure of what is known as the second mortgage upon the road given to secure the bondholders.

A receiver had been appointed in the cause at the instance of the complainants, and his powers were subsequently modified by the court, so as to let in the Milwaukee and St. Paul Company to run the road and manage its affairs under the direction of the court.

A decree had been rendered by the court in the foreclosure suit, previous to these motions, in favor of the complainants, from which they had taken an appeal, and which appeal, as has been decided at this term, had the effect to suspend the execution of the decree of the court below and all proceedings under it, except such as might be necessary for the preservation and security of the subject of litigation. But without inquiring whether the court below, after the appeal, had any authority to entertain the motions of the appellant, it is sufficient to say the order made in disposing of them is not the subject of an appeal. The removal or appointment of a receiver, which, in effect, was the object of the motions, rested in the sound discretion of the court, and the decision is not revisable here.

We should add that the decision already given in this cause at the present term, holding that the foreclosure suit pending in the District Court at the passage of the act extending the circuit court system to the State of Wisconsin, transferred it to the jurisdiction of the Circuit, is, of itself, conclusive against this appeal.

The appeal is dismissed.

Mr. M. H. Carpenter for appellants.

Mr. N. A. Cowdry and *Mr. N. J. Emmons* for appellee.

MILWAUKEE AND MINNESOTA RAILROAD CO. *v.* SOUTTER.

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

No. 268. Argued February 1–9, 1864. — Decided February 23, 1864.

Milwaukee & Minnesota Railroad Co. v. *Soutter*, *ante*, 540, followed.

The case is stated in the opinion.

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from an order made in the suit of Soutter and Bronson, trustees of the second mortgage bonds of the La Crosse and Milwaukee Railroad Company, against the mortgagor and others, including the appellants, as defendants, in the court below, for the foreclosure of the mortgage. The appellants made a motion in the Circuit Court of the United States for Wisconsin, in which the suit was pending, for an order discharging the receiver that had been previously appointed at the instance of the complainants, and to put the petitioners and present appellants into the possession of the eastern division of the road, with its appurtenances, to

be run under their superintendence and control pending the suit of the foreclosure.

A like motion was made in the suit on the same day before the United States District Court, there being some doubt expressed, whether, under the act of Congress, July 15, 1862, extending the circuit court system to the State of Wisconsin, and the amendment of the same, March 3, 1863, (12 St. at Large, pp. 567–807,) the foreclosure suit then pending in the District Court had been transferred to the Circuit. This court have decided at the present term that the suit had been thus transferred. The motion in the District Court was denied, and an appeal taken to this court, which we have just disposed of.

The motion in the circuit, which is now before us on appeal, was also denied, and we need only say that one of the grounds for dismissing the appeal in the previous case is applicable to this, namely, that the order, in effect, refusing to remove a receiver and to appoint another, rests in the sound discretion of the court, and which is therefore not the subject of an appeal.

The appeal is therefore dismissed.

Mr. M. H. Carpenter for appellant.

Mr. N. A. Cowdry and *Mr. N. J. Emmons* for appellee.

MERRIAM *v.* HAAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 77. Argued and submitted December 23, 1864. — Decided January 23, 1865.

A loan was negotiated through a banker, who received the money from the lender, and failed before the borrower called for it. *Held*, on the facts disclosed by the proof, that he held it as the agent of the borrower.

The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

This is a suit to foreclose a mortgage for six thousand dollars, given to secure a loan of money. It is conceded that at the time the mortgage was executed and delivered, only four thousand dollars of the loan were received by defendant; it being stipulated that the remaining two thousand dollars were to be advanced when defendant should finish a building on the lot conveyed by the mortgage, and cause it to be insured for the benefit of plaintiff.

The loan was negotiated in some part through the banking house of Caldwell & Co., of St. Paul, where the defendant resided.

On the 30th day of July, the defendant brought to Caldwell & Co. the policy of insurance, and satisfied them that the condition on which he was to receive the last two thousand dollars had been complied with, and Caldwell & Co. drew on plaintiff residing in Boston, for that sum, and the draft was duly honored.

On the 9th day of August, Caldwell & Co. failed, without having paid over the money to defendant; and the sole question in the case is, for which of the parties to this suit did they hold the money at the time of their failure.

It is a mere question of the weight of testimony, and we are not able to see that any principle can be settled or illustrated by its discussion. It is perhaps sufficient to say that the testimony satisfies us that the money was held by the bankers as a deposit to the credit of the defendant, and that he knew and so understood it before their failure.

We will mention only a few of the reasons which induce this belief. Caldwell, one of the banking firm, testifies that it was under the instruction and at the request of defendant, that he drew on plaintiff for the money; that in doing so, he acted solely for defendant, and that on the day of the date of the draft, he permitted defendant to check against this money on his bank for the sum of two hundred and fifty dollars, and that in all defendant checked on him against that fund for over eight hundred dollars.

The clerk and bookkeeper of Caldwell & Co. testifies, that on the day the draft was drawn, defendant was credited on their books for two thousand dollars on account of said draft, and that he continued to draw it out by checks, until they amounted to over eight hundred dollars, at the day of their failure.

The pass-book of *plaintiff* with Caldwell & Co. is produced by himself, and shows a credit of two thousand dollars, dated August 30; but as this was some time after their failure, and after they had had this pass-book in their hands, it is evidently a mistake as to date. The clerk above mentioned says it was intended for August 1, as the arrangement was made on Saturday, July 30, after banking hours, and it was his custom to carry such transactions on the books of the next business day. This explanation seems reasonable, and as he swears that it conforms to the memorandum on his blotter, we see no reason to doubt it. The checks are shown which defendant drew between July 30 and August 9, and it is not denied that unless drawn against this money, the defendant was overdrawing his account. No proof is offered of any agreement or customary dealing by which he was authorized to do this.

These facts leave no doubt on our minds that the money must be considered at the time of the assignment of Caldwell & Co., a credit of the defendant with them, with his knowledge and consent, and the loss must be his.

The decree of the District Court is therefore

Reversed with costs, and the case remanded to the Circuit Court for the District of Minnesota, with directions to enter a decree in conformity with this opinion.

Mr. Lorenzo Allis for appellant.

Mr. J. M. Carlisle and *Mr. C. D. Gilfillan* for appellee.

UNITED STATES *v.* DE HARO.

MAHONEY, Intervenor, *v.* UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Nos. 81 and 146. Argued December 27 and 28, 1865. — Decided January 15, 1866.

A plat made in 1853 of land adjudged to be covered by a Mexican grant, and confirmed in 1862, is sustained as the correct designation of the property covered by the grant.

The case is stated in the opinion.

Mr. Justice Grier delivered the opinion of the court.

The only question on these cases is, as to the location of the half league confirmed to the heirs of De Haro. The boundaries as described in the diseño annexed to the grant, would include a much larger quantity; all of which was claimed by the heirs. The District Court, affirming the decision of the board of commissioners, confirmed their title to the extent only of "*half a square league, being one league from north to south and half a league from east to west*, to be located according to, and within the calls of, the original grant, &c., regard being had to the occupation of the original grantee and the ancestor of the present claimant."

While the case was pending before the board, a preliminary survey was made, at the suggestion of the heirs, by the surveyor general. This survey exhibited a plat not only of the outside boundary of the diseño, but also those of the half league selected out of the whole, in case they could get no more. In 1853 the surveyor caused the sobrante or overplus land outside of the half league to be surveyed into sections as public lands. These sections have been settled and improved by parties claiming under the

government. On the 18th June, 1862, the District Court, after a full hearing of the parties, ordered a survey to be made in accordance with the election of the claimants made in 1853, "as evidenced by the plat of a survey of said lands by Leander Ransom, United States deputy surveyor," &c. The question whether such an election had been made was disputed, and fully examined by the court, as is shown by the opinion of the learned judge on the record. His reasons for the conclusion he arrived at need not be repeated. Suffice it to say, they fully demonstrate the correctness of the order made by the court.

The survey of Ransom conformed to all the calls of the decree, except that it did not include an abandoned improvement and building once made by Galindo, the original grantee. De Haro, who purchased from him, made his settlement and possession on another portion of the tract described in the diseño. He certainly had a right to do so; and his heirs, in selecting the best land for their half league, had a right to exclude the abandoned possession of Galindo. The land selected by them included the "actual occupation of their ancestor," and was in the form prescribed by the decree of the court. To include the abandoned occupation of Galindo, it would not conform to the other calls of the decree.

A survey, made according to this order or decree, ought to have satisfied all parties, as it did justice to all concerned. But, as nine years had elapsed since the Ransom survey was made, the state of the country in this region was much changed, and a new party intervened. Mahoney had purchased the title of the heirs of De Haro and the claimants under the United States had made valuable improvements. If this new party could set aside the selection made by those under whom he claimed, and make a new selection covering the improvements made by those claimants, it is not doubted he could have made a selection more satisfactory *to himself*, at the expense of the other claimants.

Soon after the date of this order or decree of the court, David Mahoney intervenes and petitions the court for a rehearing. In this petition he impugns the decision of the court as to the Ransom survey, denies that it was sanctioned by the heirs, and alleges fraud in the "*sectionizing*" the lands by the public officers.

The court, on this petition, reconsidered their decree, and made another on the 27th of June, 1863, according to another survey made on the 15th of June preceding. This survey is objected to by all the parties interested; by the United States, because it covers land claimed by settlers and purchasers from the govern-

ment; and, by Mahoney, because it does not include more of the land so occupied and improved.

This change of location is made, not because the selection made in 1853 was not made by consent of the heirs, or because the fraud charged upon the public officers was proved, or ought to affect the title of those claiming under the government, but because the land selected by them did not include the abandoned settlement made by Galindo.

Now if the heirs had a right to select within the boundaries of the original diseño; if their selection conformed with all the other calls of the decree, as to the length and breadth of the half league, and included the portion occupied by De Haro, their ancestor, no one had a right to complain if they rejected the abandoned occupation of Galindo. A tract, one league from north to south and half a league from east to west, including the land occupied by De Haro, cannot be made to include the other calls of the decree.

We are of opinion, therefore, that

The order or decree made on the 27th of June, 1863, *should be set aside, and that made on the 18th day of June*, 1862, *be confirmed, and that the appeal of Mahoney be dismissed.*

Mr. Attorney General, *Mr. J. A. Wills* and *Mr. Joseph H. Bradley* for the United States.

Mr. J. S. Black and *Mr. W. H. Tompkins* for De Haro *et al.* and Mahoney.

ROGERS *v.* KEOKUK.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

No. 94. Submitted January 4, 1866. — Decided January 22, 1866.

The legislature of Iowa had power to authorize the city of Keokuk to subscribe for and take stock in a railway company, to issue its bonds therefor and to lay a tax to pay the interest thereon.

It had also power to give validity to bonds informally issued for such purpose.

A plaintiff who purchases such bonds in the open market is not chargeable with defects or irregularities in their issue.

The case is stated in the opinion.

Mr. Justice Grier delivered the opinion of the court.

It might be objected to the certificate of division of opinion in this case, that it is a submission of the whole case, first in separate propositions, and afterwards in a point containing all the rest.

When the case was tried below, the questions on which it depends had not been decided by this court, and were considered doubtful, having received in the courts of Iowa contrary solutions. But having since that time been decided in this court in other cases involving the same questions, we need only refer to them as containing answers to all the questions necessary to the decision of this case.

The case of *Gelpcke* v. *Dubuque*, 1 Wall. 175, 202, will afford an answer to the first, which is the most important question submitted, to wit: "That the legislature of the State of Iowa had the power to authorize the said municipal corporation, the city of Keokuk, to subscribe for and take stock in a railroad company and to issue its bonds in payment therefor, and to lay a tax to pay the interest upon said bonds."

It is not necessary to vindicate the correctness of this decision by further argument.

2. The legislature, having such authority, the "act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis" gave validity to said bonds notwithstanding any informality or illegality in their issuing. This is a sufficient answer to the second and third questions proposed.

3. The plaintiff having purchased the bonds in open market, for value, is not charged with any defect or irregularity in their issue.

The fifth and sixth questions proposed each include all that is presented, and need not be answered.

Mr. F. A. Dick for plaintiff.

No appearance for defendant.

ROGERS *v.* LEE COUNTY.

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

No. 95. Submitted January 4, 1866. — Decided January 22, 1866.

Reversed on the authority of *Rogers* v. *Keokuk*, *ante*, 546.

THE case is stated in the opinion.

MR. JUSTICE GRIER delivered the opinion of the court.

In this case the court instructed the jury that "under the evidence the bonds issued were without authority and were void."

The facts of this case, and the question of law arising thereon, are the same in substance as those in the preceding case of *Rogers*

v. *City of Keokuk*. Without again repeating our reasons — it is ordered, that the judgment be reversed, and a *venire de novo* be awarded. *Reversed.*

Mr. F. A. Dick for plaintiff in error.

Mr. J. C. Hall for defendant in error.

DUVALL *v.* UNITED STATES.

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

No. 145. Submitted March 27, 1866. — Decided April 3, 1866.

This court affirms after the close of the civil war, a judgment condemning a vessel and cargo for violation of the acts of July 13, 1861, c. 3, and August 6, 1861, c. 60, in transferring goods from Alexandria to a part of Virginia then in a state of insurrection.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Maryland.

The United States filed in the District Court a libel of information against certain goods seized, as was alleged, in transit to a part of the State of Virginia, then in insurrection. The libel was founded upon the fifth section of the act of Congress of July 13, 1861, chapter 3, and the first section of the act of August 6, 1861, chapter 60. The plaintiff in error interposed and claimed the goods. A verdict and judgment were rendered for the United States.

Upon the trial several exceptions were taken by the claimant. The judgment was affirmed by the Circuit Court, and the case is now before this court for review. An elaborate brief has been filed for the United States. No argument has been submitted for the plaintiff in error. From this we infer that the exceptions relied upon in the Circuit Court have been abandoned. We have, however, looked into them, and find nothing which we deem erroneous.

A motion has been made, and fully argued, in behalf of the plaintiff in error, to dismiss the case, upon the ground that the war having ceased the effect of that fact is the same which would have followed the repeal of the statutes upon which the prosecution is founded. That proposition was ruled adversely to the claimant by this court in the case of *The United States* v. *The Schooner*

Reform, Baily and Penniman claimants, decided at this term. 3 Wall. 617.

The subject was then fully considered. It is sufficient to refer to the opinion of the court in that case for an exposition of our views, without reproducing the considerations which controlled the decision. *The judgment below is affirmed with costs.*

Mr. George W. Dobbin and *Mr. William Price* for plaintiff in error.

Mr. Attorney General and *Mr. A. S. Ridgley* for defendant in error.

HORBACH *v.* PORTER.

HORBACH *v.* BROWN.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

Nos. 189, 190. Submitted December 1, 1865. — Decided December 18, 1865.

When two parties acquire title to the same tract of land from the same grantor, if the later grantee takes his deed with knowledge that the first grantee is in possession of the land, and has enclosed it, and is cultivating it, he is chargeable with knowledge of all the equitable rights of the first grantee with which an inquiry would have put him in possession.

The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

In these two cases the facts are the same, and the questions suggested by the records are exclusively questions of fact.

It is charged in the bill that Horbach, one of the defendants, having sold the land which is the subject of the controversy, and received the consideration for it, afterwards caused the equitable title under which he then claimed to be set aside by the Secretary of the Interior, and procured a patent to himself, for the land thus sold; and that he then conveyed the land to Wiggins, his co-defendant in these suits.

The plaintiffs are purchasers from Horbach's first vendee, and charge that Wiggins purchased with notice of their rights.

We are of opinion that the evidence sustains the allegations of the bill, although the answer of Wiggins denies them.

It is made pretty clear by the testimony that the charges against Horbach are true. And although it is not shown that Wiggins had any participation in this fraud, or that he had actual knowledge of the rights of plaintiffs when he purchased from Horbach, and

received the legal title, a case of constructive notice of those rights is well made out.

The plaintiffs in both cases were in possession of the land, having it enclosed by fence, and in actual cultivation at the time Wiggins bought of Horbach. This was sufficient to put him upon the inquiry, and if he had inquired he would have received full information of the superior equitable claims of complainants.

The plaintiffs in accordance with these views had decrees for conveyance of the legal title in the District Court in which the cases were first tried, and these decrees were affirmed on appeal by the Supreme Court of the Territory of Nebraska. On a simple matter of conflict of testimony like this, in which we are able to concur fully with the judgments of two courts which have already passed upon the same record, we do not deem it necessary to give any minute criticism upon the testimony on which these decrees are founded. *They are therefore affirmed with costs.*

Mr. J. J. Reddick for appellants.

Mr. J. M. Carlisle and *Mr. James M. Woolworth* for appellees.

HAMMOND *v.* MASSACHUSETTS.
McNEAL *v.* MASSACHUSETTS.
CLARK *v.* MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF MASSACHUSETTS.

Nos. 240, 241, 242. Submitted February 27, 1866. — Decided March 26, 1866.

McGuire v. *Massachusetts*, 3 Wall. 387, followed.

Mr. Justice Nelson delivered the opinion of the court.

Enter in these cases the same judgment as in *McGuire* v. *Commonwealth of Massachusetts*, 3 Wall. 387.

Mr. N. Richardson and *Mr. C. Cushing* for plaintiffs in error.

Mr. C. J. Reed and *Mr. D. Foster* for defendant in error.

CHURCHILL *v.* UTICA.

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

No. 286. Argued January 31, February 1, 2 and 5, 1866. — Decided March 26, 1866.

Reversed on the authority of *Van Allen* v. *Assessors*, 3 Wall. 573.

The case is stated in the opinion.

Mr. Justice Nelson delivered the opinion of the court.

Churchill is the only party against whom judgment was rendered in the court below, and the party who has brought a writ of error to this court.

The judgment is reversed, and the case remitted to the court below for proceedings there as directed in the case of *Van Allen* v. *Assessors*, 3 Wall. 573. We refer to the opinion in that case as governing this one. *Reversed.*

Mr. W. M. Evarts, *Mr. C. B. Sedgwick* and *Messrs. Edmonds & Miller* for plaintiff in error.

Mr. F. Kernan for defendant in error.

WILLIAMS *v.* NOLAN.

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

No. 288. Argued January 31, February 1, 2 and 5, 1866. — Decided March 26, 1866.

Reversed on the authority of *Van Allen* v. *Assessors*, 3 Wall. 573

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court:

The opinion in the case of *Van Allen and Others* v. *Nolan and Others* governs this case, and the same judgment must be entered. *Judgment reversed and case remitted.*

Mr. J. H. Reynolds for plaintiff in error.

Mr. A. T. Parker for defendants in error.

BROWN *v.* JOHNSON.

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

No. 47. Submitted December 11, 1866. — Decided January 3, 1867.

Reversed on the authority of *Brown* v. *Bass*, 4 Wall. 262.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of Mississippi.

The case involves the same questions examined in the case of *Brown* v. *Bass*, 4 Wall. 262, and the opinion in that case governs this, and shows that the court erred in the several rulings and instructions in this case. *Reversed.*

Mr. J. M. Carlisle and *Mr. J. D. McPherson* for plaintiff in error.

MINERAL POINT *v.* LEE.

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

No. 164. Submitted April 18, 1867. — Decided April 22, 1867.

Affirmed on the authority of several cases of a similar character.

THE case is stated in the opinion.

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

The action in the court below was brought to recover the amount of certain coupons issued by the town of Mineral Point of which Lee, the plaintiff below, was the holder. We think it unnecessary to repeat the views heretofore expressed in several cases of similar character. *The judgment is affirmed with costs.*

No appearance for plaintiff in error.

Mr. M. H. Carpenter for defendant in error.

UNITED STATES *v.* MAYRAND.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

No. 187. Submitted May 15, 1867. — Decided May 16, 1867.

United States v. *Holliday*, 3 Wall. 407, followed.

THE case is stated in the opinion.

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

This cause comes here, upon a certificate of division of opinion, from the Circuit Court of the United States for the District of Minnesota.

Mayrand was indicted for selling liquor to an Indian of the Chippewa Tribe, which tribe was then under the charge of an Indian agent, duly appointed by the government of the United States. He demurred to the indictment; and the question certified is, whether the act of Congress, under which the indictment was framed, has any force or validity in this case.

In the case of *The United States* v. *Holliday*, 3 Wall. 407, this very question was fully discussed and finally decided.

An affirmative answer must be certified to the Circuit Court.

Mr. Attorney General and *Mr. J. Hubley Ashton* for plaintiff.

No appearance for defendant.

TILLINGHAST *v.* VAN BUSKIRK.

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

No. 313. Argued April 12, 1867. — Decided April 22, 1867.

Green v. *Van Buskirk*, 5 Wall. 307, followed.

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

MR. JUSTICE MILLER delivered the opinion of the court.

This opinion [in *Green* v. *Van Buskirk*, 5 Wall. 307] disposes also of the case No. 313, *Tillinghast* v. *Van Buskirk and Others*, in which the same order will be entered.

Mr. Amasa J. Parker for plaintiffs in error.

Mr. John B. Gale and *Mr. J. M. Carlisle* for defendants in error.

CONNELLSVILLE AND SOUTHERN PENNSYLVANIA RAILROAD *v.* BALTIMORE.

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

No. 413. Argued April 26, 1867. — Decided April 29, 1867.

The appellant was a proper party defendant in the court below, and duly took his appeal.

The order assigning the case for hearing at this term is rescinded.

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

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

We have considered the motion to dismiss the appeal of the Pittsburgh and Connellsville Railroad Company, and are of opinion that that company was a proper party defendant in the court below and the appeal in the record appears to have been taken by this defendant as well as by the others. We must therefore overrule the motion to dismiss.

We have also further considered the motion to rescind the order heretofore made assigning the matter for hearing at this term, and have come to the conclusion that the order should be rescinded. And it is *So directed.*

Mr. John Knox, Mr. Andrew Stewart and *Mr. J. S. Black* for appellants.

Mr. J. H. B. Latrobe, Mr. R. Johnson and *Mr. J. L. Thomas, Jr.*, for appellees.

EX PARTE MILWAUKEE AND MINNESOTA RAILROAD CO.

ORIGINAL.

No. 8. Original. Submitted March 20, 1868. — Decided March 30, 1868.

A petition for a writ of mandamus is denied on the authority of *Minnesota Co.* v. *St. Paul Co.*, 6 Wall. 742.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is an amended petition by the Milwaukee and Minnesota Company for a mandamus to the judges of the Circuit Court of the United States for the District of Wisconsin, commanding that court to order certain rolling stock, particularly described, to be taken out of the hands of a receiver, and delivered to the petitioners, pursuant to a decree entered in said court on the 18th July, 1866, in the case of *Soutter, &c.*, v. *The La Crosse and Milwaukee Company and Others.* Since this petition was presented a case on appeal between the parties has been heard and decided, in which it was determined that the possession of this rolling stock did not belong to the petitioners. [See *Minnesota Co.* v. *St. Paul Co.*, 6 Wall. 742.] The motion for the mandamus must, therefore, be

Denied.

Mr. C. Cushing for petitioner.

MISSISSIPPI *v.* STANTON AND GRANT.

ORIGINAL.

No. 14. Original. Argued May 15, 1867. — Decided May 16, 1867. — Opinion delivered February 10, 1868.

Dismissed on the authority of *Georgia* v. *Stanton*, 6 Wall. 50, and *Georgia* v. *Grant*, 6 Wall. 241.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

The bill is dismissed for want of jurisdiction for the reasons assigned in the case of *The State of Georgia* v. *E. M. Stanton, U. S. Grant and John Pope*, 6 Wall. 50; 241.

Dismissed.

Mr. W. L. Sharkey, Mr. R. J. Walker and *Mr. A. H. Garland* for complainant.

Mr. Attorney General for defendants.

GAINES *v.* LIZARDI.

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

No. 83. Argued January 30, February 3 and 4, 1868. — Decided April 6, 1868.

Reversed on the authority of *Gaines* v. *New Orleans*, 6 Wall. 642.

Mr. Justice Davis delivered the opinion of the court.

This case in all its essential features is like the case of the same complainant against the city of New Orleans, just decided, and the opinion delivered in that case is also decisive of this suit.

The decree of the Circuit Court of the United States for the Eastern District of Louisiana is reversed, and this cause is remanded to that court with directions to enter a decree for the complainant in conformity with the opinion in the case of *Myra Clark Gaines* v. *The City of New Orleans and others*, 6 Wall. 642.

Reversed.

Mr. C. Cushing for appellant.

Mr. James McConnell and *Mr. Miles Taylor* for appellees.

UNITED STATES *v.* COOK.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 102. Argued February 12 and 13, 1868. — Decided February 24, 1868.

United States v. *Hartwell*, 6 Wall. 385, followed.
The indictment in this case is sufficient.

The case is stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court.

This case was certified up to this court from the Circuit Court of the United States for the Southern District of Ohio, — the opinions of the judges of that court being opposed upon the points set forth in the certificate.

The first and third questions presented for our consideration are fully met by the opinion just delivered in the case of *The United States* v. *Hartwell*, 6 Wall. 385.

In accordance with that opinion they will be answered in the affirmative.

The second question relates to the sufficiency of the indictment in the particulars mentioned. We are of opinion that the indictment is sufficient. We deem this proposition so plain that any discussion of the subject is unnecessary.

This question will be answered accordingly.

The record shows that there is no foundation for the fourth question. It does not arise upon the indictment, and was abandoned by the defendant's counsel in the argument at the bar.

This question, therefore, needs no answer.

Mr. Attorney General and *Mr. J. Hubley Ashton* for plaintiff.

Mr. H. Hunter for defendant.

HUNT *v.* BENDER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

No. 103. Submitted March 13, 1868. — Decided March 30, 1868.

Several judgments severally held by different complainants who unite in the prosecution of a creditor's bill, cannot be added together to make the amount necessary to give this court appellate jurisdiction.

THE case is stated in the opinion.

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

The object of the writ in the territorial court was to subject certain property to the satisfaction of certain judgments. The bill of the complainants, now appellants, was dismissed, and they now prosecute this appeal for the reversal of that decree.

The judgments set up by the complainants were several, and neither of them was for an amount exceeding two thousand dollars; and it was decided at the last term in the case of *Seaver* v. *Bigelows*, 5 Wall. 208, that several judgments severally held by different complainants who unite in the prosecution of a creditors' bill cannot be added together in order to make the amount exceeding two thousand dollars, which is necessary in order to enable the court to take appellate jurisdiction.

The appeal must therefore be

Dismissed for want of jurisdiction.

Mr. Reddick and *Mr. Briggs* for the appellants.

Mr. J. H. Reynolds for the appellees.

UNITED STATES *v.* BALES OF COTTON MARKED J. H. B.

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

No. 146. Argued March 26, 1868. — Decided March 30, 1868.

Reversed on the authority of *Union Ins. Co.* v. *United States*, 6 Wall. 759.

THE case is stated in the opinion.

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

The libel in the Circuit Court was filed under the act of August 6, 1861, and stated a case of seizure on land.

In conformity, therefore, with the principles settled in the case of *The Union Insurance Company* v. *The United States*, the decree of the Circuit Court must be reversed as irregular, and the cause remanded for a new trial, conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law.

Reversed.

Mr. Attorney General and *Mr. J. Hubley Ashton* for the appellants.

No appearance for appellee.

WILLIAMSON *v.* MOORE.

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

No. 421. Argued February 14, 1868. — Decided April 6, 1868.

Williamson v. *Suydam*, 6 Wall. 723, followed.

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

MR. JUSTICE CLIFFORD delivered the opinion of the court.

The facts of the case are substantially the same as in the case just decided. *Williamson* v. *Suydam*, 6 Wall. 723.

The case, among other things, alleges that the act of April 1, 1814, was unconstitutional and void, as impairing the obligation of contracts.

Judgment of the state court was to the contrary in express terms, as appears in the record. *Motion overruled.*

Mr. David Dudley Field for plaintiffs in error.

Mr. H. E. Davies for defendant in error.

TILLINGHAST *v.* VAN BUSKIRK.

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

No. 32. Argued January 7 and 8, 1869. — Decided February 8, 1869.

Green v. *Van Buskirk*, 7 Wall. 139, followed.

THE case is stated in the opinion.

MR. JUSTICE DAVIS delivered the opinion of the court.

This case is in all respects like the case of *Green* v. *Van Bus-*

kirk, 7 Wall. 139, decided at this term, and no separate opinion is necessary.

The judgment of the Supreme Court of the State of New York is reversed, and the cause is remitted to that court, with directions to enter judgment for the plaintiffs in error.

Reversed.

Mr. Amasa J. Parker and *Mr. Lyman Trumbull* for plaintiffs in error.

Mr. J. S. Black, Mr. J. M. Carlisle, Mr. J. B. Gale and *Mr. J. K. Porter* for defendants in error.

BURBANK *v.* BIGELOW.

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

No. 36. Argued and submitted March 26, 1868. — Decided January 11, 1869.

After a cause is at issue, and on the day when it is set for trial before a jury, it is too late to take a peremptory exception that a partner with plaintiff in the transaction sued on is not a party plaintiff.

An objection in an action at law that the matter of plaintiff's demand is one of equitable cognizance in Federal courts cannot be taken for the first time in this court.

The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

The case of *Breedlove* v. *Nicolet and Siggs*, 7 Pet. 413, disposes of the only question raised by the record in the present case.

That was an action in the Circuit Court of the United States for the District of Louisiana, brought by Nicolet and Siggs as partners, in which, after issue taken on pleas in bar of the action, the defendants on the day set for trial filed a plea averring that Musson and others were also partners with plaintiffs, and citizens of Louisiana. The plea was stricken out by order of the court on the ground that it came too late. This court held that such action was within the discretion of the Circuit Court, and could not be revised.

In the case before us the defendant below, plaintiff in error, filed his peremptory exception after the case was at issue, and on the day that it was set for trial before a jury, praying that the suit should be dismissed, because T. S. Burbank, a partner with plaintiff in the transaction which is the foundation of this suit, was not made a plaintiff in the case. The court overruled this exception

on the ground that it came too late. We were at first inclined to distinguish the two cases under the idea that the plea in the first case rested on the citizenship of the partners not joined in the suit, who, if joined, would have defeated the jurisdiction of the court. But it is expressly said in the opinion, that "the plea is to be considered as if the averment that Musson and others were citizens of Louisiana had not been contained in it."

The point ruled in that case is identical with the one presented here, and that decision must govern this.

The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court.

As the record raises no other question for our consideration, the judgment of the Circuit Court is *Affirmed.*

Mr. C. Cushing and *Mr. W. W. Boyce* for plaintiff in error.

Mr. Thomas J. Durant for defendant in error.

SMITH *v.* WASHINGTON GAS LIGHT CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 86. Argued February 18, 1869. — Decided March 1, 1869.

The appellant has failed to prove the renewal of his contract with the appellee, which alleged renewal is the foundation of the remedy sought for by his bill.

THE case is stated in the opinion.

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

This is a suit in equity to enforce the specific performance of a contract for the delivery of gas tar, and to obtain compensation in damages for partial non-performance.

The alleged contract was for the delivery of all the tar, made by the company and not wanted by it for a specific purpose, from time to time, as made and called for by the contractor, during the term of five years; and for the renewal of the contract at the end of that period for another like term. The consideration to be paid to the

company by the contractor was five hundred dollars a year in half-yearly instalments. In case of refusal to renew the company engaged to refund to the contractor the payments made during the last year.

It is unnecessary to examine the question whether, upon sufficient evidence in support of the allegations of the bill, the complainant could have relief by a decree for specific performance; for we are all of opinion that no case for relief is made by the proof.

It is not alleged that, during the first five years, the company failed in any respect to perform its contract. The main ground of complaint is that the company, after having renewed the contract for a second term of five years, failed to fulfil its stipulations.

There is much evidence on the point of renewal and it is very contradictory. We shall not enter into any minute criticism upon it.

It is clear that the company was not bound to renew except upon the request of the contractor. There could be no refusal except upon a demand. Nor was the company bound to renew even upon demand. It might still refuse; and in that case would be bound only to return to the contractor or his assignee the last year's payment of five hundred dollars.

The proof shows that the contract proved unexpectedly profitable to the contractor; and that the tar would be worth during a second term of five years, not five hundred dollars only, but over five thousand dollars a year.

It was natural that the contractor should seek a renewal; and it was equally natural that the company should be unwilling to renew except at an advanced rate, corresponding, in some degree, to the increased value.

No formal demand for renewal seems to have been made, but there appears to have been a good deal of negotiation between the parties, and some adroit attempts on the part of the contractor to obtain admissions, either in words or acts, from the officers of the company, upon which a claim that the contract had been in fact renewed might be established.

But these attempts were not successful. We are unable to find in the testimony any satisfactory evidence of a renewal of the contract. On the contrary, the whole weight of the proof shows refusal to renew except at an advanced rate, and failure on the part of the contractor to accept the terms required. Refusing to renew the contract the company was under no obligation to the contractor except to refund the five hundred dollars received from him during

the preceding year; and for the recovery of this sum the remedy of the complainant was complete at law.

The decree of the Supreme Court of the District dismissing the bill must therefore be *Affirmed.*

Mr. R. J. Brent and *Mr. R. T. Merrick* for appellant.

Mr. J. C. Kennedy and *Mr. W. B. Webb* for appellee.

FINLEY *-v.* ISETT.

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

No. 150. Submitted April 7, 1869. — Decided April 15, 1869.

B., who had transactions with the appellees who were bankers, delivered to them his five promissory notes secured by mortgage. The appellant was also a creditor of B. and had a claim upon the fund in the appellees' hands. *Held*, (1) That the fact that the notes were in the possession of the appellees raised a legal presumption that they were their property; (2) That the weight of the evidence was in favor of the position that the appellees were to be first paid before transferring the notes to appellants.

The case is stated in the opinion.

Mr. Justice Miller delivered the opinion of the court.

In the spring of the year 1865 Sage O. Butler made and delivered to Isett & Brewster, a banking firm of Muscatine, Iowa, his five several promissory notes, for two thousand dollars each, payable to their order in one, two, three, four, and five years from date; and, at the same time, made and delivered to them a mortgage on certain real estate to secure the payment of the notes.

The plaintiff, Finley, on the 22d January, 1866, filed this bill in chancery, alleging that the notes and mortgage were deposited with Isett & Brewster, in trust for his benefit, for the purpose of securing Butler's indebtedness to him, and praying the court to declare the trust, and decree Isett & Brewster to assign to him the notes and mortgage, or for such other relief as might be appropriate. Butler is also made defendant, and all three of them required to answer specific interrogatories, under oath, touching the alleged trust.

Isett & Brewster file separate answers, and say that the notes were delivered to them as security for advances made by them to Butler, to enable him to carry on the business of packing pork, during the previous winter, and with an understanding that, when their debt was paid, they would transfer the notes and mortgage to

whomsoever Butler might direct. They allege that Butler is still indebted to them in the sum of six thousand dollars, and say they are willing to transfer the securities to plaintiff on payment of that sum and interest.

There seems to be no doubt about Butler's indebtedness to Isett & Brewster, and to complainant.

The issue, therefore, is a very simple question of fact, namely, whether Isett & Brewster received the notes and mortgage from Butler as a security, primarily, for their own debt, and then subject to his order; or as a mere trust for plaintiff, without any beneficial interest in themselves.

The main reliance of plaintiff to establish the trust, is on a letter written by Butler to him, at or about the time he delivered the securities to Isett & Brewster.

In this letter Butler says: "For the purpose of protecting you to some extent against worthless securities, I executed my notes, on the 11th March, at one, two, three, four, and five years, with interest at six per cent, to order of Messrs. Isett & Brewster, and secured the same by mortgage on my pork house, and the mortgage was recorded, and Messrs. Isett & Brewster hold these notes in trust, and will, at proper time, transfer them, with mortgage, (without recourse,) to parties I may designate. When I know my exact situation, I hope to do more, but in mean time please keep the above as confidential."

Butler, whose deposition is in the record, swears that he read this letter to Brewster, at the time he delivered to him the notes and mortgage, and told him that he intended them for the benefit of plaintiff, and that Brewster assented to the arrangement, and agreed to assign them, without recourse, when requested.

In addition to this positive testimony of Butler, there is some evidence of statements not very clear or satisfactory, made by Brewster, when speaking of these securities afterwards.

The statement of Holden is, that when he asked Brewster about these notes and mortgage, he said "it was a trust matter." As this was true, whether the trust was to secure Finley first, or only for his use, after Isett & Brewster were paid, it does not prove anything in the present issue.

Higgins, another witness, says that, when he asked Brewster why he had taken the mortgage, he said he did not take it on his own account, but in trust for another. This conversation was April 18th, six days before the date of the letter from Butler to plaintiff, and is to be taken for what it is worth.

To this testimony on the part of complainant, is opposed —

1. The fact that the notes and mortgage are payable to the order of Isett & Brewster, and are in their possession, which raises the legal presumption that they are their own property.

2. The separate answers of Isett & Brewster to plaintiff's bill and interrogatories, in which they both deny the exclusive trust for plaintiff, and assert their interest to the extent of their debt.

3. Brewster denies, in his deposition, that the letter of Butler to Finley was ever read to him or by him, or that he ever gave assent to the claim of Finley.

4. Certain letters from Finley, the plaintiff, to Brewster and Butler, written in October, 1865, in regard to the matters now in controversy, in none of which does he claim that these notes are for his benefit, until after Isett & Brewster are first paid, and in one of them, dated October 20, to Butler, he says: "As I understand you and Mr. Brewster, the mortgage was given with the intention of protecting my interests as well as Mr. B. When Mr. B.'s claim was satisfied, the transfer of the property to be made to me. This is the way I understand my position now."

5. The statement of Butler, in his deposition, that, at an interview between himself and Finley and Brewster, in October, Mr. Brewster spoke of his prior claim on the notes and mortgage, and that, while Finley did not in words admit it, he made no denial of it.

We are of opinion that the weight of the evidence is clearly in favor of the statement of the defendants, that they were to be first paid out of the notes, before they were to transfer them.

The decree of the Circuit Court, giving the two notes last due to plaintiff, is therefore as favorable to him as the facts justify, and must be

Affirmed.

Mr. George C. Bates for appellant.

Mr. William F. Brannan for appellees.

DUTTON *v.* PALAIRET.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 184. Decided November 8, 1869.

Affirmed upon the authority of *Bronson* v. *Rodes*, 7 Wall. 229.

THE case is stated in the opinion.

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

The same questions substantially are presented in this case as in the case of *Bronson* v. *Rodes*, 7 Wall. 229, heretofore decided at this term. The principles settled by that judgment require that the judgment of the Supreme Court of Pennsylvania be affirmed, and it is so ordered. *Affirmed.*

Mr. David W. Sellers for plaintiff in error.

No appearance for defendants in error.

UNITED STATES *v.* MOWRY.

APPEAL FROM THE COURT OF CLAIMS.

No. 186. Argued March 29, 30 and 31, 1869. — Decided April 12, 1869.

United States v. *Adams*, 7 Wall. 463, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is an appeal from the Court of Claims.

The petition of Mowry sets forth that railroad cars were needed on the Pacific Railroad, in Missouri, for the transportation of men and supplies in the military department of the West, then in command of General Fremont, and that, on the 22d September, 1861, he made a contract with Chief Quartermaster McKinstry, at the head of that department under General Fremont, to construct fifty box cars and fifty platform cars, the former for $825 each, and the latter for $700 each. These cars were afterwards constructed, approved and taken into the service of the government.

The payment of the price on this contract was among many others within that military district, suspended upon allegations of fraud and irregularities committed therein, and a board of commissioners appointed to investigate them and report to the Secretary of War. The petitioner presented his claim before this board, charging the contract price, amounting to $76,250. This board, after investigation, allowed to the petitioner $58,750, and gave him a voucher for that amount, the payment of which was accepted by him from the government, as provided for by an act of Congress. The Court of Claims allowed the balance of the contract price, $17,250.

The case falls within the decision of this court just rendered in the case of *The United States* v. *Adams*, 7 Wall. 463. Under the circumstances the petitioner is concluded by the finding of the board and acceptance of payment.

The decree must be

Reversed, and the cause remanded with directions to enter a decree dismissing the petition.

Mr. Attorney General, Mr. Assistant Attorney General Dickey and *Mr. E. P. Norton* for appellant.

Mr. R. M. Corwine, Mr. J. M. Carlisle and *Mr. J. D. McPherson* for appellee.

UNITED STATES *v.* MORGAN.

APPEAL FROM THE COURT OF CLAIMS.

No. 191. Argued March 29, 30 and 31, 1869. — Decided April 12, 1869.

Reversed on the authority of *United States* v. *Adams*, 7 Wall. 463.

The case is stated in the opinion.

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from the Court of Claims.

The petition in this case sets forth that Morgan, under a contract with the government, in September, 1861, purchased five hundred and twenty-two horses, for which he was to receive $130 each; that the government has refused to pay the price according to the contract, and that a balance remains of $7830. This contract was made with the petitioner by Reeside, an agent of General Fremont, who had been authorized to purchase two thousand horses for his military department, at the price above stated.

The claim was presented to the board of commissioners appointed to investigate contracts made in this department, and, after an examination into the claim, it was reduced $7830, the board allowing only $115 per head for the horses instead of $130, the contract price; and gave to the claimant a voucher for the amount at this rate, $60,076, payment of which was afterwards accepted by him from the government.

The Court of Claims decreed in his favor the contract price, deducting the above payment. The case falls within the decision of *The United States* v. *Adams*, and this decree must, therefore, be reversed.

The case is remanded with directions to dismiss the petition.

Mr. Attorney General, Mr. Assistant Attorney General Dickey and *Mr. E. P. Norton* for appellant.

Mr. J. M. Carlisle, Mr. J. D. McPherson and *Mr. R. W. Corwine* for appellees.

UNITED STATES *v.* BURTON.
UNITED STATES *v.* GEFFROY.
UNITED STATES *v.* HIGDON.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 192, 193, 197. Argued March 29, 30, 31, 1869. — Decided April 12, 1869.

Reversed on the authority of *United States* v. *Adams*, 7 Wall. 463, and *United States* v. *Morgan*, *ante*, 565.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

These are all cases of contracts made by Reeside with the claimants for the purchase of horses, under the same circumstances as stated in the case of *United States* v. *Morgan*, *ante*, 565, and must follow the same result.

The decrees of the Court of Claims in each case must be reversed, and the causes remanded, with directions to dismiss the petitions.

Mr. Attorney General, *Mr. Assistant Attorney General Dickey* and *Mr. E. P. Norton* for appellant.

Mr. J. M. Carlisle, *Mr. J. D. McPherson* and *Mr. R. W. Corwine* for appellees.

DAVIDSON *v.* STARCHER.
SAME *v.* KING.
SAME *v.* McMAHON.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Nos. 329, 330, 331. Argued January 8, 1869. — Decided January 11, 1869.

No question under the 25th section of the Judiciary Act having been passed upon by the court below, this court has no jurisdiction over the judgment of the state court.

THE case is stated in the opinion.

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

In these cases it appears, on looking into the record, that no question under the 25th section of the Judiciary Act was passed upon by the court. No ground appears, therefore, of jurisdiction in this court over the judgments of a state court, and the several writs of error must be dismissed for want of jurisdiction.

Mr. L. Allis for plaintiffs in error. *Dismissed.*

Mr. R. P. Spalding for defendants in error.

MOULDER *v.* FORREST.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 371. Argued February 5, 1869. — Decided February 15, 1869.

A writ of error is fatally defective if it lacks the test required by law, and the defective writ cannot be amended here.

THE case is stated in the opinion.

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

The motion to dismiss the writ of error for want of the test required by the process act of 1789, 1 U. S. Stat. 93, must be allowed. The defect in the test was doubtless occasioned by an oversight of the clerk below; but a majority of the court is of the opinion that the writ cannot be amended here without departure from its established practice. *Insurance Company* v. *Mordecai*, 21 How. 195; *Porter* v. *Foley*, 21 How. 393. *Dismissed.*

Mr. Nathaniel Wilson for plaintiff in error.

Mr. W. S. Cox for defendant in error.

EX PARTE PARGOUD.

ORIGINAL.

No. 9. Original. Argued February 18, 1870. — Decided February 28, 1870.

A writ of mandamus to the Court of Claims is granted on the authority of *Ex parte Zellner*, 9 Wall. 244.

PETITION for mandamus to the judges of the Court of Claims. The case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a petition on behalf of Pargoud, the relator, for a mandamus to the Court of Claims to compel them to allow an appeal from a decree against him in that court.

The case falls within the *Case of Zellner*, 9 Wall. 244, and the motion must be granted.

Motion for a peremptory mandamus granted.

Mr. Thomas J. Durant for petitioner.

Mr. Robert S. Hale for respondent.

BURLINGTON AND MISSOURI RIVER RAILROAD CO. *v.* MILLS COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 39. Ordered to be submitted to abide decision in No. 40, February 2, 1870. — Decided February 7, 1870.

Railroad Co. v. *Fremont County*, 9 Wall. 89, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa.

The pleadings and proofs present the same questions involved in the case of the same plaintiffs against Fremont County, and must be disposed of in the same way.

The decree of the court below affirmed.

Mr. D. Rover for plaintiff in error.

Mr. T. Ewing for defendant in error.

WILLARD *v.* WILLARD.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 90. Argued February 25, 1870. — Decided March 7, 1870.

Willard v. *Presbury*, 14 Wall. 676, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is an appeal from the Supreme Court of the District of Columbia.

The bill is, substantially, the same as in the case of *Willard* v. *Presbury*, 14 Wall. 676; and the proofs the same. The decision in that case governs this. (See opinion.)

Reversed.

Mr. W. D. Davidge and *Mr. W. F. Mattingly* for appellant.

Mr. R. T. Merrick and *Mr. R. J. Brent* for appellees.

UNITED STATES *ex rel.* AMY *v.* BURLINGTON.
UNITED STATES *ex rel.* LEARNED *v.* BURLINGTON.

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

Nos. 94 and 95. Argued November 30, 1869. — Decided January 24, 1870.

Butz v. *Muscatine*, 8 Wall. 575, followed.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court in these causes.

Upon examination these cases are found to be substantially the same with the case of *The United States on the relation of Thomas Butz* v. *The City of Muscatine*, No. 93, heretofore decided by this court at the present term. (8 Wall. 575.) Our opinion is the same as in that case. The judgment in each of these cases is therefore reversed, and the cause remanded to the court below for further proceedings in conformity to the views of this court as expressed in the case referred to. *Reversed.*

Mr. James Grant for plaintiffs in error.

No appearance for defendants in error.

FLANDERS *v.* TWEED.

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

No. 108. Argued March 8 and 9, 1870. — Decided March 21, 1870.

Flanders v. *Tweed*, 9 Wall. 425, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Louisiana.

The suit was brought by Tweed in the court below against Flanders to recover one hundred and twenty-three bales of cotton.

The answer of the defendant states that he was a deputy general agent of the Treasury Department of the United States; denies that the cotton belonged to the plaintiff, but was the property of the United States; that the cotton was shipped to him as such at New Orleans, with other lots, by a treasury agent at Shreveport, under a contract with the plaintiff and the Treasury Department, in relation to cotton known as Confederate States cotton, captured in war and turned over to the Treasury Department by officers of the army; that by virtue of this contract, and certain services rendered by the plaintiff, three-fourths of the number of bales received by the defendant were to be turned over to him, and one-fourth reserved to the United States; that the one hundred and twenty-three bales in suit are the one-fourth thus reserved; and that the three hundred and seventy-two bales claimed by the

plaintiff in his suit, No. 3872 of the docket of the court, are the three-fourths coming to the plaintiff under the contract. The defendant also claims that the one hundred and twenty-three bales in question are captured or abandoned property.

A large amount of evidence was taken in the cause on both sides upon the issues thus raised. The cotton had been sequestered and delivered to the plaintiff on his giving a bond as security for the same. The court rendered a judgment for the plaintiff. It was rendered on the 29th January, 1868. A statement of facts is found in the record, at p. 83, by the judge, filed May 13, 1868, some three months and a half after the rendition of the judgment.

This case, therefore, falls within the views expressed in the suit between these parties involving the question of damages for the detention of these one hundred and twenty-three bales of cotton, together with the three hundred and seventy-two bales disposed of in a previous suit in the court below against the defendant, referred to in his answer, the opinion in which has just been delivered. 9 Wall. 425.

For the reasons given in that case the judgment must be

Reversed for a mistrial, and the cause remanded for a new trial.

Mr. Attorney General and *Mr. Assistant Attorney General Field* for plaintiff in error.

Mr. J. Hubley Ashton, Mr. T. D. Lincoln and *Mr. E. C. Billings* for defendant in error.

WEED *v.* CRANE.

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

No. 123. Submitted March 15, 1870. — Decided April 4, 1870.

There being no exception to a ruling or to anything which took place at the trial, there is nothing in the record to be reviewed, and the judgment below is affirmed.

THE case is stated in the opinion.

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

On looking into the record of this cause we find no exception to any ruling of the court upon the trial, nor any exception to the report of the assessor, nor to any ruling of the court in relation to it. There is nothing, therefore, in the record which can be reviewed here upon error; and the judgment of the Circuit Court must be

Affirmed.

Mr. J. B. Robb for plaintiffs in error.

Mr. F. A. Brooks for defendant in error.

SUPERVISORS *v.* DURANT.

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

No. 134. Argued and submitted March 18, 1870. — Decided April 4, 1870.

Affirmed on the authority of *Supervisors* v. *Durant*, 9 Wall. 415.

THE case is stated in the opinion.

MR. JUSTICE STRONG delivered the opinion of the court.

All the questions raised by this record have been considered and disposed of in the opinion filed in No. 133. For the reasons stated in that opinion this judgment must be affirmed.

The judgment of the Circuit Court is *Affirmed with costs.*

Mr. H. Strong for plaintiffs in error.

Mr. James Grant for defendant in error.

WASHINGTON COUNTY *v.* UNITED STATES *ex rel.* MORTIMER.

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

No. 137. Argued and submitted March 18, 1870. — Decided April 4, 1870.

Affirmed on the authority of *Supervisors* v. *Durant*, 9 Wall. 415.

MR. JUSTICE STRONG delivered the opinion of the court.

This case differs in no essential particular from No. 133 decided at this term. For the reasons given in the opinion filed in that case this judgment must be affirmed.

The judgment of the Circuit Court is *Affirmed with costs.*

Mr. H. Strong for plaintiffs in error.

Mr. James Grant for defendant in error.

NORTHERN BELLE *v.* ROBSON.

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

No. 141. Argued March 21, 1870. — Decided April 11, 1870.

It is the duty of a carrier who offers barges for service to have them often examined and thoroughly inspected, so as to be sure of their condition.

THE case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

In this case the same parties as in the case just decided, (*The Northern Belle*, 9 Wall. 526,) about a month later made another contract for the carrying of wheat in the same barge Pat Brady for the same voyage, the barge being this time attached to the steamboat Northern Belle.

After the accident of the 12th May, which we have just considered in the other case, the barge was merely repaired by removing a plank or two which seemed to be injured, and replacing them by others. In two or three days she was again in use, and on the 19th June took on board another cargo for Robson.

Very soon after leaving Hastings the barge was run on a sandbar, and soon commenced leaking, so that the wheat was wet and greatly damaged. For this Robson recovered a decree in the District Court, which was affirmed on appeal to the Circuit Court.

Much testimony was taken to show that, owing to the violent wind and the condition of the channel, this running of the barge on the sand-bar was inevitable. It is not necessary to inquire whether this were so, for we are satisfied that the loss would not have occurred if the barge had been sound and fit for the voyage. It was the rotten condition of her timbers, as shown by the same testimony that we have commented on in the former case, that rendered her unable to resist the ordinary pressure which such accidents subject barges to every day.

We do not deem it necessary to go into the testimony on this further than to remark that the failure of the owners of the Pat Brady to have her thoroughly inspected after the first accident is without excuse.

She was then an old barge, and the circumstances of that accident should have suggested a suspicion of her condition.

But we do not place the decree on the ground of special want of care in that particular. It is the duty of the carrier who offers these barges for service to have them often examined and thoroughly inspected so as to be sure of their condition. He should not use a barge after she has become, from age, or decay, or injury, unfit for use, and should repair them often and well, so long as they can by repairing be safely used, and no longer.

For this the best interest of all parties requires that he shall be held rigidly responsible.

The decree of the Circuit Court is affirmed.

Mr. J. W. Cary for appellants.

Mr. N. J. Emmons for appellee.

KENOSHA *v.* LAMSON.

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

No. 143. Argued March 22 and 23, 1870. — Decided April 4, 1870.

Knox County v. *Aspinwall*, 21 How. 539, followed.
The City v. *Lamson*, 9 Wall. 477, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Wisconsin.

This was an action of assumpsit upon 516 coupons against the City of Kenosha, described in the declaration and notice accompanying it. They were all given in evidence, and when the plaintiff rested, the counsel for the defendants prayed the court to instruct the jury that the bonds, as well as the coupons, should have been given in evidence, which was refused. And further, that the city possessed no authority to issue the bonds, which was also overruled. The verdict was for the plaintiff.

The first question was decided against the plaintiff in *Knox County* v. *Aspinwall*, 21 How. 539, and the second in a case at the present term between the same parties. *The City* v. *Lamson*, 9 Wall. 477. *Judgment affirmed.*

Dissenting, MR. JUSTICE MILLER.

Mr. J. W. Cary for plaintiff in error.

Mr. M. H. Carpenter for defendant in error.

LONG *v.* PATTON.

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

No. 196. Argued April 25, 1870. — Decided April 30, 1870.

Little v. *Herndon*, 10 Wall. 26, followed.

In Illinois, a will probated in Virginia is as available in proof as if probated in Illinois.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The suit in ejectment in this case was brought by Mrs. Patton

against Long and others, to recover possession of the south half of section 22, township 27 north, range 13 west. The plaintiff gave in evidence a patent to Robert Hord, including the premises, dated November 1, 1839, and a deed from Hord to John M. Patton, and the will of Patton, by which the lot in question was devised to the plaintiff, and rested.

The defendant offered in evidence a deed from the sheriff of the county of Iroquois to L. M. Peck, including the premises in question, dated July 1, 1864, which purported to be a deed upon a sale for taxes; a deed from Peck and wife to B. L. T. Bourland, dated July 1, 1864; and from Bourland and wife to Isaac Underhill, dated April 29, 1865, and then offered in evidence five tax certificates of payment of taxes on the lot for the year therein mentioned, stating that his object in offering said evidence was to show title to the premises, and to require the payment of said taxes by the plaintiff, in case he questioned the title of Underhill under the statute. But the court held that the defendants had not brought themselves within the act of February 21, 1861, to which ruling there was an exception.

All the questions presented in this case have been disposed of in the case of *Little* v. *Herndon*, except as to the admission of the will of J. M. Patton. The only one material point to notice is that it was not properly proved or probated. But the proofs are conclusive that it was proved in the Circuit Court of the city of Richmond, Virginia, agreeably to the laws of that State, and according to the laws of Illinois, the will was as available in proof there as if probated in that State. *Judgment affirmed.*

Mr. B. C. Cook for plaintiffs in error.

Mr. Conway Robinson for defendant in error.

UNDERHILL *v.* HERNDON.

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

No. 197. Argued April 25, 1870. — Decided April 30, 1870.

Little v. *Herndon*, 10 Wall. 26, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

This is a suit in ejectment against Underhill, in the court below,

to recover possession of the southwest quarter of the northeast quarter, and the south half of the northwest quarter, section 26, township 27 north, range 13 west.

The opinion in the case of *Little* v. *Herndon* disposes of all the questions raised and decided in this case in the court below.

Judgment affirmed.

Mr. B. C. Cook for plaintiff in error.

Mr. Conway Robinson for defendant in error.

STURTEVANT *v.* HERNDON.

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

No. 198. Argued April 25, 1870. — Decided April 30, 1870.

Little v. *Herndon*, 10 Wall. 26, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

This suit in ejectment was brought by Herndon against Sturtevant, in the court below, to recover possession of the southwest quarter of the northeast quarter, and the south half of the northwest quarter of section 26, township 27 north, range 13 west. The opinion in *Little* v. *Herndon*, 10 Wall. 26, disposes of all the questions in this case. *Judgment affirmed.*

Mr. B. C. Cook for plaintiff in error.

Mr. Conway Robinson for defendant in error.

UNDERHILL *v.* PATTON.

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

No. 199. Argued April 25, 1870. — Decided April 30, 1870.

Little v. *Herndon*, 10 Wall. 26, followed.
Long v. *Patton*, *ante*, 573, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois.

The suit in ejectment was brought by Mrs. Patton against Under-

hill, in the court below, to recover possession of the south half of section 22, township 27 north, range 13 west.

All the questions in this case are disposed of in the cases of *Little* v. *Herndon*, 10 Wall. 26, and *Long* v. *Patton*, *ante*, 573.

Judgment affirmed.

Mr. B. C. Cook for plaintiff in error.

Mr. Conway Robinson for defendant in error.

SUPERVISORS *v.* UNITED STATES *ex rel.* DURANT.

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

No. 202. Submitted April 25, 1870. — Decided April 30, 1870.

There being no error, the judgment of the court below is affirmed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Iowa.

The writ of error brings up the petition of the relator for an alternative writ of mandamus to the Supervisors of Poweshiek County, commanding them to levy a tax sufficient to pay a judgment against the county; a return, demurrer to the same, judgment sustaining demurrer; a writ of peremptory mandamus, and leave granted till next term to make a sufficient return to peremptory mandamus; or, if not, that an attachment issue returnable forthwith.

We perceive no error in the proceedings, and the judgment for peremptory mandamus is *Affirmed.*

Mr. S. V. White for plaintiff in error.

Mr. James Grant for defendant in error.

GODBE *v.* TOOTLE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 258. Argued April 22, 1870. — Decided April 30, 1870.

This court will not review a judgment in favor of a firm, if the writ of error does not name the persons who compose it.

THE case is stated in the opinion.

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

This is a motion to dismiss the writ of error by which the cause is brought here from the Supreme Court of the Territory.

The writ of error describes the judgment as rendered in favor of Tootle, Leach & Co., without naming the persons who composed the firm. But it has been often held that such a writ is irregular and that this court will not undertake to review a judgment thus described. The cases are cited in *Mussina* v. *Cavazos*, 6 Wall. 355, and need not be more particularly referred to.

The motion to dismiss the writ must be allowed.

Mr. A. G. Thurman, *Mr. R. N. Baskin*, *Mr. T. W. Bartley*, and *Mr. F. P. Stanton* for the motion.

Mr. J. M. Carlisle and *Mr. John Titus* opposing.

McCOLLUM *v.* HOWARD.

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

No. 344. Argued February 4, 1870. — Decided March 7, 1870.

This court will not take jurisdiction over an interlocutory decree.

Mr. Justice Field delivered the opinion of the court.

The decree in this case, made on the twenty-sixth day of May, 1869, is interlocutory and not final. The appeal from it must, therefore, be dismissed. *Ordered accordingly.*

Mr. S. W. Fuller, *Mr. B. C. Cook*, *Mr. Thomas F. Withrow*, for appellants.

Mr. James Grant for appellees.

UNITED STATES *v.* POLLARD.
UNITED STATES *v.* KOHN.
UNITED STATES *v.* STANTON.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 391, 359, 390. Argued February 8, 9, 10, 1870. — Decided February 28, 1870.

Affirmed on the authority of *United States* v. *Anderson*, 9 Wall. 56.

The case is stated in the opinion.

Mr. Justice Davis delivered the opinion of the court.

There are no material points of difference between these cases and the case of *The United States* v. *Anderson*, 9 Wall. 56, decided at this term, and the views presented in that case dispose of these.

The judgment of the Court of Claims in each of the above-named cases is *Affirmed.*

Mr. Attorney General and *Mr. R. S. Hale* for appellant.

Mr. A. G. Riddle for Pollard, *Mr. J. A. Wills* for Kohn, and *Mr. George Taylor* for Stanton.

RILEY *v.* WELLES.

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

No. 397. Submitted February 14, 1870. — Decided March 7, 1870.

Wolcott v. *Des Moines Co.*, 5 Wall. 681, followed.

THE case is stated in the opinion.

MR. JUSTICE NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the District of Iowa.

This case is not distinguishable from that of *Wolcott* v. *The Des Moines Company*, 5 Wall. 681.

Welles, the plaintiff below, derives his title by deed from this company, the same as Wolcott in the former case. The suit in that case was brought to recover back the consideration money from the Des Moines Company, the grantors, on the ground of failure of title. The court held that Wolcott received a good title to the lot in question under his deed.

In that case it was insisted that the title was not in the Des Moines Company, but in the Dubuque and Pacific Railroad Company.

In the present case the defendant claims title under, and in pursuance of, the preëmption act of September 4, 1841.

Her husband took possession of the lot in 1855, and she was permitted by the register to prove up her possession and occupation, May, 1862. The patent was issued October 15, 1863.

It will appear from the case of *Wolcott* v. *The Des Moines Company* that the tract of land, of which the lot in question was a part, had been withdrawn from sale and entry on account of a difference of opinion among the officers of the land department as to the extent of the original grant by Congress of lands in aid of the improvement of the Des Moines River, from the year 1846 down to the resolution of Congress of March 2, 1861, and the act of July 12, 1862, which acts we held confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855 without right, and the possession was continued without right, the permission of the register to prove up the possession and

improvements, and to make the entry under the preëmption laws, were acts in violation of law, and void, as was also the issuing of the patent.

The reasons for this withdrawal of the lands from public sale or private entry are stated at large in the opinion in the case of *Wolcott* v. *The Des Moines Company*, and need not be repeated. The point of reservation was very material in that case, and we have seen nothing in the present one, either in the facts or in the argument, to distinguish it. *The decree below affirmed.*

Mr. Thomas F. Withrow, *Mr. Galusha Parsons*, and *Mr. William H. Kelsey* for appellant.

Mr. Edwin C. Litchfield for appellee.

EX PARTE WAPLES.

ORIGINAL.

No. 10. Original. Argued December 19, 20, 1870. — Decided January 9, 1871.

Ex parte Graham, 10 Wall. 541, followed.

Petition for writ of prohibition. The case is stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court.

The facts are the same in this case, and the same questions are involved, as in the preceding case of *Ex parte Graham and Day*, No. 9, just decided, 10 Wall. 541, and this case is disposed of in the same way. The same entry will be made in both cases.

Mr. Thomas J. Durant for petitioner.

Mr. Caleb Cushing opposing.

GARNETT *v.* UNITED STATES.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 15. Reargued February 8, 9, 1871. — Decided March 6, 1871.

Garnett v. *United States*, 11 Wall. 256, followed.

The case is stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court.

This also is a writ of error to the Supreme Court of the District of Columbia.

The record discloses the same error which has been considered in the preceding case, No. 14, and the same results must follow.

Mr. Caleb Cushing for plaintiff in error.

Mr. Attorney General for defendant in error.

STEVENS *v.* DE AUBRIE.
STEVENS *v.* BELLEMARDE.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 45 and 46. Argued and submitted November 16, 1870. — Decided December 6, 1870.

Smith v. *Stevens*, 10 Wall. 321, followed.

THE case is stated in the opinion.

MR. JUSTICE DAVIS delivered the opinion of the court.

These cases are, in all respects, like the case of *Smith* v. *Stevens*, 10 Wall. 321, decided at this term, and the judgment of the Supreme Court of Kansas in each of them is affirmed.

Mr. J. R. Doolittle, Mr. J. W. Denver and *Mr. James Hughes* for plaintiff in error.

Mr. J. S. Black for defendants in error.

UNITED STATES *v.* HODSON.

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

No 52. Argued November 17, 1870. — Decided December 6, 1870.

United States v. *Hodson*, 10 Wall. 395, followed.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is also a writ of error to the Circuit Court of the United States for the District of Wisconsin.

The record presents the same questions which have just been decided in the case of the *United States* v. *Hodson*, No. 50, 10 Wall. 395. The result in this case must be the same.

The judgment below is reversed and the cause will be remanded with directions to issue a *venire de novo*. *Reversed.*

Mr. Attorney General for plaintiff in error.

Mr. M. H. Carpenter for defendants in error.

UNITED STATES *v.* MYNDERSE.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

No. 237. Submitted November 14, 1871. — Decided November 27, 1871.

United States v. *Hodson*, 10 Wall. 395, followed.

THE case is stated in the opinion.

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

This case comes before us on a certificate of division of opinion from the Circuit Court of the United States for the Northern District of New York.

The answers to the questions certified must be given according to the opinion of this court, delivered at a former day in this term, in the case of the *United States* v. *Hodson*, 10 Wall. 395. That opinion, to which it is needless to refer further, requires that the first question certified to us be answered in the negative, and the second in the affirmative, and they are so answered.

Mr. Attorney General, Mr. Solicitor General and *Mr. Assistant Attorney General Hill* for plaintiff.

No appearance for defendants.

VAN SLYKE *v.* WISCONSIN.
BAGNALL *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

Nos. 261 and 262. Argued November 15, 1871. — Decided November 27, 1871.

The right of a State to tax shares of stockholders in national banking associations within its limits is affirmed.

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

The judgment of the Supreme Court of the State of Wisconsin, which asserts the right of that State to tax the shares of stockholders in national banking associations within its limits, is affirmed. The case before us is governed by the cases of *National Bank* v. *Commonwealth*, 9 Wall. 353, in which this court affirmed the judgment of the Court of Appeals of Kentucky, and *Lionberger* v. *Rouse*, 9 Wall. 468, in which we affirmed the judgment of the Supreme Court of Missouri on questions substantially the same as those in this case. We think it unnecessary to restate the reasons by which those decisions were sustained. *Affirmed.*

Mr. S. U. Pinney for plaintiffs in error.

Mr. S. S. Barlow and *P. L. Spooner* for defendant in error.

COUSIN *v.* GENERES.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 286. Argued November 17, 1871. — Decided November 20, 1871.

Bethell v. *Demaret*, 10 Wall. 537, followed.

THE case is stated in the opinion.

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

I am instructed by the court to say that the decision in *Bethell* v. *Demaret*, 10 Wall. 537, decided at this term, is regarded as governing this case.

The writ of error must therefore be dismissed.

Mr. P. Phillips for plaintiff in error.

Mr. Louis Janin for defendants in error.

EX PARTE LOUD.

ORIGINAL.

No. 8. Original. Argued January 26, 1872. — Decided March 25, 1872.

Ex parte McNiel, 13 Wall. 236, followed.

PETITION of a writ of prohibition to the District Court of the United States for the Eastern District of New York. The case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This case differs in no material particular from the case of the like application by *Alexander McNiel* just decided, 13 Wall. 236. The same considerations apply, and the result must be the same.

The application is denied and the petition dismissed.

Mr. C. Donohue for petitioner.

Mr. F. A. Wilcox for respondent.

HOLMES *v.* SEVIER.

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

No. 31. Argued and submitted November 8, 1871. — Decided May 6, 1872.

The liability of the maker of a note given for the purchase of slaves before the civil war was not affected by their emancipation.

THE case is stated in the opinion.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This is an appeal in equity from the decree of the Circuit Court of the United States for the Eastern District of Arkansas.

The bill was filed by the appellants to enforce the payment of the balance due upon a promissory note, bearing date on the 25th of December, 1856, made by John A. Jordan, since deceased, to Robert Ryan, also since deceased, for ten thousand dollars, payable on the first of January, A.D. 1860, with interest at the rate of ten per cent per annum from date until paid. The note

was secured by a mortgage, and is averred to have been given for the purchase money of slaves subsequently emancipated by the government of the United States. The defendants demurred to the bill. The demurrer was sustained and the bill dismissed. The opinion of the court was confined to the effect of the emancipation of the slaves upon the validity of the note. The judgment proceeded upon that ground. The views of this court upon that subject were fully expressed in *Osborn* v. *Nicholson*, 13 Wall. 654, recently decided at this term, and they are decisive of this case.

In accordance with those views the decree of the court below is reversed, and the case will be remanded to the Circuit Court with directions to proceed in conformity to the opinion of this court.

Reversed.

Mr. P. Phillips and *Mr. S. F. Clark* for appellants.

Mr. George C. Watkins and *Mr. U. M. Rose* for appellees.

JACOWAY *v.* DENTON.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 47. Submitted November 14, 1871. — Decided April 1, 1872.

Sevier v. *Haskell*, 14 Wall. 12, followed.

The case is stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court.

This case is also before us upon a motion to dismiss the writ of error for want of jurisdiction.

The defendant in error brought suit in the Circuit Court of Yell County to the September term, 1866, upon the writing obligatory executed to him by William D. Jacoway, deceased, on the 4th of October, 1860, for the sum of $4500 payable one year from date, with interest at the rate of ten per cent per annum from the maturity of the obligation until its payment. The administrator interposed three pleas:

(1) That the consideration of the obligation was the purchase of slaves, and that they were all emancipated by the constitution of Arkansas adopted in 1864.

(2) That the slaves were emancipated by an amendment to the Constitution of the United States, and that the consideration of the obligation thereby wholly failed.

(3) That the contract was originally null and void.

The plaintiff demurred. The court sustained the demurrers and gave judgment against the defendant for the amount claimed in

the declaration. The defendant appealed to the Supreme Court of the State, and that court affirmed the judgment.

After what we have said in *Sevier* v. *Haskell*, 14 Wall. 12, just decided, it is sufficient to remark that the record discloses no question cognizable by this court.

The writ of error is therefore dismissed.

Mr. A. H. Garland and *Mr. P. Phillips* for plaintiffs in error.

No appearance for defendant in error.

PLANT *v.* STOVALL.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 82. Submitted January 22, 1872. — Decided February 5, 1872.

There being no error the judgment is affirmed.

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

We find no error in the record.

The judgment of the Supreme Court of Georgia is, therefore,

Affirmed.

Mr. S. W. Johnston and *Mr. Joseph P. Carr* for plaintiff in error.

No appearance for defendant in error.

THE DES MOINES.

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

No. 108. Argued February 29 and March 1, 1872. — Decided March 25, 1872.

The District Court in a libel in Admiralty for collision, having adjudged both vessels to be in fault, and only one having appealed, the only question here is as to the fault of the appealing vessel; and on the evidence the court holds it to have been in fault.

The case is stated in the opinion.

Mr. Justice Davis delivered the opinion of the court.

This is a case of collision between the steamers Katie and Des Moines while navigating the Ohio River on the night of the 22d of November, 1864. The Katie was descending and the Des Moines ascending the river, when, near the head of Diamond Island, they came in contact, and the Katie immediately sank and became a total loss. The District Court adjudged both vessels to be in fault, and the Circuit Court, on appeal, affirmed this judgment.

As the owners of the Katie did not appeal from this decision, the only question for investigation here is, whether the Des Moines was in fault. As is usual in cases of this character, there is a conflict of testimony between the officers and crew of the two boats on important points, but the physical facts of the case establish the proposition that on the disputed point of most significance the Des Moines was blamable. The Des Moines, following the course of the channel, had crossed over from the foot of Diamond Island toward the Indiana shore, and being an ascending boat, according to the well-settled rules of navigation, had the choice of position in the river. This choice was taken by blowing two whistles, which told the officers of the Katie that she intended to keep along the Indiana shore which was to her larboard, while the Kentucky or Diamond Island shore was to the larboard of the Katie. The Des Moines, instead of keeping to the larboard, as her signal indicated, was at the time of the collision turned to the starboard. This is proved by the nature of the injuries received by both boats, the injury to the Katie being on her starboard side, while the Des Moines was struck on her larboard bow. If, as is claimed for the Des Moines, she had gone to the larboard until she got close to the Indiana shore, and then, as her pilot says he kept her "straight in the river," and while in that position the Katie came down on to her, this could not have happened; for if the Katie struck her on the larboard, the larboard side of both boats would have been injured, and if on her starboard, then the starboard side of both boats would have been injured; but if both boats were heading toward the Kentucky shore, the one coming down and the other going up, and a collision ensued, it would have brought the starboard of the one in contact with the larboard of the other. This was what occurred in this case, and shows clearly that the Des Moines did not obey her own signals, and was, therefore, chargeable with negligence.

It is unnecessary to consider whether the Des Moines is not blamable in other particulars, for this change of course, being the proximate cause of the collision, is enough to condemn her.

It is insisted on the part of the appellant that there was not sufficient effort to raise the Katie after the accident, and that the Des Moines should not be visited with the consequences of this neglect. But there is no proof that the Katie could have been raised if an earlier effort had been made. If full effect be given to the evidence on this subject, it may tend to create a suspicion that the owners of the Katie did not engage the wrecker soon enough, but

it does nothing more. Leezer, the wrecker, who had to stop work on account of the rise in the river, is unable to tell the condition of the river for the two previous weeks, nor can he say whether his business would have been interrupted had he commenced proceedings ten days before. It would seem as if an intelligent river man ought to have known these things, but in the absence of proof on these points, there is no data on which to base a conclusion that an earlier effort would have been successful, and there is no pretence after the work was begun that it was not continued long enough. *The decree of the Circuit Court is affirmed.*

Mr. John A. Wills, Mr. J. H. Rankin and Messrs. Lander & Merriman for appellant.

Mr. F. A. Dick and *Mr. James O. Broadhead* for appellees.

THE ST. JOHN.

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

No. 131. Argued March 6, 1872. — Decided April 1, 1872.

On a question purely of fact the court finds the St. John in fault, and decrees accordingly.

THE case is stated in the opinion.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Abraham E. Hasbrouck, the libellant in this case, was the owner of a barge called the Ulster County, which was sunk in the Hudson River near West Point, on the 20th November, 1864, by collision with the steamer St. John, whilst said barge was in tow of the steam propeller Pluto. The libel was filed against the steamer to recover damages for the injury sustained. The St. John was a large passenger steamer, on her downward trip from Albany to New York; the Pluto was moving up the river with the barge Ulster County lashed to her larboard side, and another barge to her starboard side, and a canal boat astern of the latter. The collision took place about three o'clock in the morning in a clear moonlight night. At West Point there is an abrupt bend in the Hudson River, making nearly a right angle. Below this bend its course is southerly; above it, proceeding up the river, it is westerly for nearly a mile, and then northerly. The Pluto with her tows was still below the point, proceeding slowly up the river, nearer to the eastern than to the western shore, when the St. John was discovered up the western reach of the river. The St. John blew two whistles, signifying that she would go to the

left or eastward of the Pluto. The men on the Pluto say that the signal was answered by two whistles on their part, and that the helm was put to starboard accordingly, turning the head of the Pluto more to the west. The collision took place directly off West Point, at the abrupt bend of the river, about the middle of the channel. The St. John struck the larboard bow of the barge Ulster County, and cut into her about ten feet. The witnesses for the libellant, the pilot and others, say that when the St. John approached them, she seemed to sheer to the west, and thus ran into the tow. This is denied on the other side.

On the part of the St. John it is testified by the pilot and wheelman that they discovered the light of the Pluto below West Point, over the land, as they, the St. John, rounded Magazine Point, where the river turns to the east; and that they kept the helm of the St. John hard astarboard until the collision occurred, thus keeping up all the time a sheer to the eastward. This could not have been so, for it would have carried the St. John to the east side of the channel; whereas it is conceded that the collision occurred in about mid-channel. The St. John selected her own course; instead of going to the right of the Pluto, as is usual, she concluded to go to the left, miscalculating the precise position of the Pluto, and supposing her to be nearer to the western shore than she was. Having selected her course, the St. John ought to have kept far enough to the eastward, or left, to be sure of avoiding a collision. Instead of this, she kept in the middle of the channel, evidently expecting the propeller to keep out of her way. In rounding the point she hugged too near, and did not give the Pluto a chance to get inside of her.

The case is purely one of fact, and it can serve no instructive purpose to review the evidence in detail. We have carefully examined it, and are satisfied that the result reached by the District and Circuit Courts was correct.

The decree of the Circuit Court is affirmed, with interest on the amount.

Mr. Charles Jones for appellant.

Mr. C. Donohue and *Mr. C. Swan* for appellee.

GERMAIN *v.* MASON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 290. Argued April 5, 1872. — Decided April 22, 1872.

Writs of error from this court must bear the test of the Chief Justice.

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

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

The writ of error in this case, as in the case of *Wells* v. *McGregor*, 13 Wall. 188, decided at this term, bears the test of the clerk of the Supreme Court of the Territory of Montana and not the test of the Chief Justice of this court.

It must therefore be dismissed.

Mr. A. M. Woodfolk, *Mr. F. A. Dick* and *Mr. George G. Wright* for plaintiffs in error.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for defendant in error.

NORTHWESTERN UNION PACKET CO. *v.* HOME INSURANCE CO.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 467. Submitted January 19, 1872. — Decided January 29, 1872.

A writ of error to the highest court of a State must be allowed, either by a justice of this court, or a judge of that court.

THE case is stated in the opinion.

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

On looking at the record we find no allowance of a writ of error, either by a justice of this court or by a judge of the state court. We have repeatedly decided that such an allowance was necessary, upon a writ of error addressed to the highest court of the State, by which the judgment or decree could be rendered. *Callan* v. *May*, 2 Black, 541, 543; *Twitchell* v. *The Commonwealth*, 7 Wall. 321; *Gleason* v. *Florida*, 9 Wall. 779. The case of *Davidson* v. *Lanier*, 4 Wall. 447, 453, referred to by counsel for the plaintiff in error, was a writ of error addressed to an inferior court of the United States, and is therefore inapplicable.

The writ before us must be *Dismissed.*

Mr. L. Allis for plaintiff in error.

Mr. George W. McCrary for defendant in error.

The above was rescinded May 6, 1872, and writ of *certiorari* granted. The case was afterwards decided at December term, 1872, as No. 228. Argued and submitted and affirmed April 18, 1873.

GRAY *v.* COAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 481. Argued December 15, 1871. — Decided December 18, 1871.

To give this court jurisdiction over the judgment of the highest court of a State, brought here by writ of error, it must appear that some question under the 25th section of the Judiciary Act was made by the pleadings, or passed upon by the court.

THE case is stated in the opinion.

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

This is a motion to dismiss a writ of error to the Supreme Court of Iowa.

On looking into the record we find no question under the 25th section of the Judiciary Act made by the pleadings or passed upon by the court; and we have often held that it must appear affirmatively from the record that such a question was made and passed upon before this court can acquire jurisdiction to review the judgment of a state court upon writ of error.

The motion must therefore be allowed and the writ of error must be *Dismissed.*

Mr. Daniel Gray for plaintiff in error.

Mr. Walter I. Hayes and *Mr. A. Y. Cotton* for defendants in error.

DAVIDSON *v.* CONNELLY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 510. Submitted January 12, 1872. — Decided February 5, 1872.

A writ of error to a state court is dismissed because no question was decided by that court of which this court has jurisdiction under the 25th section of the Judiciary Act.

THE case is stated in the opinion.

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

On looking into the record we do not find that any question was decided in the state court of which we have jurisdiction under the 25th section of the Judiciary Act. The writ of error therefore must be *Dismissed.*

Mr. Lorenzo Allis for plaintiff in error.

Mr. James Smith, Jr., for defendant in error.

JONES *v.* FRITSCHLE.

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

No. 59. Argued November 22, 1872. — Decided January 6, 1873.

Dismissed because the amount in controversy does not give the court jurisdiction.

THE case is stated in the opinion.

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

This controversy relates only to certain land in Macon County, Missouri, the value of which, as stated in the answer, was one thousand dollars. This statement is confirmed by the evidence. The amount in controversy, therefore, does not exceed two thousand dollars, and we have no jurisdiction of the case on appeal.

The appeal must be dismissed.

Mr. James A. Buchanan for appellant.

Mr. J. C. Robinson for appellee.

DIAZ *v.* UNITED STATES.

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

No. 97. Submitted February 10, 1873. — Decided March 3, 1873.

Pico v. *United States*, 2 Wall. 279, and *Peralta* v. *United States*, 3 Wall. 434, followed.

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

I am instructed to say that the decree in the Circuit Court for the District of California is affirmed on the authority of *Pico* v. *United States*, 2 Wall. 279, and *Peralta* v. *United States*, 3 Wall. 434. It is not thought necessary to do more than to refer to these cases.

Affirmed.

Mr. S. O. Houghton for appellant.

Mr. Attorney General for appellee.

UNITED STATES *v.* STAFFORD.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 105. Argued January 20, 1873. — Decided January 27, 1873.

A certified question is answered coupled with a statement that, through subsequent legislation, it has ceased to be of any importance.

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

We are all of the opinion that the question certified in this case must be answered in the negative. As the act of Congress has been so modified that the question has ceased to be of any importance, no comment is thought necessary.

Mr. Attorney General and *Mr. Solicitor General* for plaintiff.

Mr. John P. Murray for defendant.

NORTON *v.* JAMISON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 192. Submitted December 6, 1872. — Decided January 13, 1873.

Bartemeyer v. *Iowa*, 18 Wall. 129, followed.

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

Our decision in this case must be governed by the case of *Bartemeyer* v. *Iowa*, 18 Wall. 129, and the writ of error must be

Dismissed.

Mr. Miles Taylor for plaintiffs in error.

Mr. D. G. Campbell for defendant in error.

OULTON *v.* SAN FRANCISCO SAVINGS UNION.

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

No. 206. Argued April 7, 1873. — Decided April 28, 1873.

Oulton v. *Savings Institution*, 17 Wall. 109, followed.

Mr. Justice Clifford delivered the opinion of the court.

Taxes were collected of the bank in this case by the defendant, to the amount of three thousand and sixty-six dollars and sixty-three cents, which the bank paid under protest, and brought this suit in the state court to recover back the amount, and the suit, on motion of the defendant, was removed into the Circuit Court.

Suffice it to say, without entering into particulars, that the pleadings, proceedings, and evidence in this case are substantially the same as in the preceding case, and the court rendered judgment for the plaintiffs for the whole amount claimed, and the defendant sued out the present writ of error, and for the reasons assigned in the preceding case the judgment must be reversed.

Judgment reversed and the cause remanded with directions to issue a new venire.

Reversed.

Mr. Attorney General for plaintiff in error.

Mr. C. E. Whitehead for defendant in error.

HUMBIRD *v.* JACKSON COUNTY.

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

No. 209. Argued April 9, 1873. — Decided April 28, 1873.

Olcott v. *Supervisors*, 16 Wall. 678, followed.

Mr. Justice Clifford delivered the opinion of the court.

The case is controlled by the rule established by this court in the case of *Olcott* v. *Supervisors of Fond du Lac County*, decided at the present term, *Olcott* v. *Supervisors*, 16 Wall. 678, to which reference is made for the grounds of the judgment in this case.

Judgment reversed and the cause remanded with directions to issue a new venire. *Reversed.*

Mr. M. H. Carpenter for plaintiff in error.

Mr. H. L. Palmer and *Mr. F. W. Pitkin* for defendant in error.

CHARLESTON *v.* JESSUP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 234. Argued February 14, 1873. — Decided March 31, 1873.

Tomlinson v. *Jessup*, 15 Wall. 454, followed.

Mr. Justice Field delivered the opinion of the court.

This case is governed by the decision in Tomlinson and others, appellants, against the same defendant, 15 Wall. 454. Upon the authority of that decision the decree must be reversed, and the cause be remanded to the court below with directions to dismiss the suit; and it is so ordered. *Reversed.*

Mr. D. T. Corbin for appellants.

Mr. I. G. Barker for appellee.

BANK OF NEW ORLEANS *v.* CALDWELL.

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

No. 255. Submitted January 28, 1873. — Decided March 3, 1873.

This case is dismissed without an opinion, as no exceptions appear to have been taken during the trial.

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

Ordered, by the court, that the judgment of the Circuit Court for the District of Louisiana be affirmed, without an opinion, no bill of exceptions appearing to have been taken during the progress of the trial.

Mr. William M. Evarts and *Mr. J. Hubley Ashton* for plaintiff in error.

Mr. P. Phillips for defendants in error.

SOUTH CAROLINA *ex rel.* ROBB *v.* GURNEY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 22. Re-argued October 20, 21, 1873. — Decided November 3, 1873.

State v. *Stoll*, 17 Wall. 425, followed.

Mr. Justice Hunt delivered the opinion of the court.

The same judgment is ordered in this case as in *State* v. *Stoll*, 17 Wall. 425.

Mr. W. W. Boyce, Mr. A. G. Magrath and *Mr. B. R. Curtis* for plaintiffs in error.

Mr. D. H. Chamberlain for defendant in error.

THE ADELIA.

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

No. 65. Argued November 3, 1873. — Decided November 17, 1873.

On the facts detailed in the opinion, the court holds that there was no contributory negligence on the part of the libellant.

The case is stated in the opinion.

Mr. Justice Bradley delivered the opinion of the court.

The steam tug Adelia had fifteen barges in tow on the Hudson River, bound from Albany to New York. The barges were arranged under the directions of the master of the Adelia, four abreast, and in four tiers. The libellant's barge, Alaska, was on the larboard side of the front tier, about three hundred feet in rear of the tug. The other tiers followed at short intervals, some eight or ten feet apart. About two o'clock in the morning, when a mile and a half below Hudson, the tug ran aground on the east side of the river, and the tow-boats, being perfectly helpless, came upon her, and the

barge of the libellant was staved in by her propeller, as is supposed, and sank. It is agreed that it was quite dark at the time, and the captain of the tug says that half a gale was blowing from N.N.W. There is conflicting evidence as to the width of the channel at that place, but the weight of it is, and the assessors found, that it is six hundred feet. The tide was at ebb, and the progress of the tug and tows was about three miles an hour, which is nearly three hundred feet per minute. Of course, if the tug stopped, the tow-boats would be upon her in a little over a minute of time. The pilot of the tug says that, "there are flats on both sides of the river; that they were steering by marks on the land when they could see them, and when they could not see them they steered by guess work; that they could not see the shore or any mark on it when they grounded, and had not been able to get a regular mark for half an hour before they grounded." It seems so very manifest that this was hazardous sailing, that the claimants feel the necessity of relying more on the alleged negligence of the owner of the barge in contributing to the accident, than on any justification of their own conduct. The assessors to whom the questions of fact were referred below, reported as follows: "The assessors have no hesitation in saying that the tug was in fault in not using the proper skill and judgment (caution) in navigation of the said tug. To exemplify: it appears that the navigator of the tug elected to proceed with his tow under what the assessors think were very hazardous circumstances. It is shown by the testimony that the wind was blowing strong, if not nearly a gale; the night was dark, spitting snow occasionally; no landmarks were discernible, or any visible thing to guide the navigator in this 'blind' part of the channel; yet, notwithstanding this, there was no lead, no sounding pole, or any means whatever used to ascertain the depth of the water, or to warn the navigator of his approach on to the flats which lined that portion of the river. This neglect seems the more reprehensible as the channel is deep, (reference to the chart presented shows that the channel is about six hundred feet wide where the collision occurred,) and the approach to the flats steep, and consequently more readily indicated."

In this verdict of the assessors we concur.

The question then arises whether the libellant, by his own negligence, contributed to the accident. It appears that there was no one on the deck of the barge when the collision happened. On one or two of the barges in the forward tier there were persons on deck at the time. But they all agree in saying that nothing could

have been done to prevent the collision. Their rudders, if they could have been unlashed, were at once disabled by the approach of the barges behind, and they could hardly be apprised of the stopping of the tug before they were down upon her. Besides, the whole tow as well as the tug was under the direction of the master of the latter, and it does not appear that he required the people in the barges to be on the lookout. An experienced tug captain testified that they don't expect to have any one on the deck of the tows; that it is not customary, and is not required. On this point the assessors say: "The assessors are of the opinion that there could not have been anything done to prevent the collision, because, 1st, the distance was too short, say three hundred feet at three knots, would be overcome in one minute of time; 2d, because those on board of the tow had no intimation that the tug was ashore, or even in danger, as the hail to 'keep off' or 'keep clear' certainly conveyed no warning that such a state of things existed, but would clearly be taken for an order to 'keep off' from the 'flats.'"

The decree is affirmed, with interest and costs.

Mr. Edward D. McCarthy and *Mr. J. Hubley Ashton* for appellant.

Mr. Morton P. Henry, Mr. T. C. T. Buckley and *Mr. James W. Paul* for appellee.

CHICAGO AND NORTHWESTERN RAILWAY CO. *v.* FULLER.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 89. Submitted November 6, 1873. — Decided December 23, 1873.

Railroad Co. v. *Fuller*, 17 Wall. 561, followed.

Mr. Justice Swayne delivered the opinion of the court.

The record in this case presents the same question as the record in No. 88, between the same parties, heretofore decided at the present term, *Railroad Company* v. *Fuller*, 17 Wall. 561. The opinion in No. 88 decides that question.

The judgment in this case is, therefore, affirmed.

Mr. B. C. Cook for plaintiff in error.

Mr. J. Hubley Ashton and *Mr. Nathaniel Wilson* for defendant in error.

KENNER *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF LOUISIANA.

No. 202. Argued April 8 and 9, 1874. — Decided May 4, 1874.

The Confiscation Cases, 20 Wall. 92, followed.

MR. JUSTICE STRONG delivered the opinion of the court.

There is nothing in this case which we have not considered in our review of *The United States* v. *Eight Hundred and Forty-four Lots and Ten Squares of Ground*, the property of John Slidell, just decided. *The Confiscation Cases*, 20 Wall. 92.

The judgment of the Circuit Court is affirmed.

Mr. C. Cushing, Mr. W. W. Boyce, Mr. C. M. Conrad, Mr. L. L. Conrad, Mr. W. D. Davidge and *Mr. R. Fendall* for plaintiff in error.

Mr. Attorney General for defendant in error.

ALLEN *v.* TARLTON.

ERROR TO THE SUPREME COURT OF THE STATE OR LOUISIANA.

No. 251. Submitted March 16, 1874. — Decided March 23, 1874.

Dismissed for want of jurisdiction.

MOTION TO DISMISS.

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

The writ of error taken in this cause is dismissed, because it does not appear that judgment of the state court necessarily involved the decision of any question which could give this court jurisdiction. *Dismissed.*

Mr. Miles Taylor and *Mr. P. Phillips* for plaintiff in error.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for defendants in error.

UNITED STATES *v.* SIX LOTS, HATCH, Claimant.

UNITED STATES *v.* TEN LOTS, CONRAD, Claimant.

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

No. 255. Submitted April 8, 1874. } Decided
No. 283. Argued April 8 and 9, 1874. } May 4, 1874.

The Confiscation Cases, 20 Wall. 92, followed.

MR. JUSTICE STRONG delivered the opinion of the court.

These cases are in all essential particulars like the case of *The United States* v. *Eight Hundred and Forty-four Lots and Ten Squares of Ground*, the property of John Slidell; *The Confiscation Cases*, 20 Wall. 92. What we have said in reference to that case is equally applicable to these.

In each case the judgment of the Circuit Court is reversed, and the cause is remanded with instructions to affirm the judgment or decree of the District Court. *Reversed.*

CLIFFORD, DAVIS and FIELD, JJ., dissented.

Mr. Attorney General and *Mr. Thomas J. Durant* for plaintiff in error.

Mr. C. M. Conrad and *Mr. C. Cushing* for defendants in error.

PRIEST *v.* FOLGER.
THWING *v.* FOLGER.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Nos. 298 and 299. Argued April 21, 1874. — Decided May 4, 1874.

Habich v. *Folger*, 20 Wall. 1, followed.

MR. JUSTICE HUNT delivered the opinion of the court.

These cases involve the same questions as the case above decided, *Habich* v. *Folger*, 20 Wall. 1; and, in accordance with that decision, are affirmed.

Mr. Dudley Field for plaintiffs in error.

Mr. John C. Dodge for defendant in error.

WOODMAN PEBBLING MACHINE CO. *v.* GUILD.

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

No. 311. Submitted January 16, 1874. — Decided January 19, 1874.

A judgment is entered according to the stipulation of the parties.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Since the appeal the parties have come to an adjustment of the controversy, as appears by the stipulation on file.

Pursuant to that stipulation I am instructed to direct that the decree of the Circuit Court be reversed; the entry to be, that it is reversed by consent and that the cause be remanded with directions that a decree be entered in the Circuit Court for the complainant as prayed in the bill of complaint, it being stated in the mandate that the decree here is entered by consent of parties as appears by the stipulation which should be recorded in the case.

Reversed.

Mr. T. L. Wakefield for appellant.

Mr. George L. Roberts for appellees.

BRUGERE *v.* SLIDELL.

HEATH *v.* SLIDELL.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Nos. 479, 532. Submitted January 8, 1874. — Decided January 19, 1874.

Bigelow v. *Forrest*, 9 Wall. 339, and *Day* v. *Micou*, 18 Wall. 156, followed.

Mr. Justice Strong delivered the opinion of the court.

Both these cases are controlled by the decisions made in *Bigelow* v. *Forrest*, 9 Wall. 339, and in *Day* v. *Micou*, just decided, 18 Wall. 156.

Judgment in both cases *Affirmed.*

Mr. L. M. Day for plaintiffs in error.

Mr. Thomas Allen Clarke for defendants in error.

HARDY *v.* HARBIN.

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

No. 14. Argued October 15, 1874. — Decided November 16, 1874.

After a careful examination of the proof relating to the identity of the appellants' ancestor with the grantee from the Mexican government, the court affirms the judgment of the court below, without deciding the questions of law.

The case is stated in the opinion.

Mr. Justice Hunt delivered the opinion of the court.

The appellants are the children of John Hardy. They allege that to their ancestor, under the assumed name of Thomas M. Hardy, the Mexican government issued a grant, October 23, 1843, for the premises in controversy; that the appellees, purchasers under a void sale of Hardy's interest, procured the commission, under the act of the 3d of March, 1851, to confirm to them the lands so granted as aforesaid to Hardy. The bill prays that the appellees may be compelled to convey to the appellants.

A demurrer to the bill was interposed upon the ground that the defendants were innocent purchasers, having no knowledge of the fraudulent character of the administrator's sale under which the confirmees purchased. The Associate Justice of the Supreme Court, who heard and decided the demurrer, overruled it, on the ground that under the allegations of the bill the sale at which the appellees purchased was absolutely void.

The demurrer having been overruled, an answer was put in which denies that the complainants (the appellants here) are the legal representatives of the Hardy to whom the grant was made; denies the alleged frauds; denies all knowledge or notice on the part of the defendants of such frauds if they were committed, and all knowledge or notice of the invalidity of the proceedings in the Probate Court, under whose order of sale they became purchasers.

This answer raised issues of fact and of law — of fact as to the identification of the Hardy to whom the grant was made with the Hardy whose heirs the complainants are admitted to be; of law, whether purchasers at a sale made by a court having no jurisdiction of the person or subject matter, can shield themselves under a plea of purchase in good faith, without notice of the invalidity of the decree under which the sale was made.

The district judge, sitting as circuit judge, entered a decree dismissing the bill upon the ground that the defendants were purchasers of parties holding the legal title — that is, the patent of the United States — and that they had no notice of the invalidity of the title of their vendors upon which the confirmation was made.

From this decree the complainants appeal to this court.

The points of law raised are —

First, That the complainants (children of John Hardy) at the date of the death of Hardy in California, in 1848, were aliens, and incapable of taking his real property by descent, and this both by the common law and the Mexican law.

Second, That the defendants are innocent *bona fide* purchasers for value without notice from the patentees, and are therefore protected in their possession. Upon this point the district judge, sitting as circuit judge, held with the defendants and dismissed the bill.

The question of fact is the identity of the two Hardys described in the evidence, or rather the union of the names of John Hardy and Tomas M. Hardy in one man, and that man, John Hardy, the father of the complainants.

The question of fact lies at the bottom of the case. If it should be held that aliens may inherit, that would be of no influence should it be decided that the complainants are not the children of the man who called himself Tomas M. Hardy.

Should it be held that the defendants are not innocent purchasers without notice, or that if such, that fact does not constitute a defence to the action, we should make no step towards a conclu-

sion, unless we also decided that the complainants were the children of the man entitled to the grant.

If it is found that the complainants are such children, the other questions arise. If it is found that they are not, the case is ended. In any aspect the question of identity arises and must be decided, and it is manifest from the suggestions already made that it is the point that should be first determined. We proceed to its consideration.

A person describing himself as Tomas M. Hardy died in California, in 1848, having received a land grant as a soldier in the Mexican service.

The children of John Hardy, of Canada, undertake to show that this person was their father.

John Hardy was a mechanic, born in the year 1801, who left Canada in the year 1831 and never returned. His wife had died not long before, leaving three young children, of whom the plaintiffs are survivors.

In seeking a solution of the question before us the inquiries at once present themselves,—

Why did he leave Canada? Was there any reason for changing his name?

He left Canada, in the language of the old tales, to seek his fortune. His wife, the daughter of a respectable clergyman, had died. Although not in want or destitution, he was not as successful in business as he wished to be. The disposition of her property by his mother did not please him. He had sought to interfere with it more officiously than pleased the mother, and she had given it to her other children, omitting to give him any portion. It was rumored also that he desired to marry the sister of his deceased wife, and that his offers in this respect were declined. These, we believe, are the only reasons shown for his leaving Canada.

These circumstances furnish the answer to the other inquiry suggested, and show that no reason existed for a change of name. He had committed no crime which compelled him to conceal his departure. There was no case of affection betrayed of which he desired to escape the consequences. He left openly, without concealment, with the knowledge of his friends, and with no attendance of crime, disgrace or dishonor. He had some conversation, as witnesses state, in which he declared that his friends would not hear from him until he was in better circumstances, and that he would change his Christian name, retaining the name of Hardy.

We place little value on the evidence of these trivial circumstances, given thirty or forty years after the occurrence, there being nothing at the time, or occurring since, to impress the conversation on the mind of the witness. That a man from any cause, desirous of concealing himself from his relatives, should retain his family name and seek to effect that object by changing his Christian name only, we think is hardly credible.

If we correctly understand the evidence no witness who ever knew or saw John Hardy in Canada also saw Thomas M. Hardy, who died in Benicia in 1848, and identified them as the same person. There is, however, evidence that John Hardy was in the Southern States and in Mexico at periods several years after leaving Canada. A number of witnesses testify to meeting a Mr. Hardy in various parts of Mexico, at different times from 1839 to 1846. Mr. Galbraith Lindsay testifies that in the winter of 1836–7, in Natchez, Mississippi, he frequently saw a man calling himself John Hardy, with whom he talked about persons and affairs in Canada, and was satisfied that he knew the persons and places of which he spoke, and that he was John Hardy. Lindsay was in Natchez four months on this occasion, and saw Hardy at different times during a period of four weeks. Two observations suggest themselves in relation to his evidence. 1st. That Hardy had not at that time made any change of name. He called himself, he says, John Hardy. If from the motives of anger or disappointment suggested, he determined to change his name, he seems to have reconsidered the determination, and at this time bore his true name.

2d. Hardy told the witness that he had come down the river, and that he had worked as a carpenter, repairing boats or building boats up the river. It does not appear that he told him that he had been a soldier in the Mexican service, or that he had been in or had seen the battle of San Jacinto. Although he might not have desired to proclaim this fact in the Southern States, would he have been likely to omit so important a feature of his life in his frequent conversations with his newly found countryman? Thomas M. Hardy, it is pretty clearly shown by the evidence of Baldridge, was in the Mexican service at the battle of San Jacinto, which occurred on the 21st of April, 1836, or witnessed the battle. Again. Would one who had taken the Mexican side in that contest be likely to return at once to the Southern States, where, as all know whose recollection goes back to that period, the Texan excitement was intense?

If we suppose that this conversation and recognition by Lindsay occurred at the beginning of the year 1836, the difficulty seems to be equally great. He conferred with Lindsay about his pursuits and employment, and was advised by him to go into the country and pursue his business as a hewer, where he could obtain good wages. No suggestion of Texas or Mexico passed between them. He came from up the river, and it is difficult to believe that before April of that year he would have drifted down the river, have passed through Texas, and entered into the uncongenial service of Mexico, and been present, on the 21st of that month, at the battle of San Jacinto. One or the other of the embarrassments suggested must have existed if this man was the same one who afterwards obtained the land grant in question.

Testimony is given by Thomas Hardy, a cousin of John Hardy, to the effect that in 1847 he received a letter from John Hardy signed with that name, and post-marked Monterey, California. The letter stated that the writer was building a mill, had a block of land in California, and wanted his son to come out; stated that he had reached California by the way of Texas, and witness thinks by way of Mexico; that he had done well, and we could all get rich if we would come out there. The substance of the letter the witness communicated to John Hardy's son, and acknowledged to Hardy the receipt of the letter.

Without intending an imputation upon the veracity of the witness we may say that this evidence is open to several criticisms.

1st. It is an unfortunate circumstance that the letter is not produced, or that a most diligent search has not been made for it.

2d. The letter was written and received seventeen years before the witness testifies to its contents. He is a member of the family making the claim, and may be assumed to be familiar with the hopes, wishes, and traditions of the family, and with their theories on the subject. Although he has no interest in the claim it is not improbable that these circumstances may have given to his evidence a point and particularity that it would not otherwise possess.

3d. Alexander, the son, was then twenty-two years of age, having been born in 1825, according to the allegation of the bill. Why did he not accede to his father's request? Why did he not strike out as his father had done, and with a prospect before him so much better than his father had? The evidence does not give us the reason. No attention seems to have been paid to the invitation by the son or by the family. That this should be seems

scarcely consistent with the idea of the actual receipt of such a letter.

4th. The letter purported to come from Monterey in 1847. Now, at that time, Thomas M. Hardy lived on the Cache Creek, in the Sacramento region, one hundred and fifty or two hundred miles from Monterey, which was on the coast. That he lived there during that year, and in 1848, until his death, and for several years previous, is proved by numerous witnesses. He there had his ranch, his horses, his mules and much other property.

The letter stated that he had built a mill and had a block of land. The presumption is that he wrote and sent his letter from the place where he resided; that he was building his mill there, and that his block of land was at the same place. Of course this is not certain, because he may have built in one place and lived in another one hundred or two hundred miles distant; his land may have been distant both from his mill and his residence, or he might have had his letter mailed at a place far off from where he wrote it. All these suggestions are possible but not probable, and the intendments of law are against them. For these reasons we do not attach much importance to the letter said to have been received by Thomas Hardy in 1847.

It should be added in support of the statement of the witness that he testifies that some friends of the family had been in the Mexican service.

In this connection may be considered the evidence of Mr. Gillespie, offered to show that John Hardy was at Monterey, and that he was the same man who lived on the Cache Creek. Mr. Gillespie, an officer of the United States sloop of war Cyane, testifies that a Mr. Hardy was in the service on that vessel in June, 1846; that he saw him also at San Diego and Los Angeles, and afterwards at his place at the mouth of the Feather River, where he ferried Commander Stockton and himself across the river in July, 1847, at his ranch, known as Hardy's ranch. Los Angeles and San Diego are some four hundred miles distant from the Cache Creek, on which Hardy was a resident during the years 1842, 1843, 1844, 1845, 1846 and 1847, as deposed by many witnesses. That Mr. Gillespie thus testifies that he was on board his vessel, and was at San Diego and Los Angeles in 1846, and that the same man was in the Feather River region (which is the same as the Cache Creek region) in 1847, is but another instance of the irreconcilable character of the evidence before us.

That Hardy was in Cache Creek, Sonoma region, during the

years 1842, 1843, 1844, 1845 and 1846, as well as in 1847 and 1848, was sworn to by Davis, by Fallon, by Leese, by Bidwell (who says he saw him every day from 1843 down to 1847), by Sutter and many others. In his prayer for the grant to the Mexican government, which bears date of September 20, 1843, he certifies that he was then established on the frontier of Sonoma. The Hardy on the Cyane, at San Diego and Los Angeles, and who wrote home from Monterey, if any one did, could scarcely have been the same man who made this petition and received the grant and lived during all these years on the Cache Creek. Other witnesses speak of knowing a Mr. Hardy in the southern part of California in 1844, 1845, 1846. If there was such a man, he may have been John Hardy, but he was not Thomas M. Hardy.

The evidence of Lindsay and Gillespie, which we have thus considered, and the evidence of Thomas Hardy that he received a letter from John Hardy, post-marked Monterey, which we have also considered, are the only pieces of testimony in the case that approach to the character of direct evidence. That they are not very direct is apparent, and that they are not entitled to any considerable weight we have endeavored to show.

We will now refer to the circumstances in evidence which the complainants think entitle them to a decree in their favor.

The complainants give great weight —

1st. To the evidence that the handwriting of the name Hardy, attached to the *espediente* and the "loose paper" on which the grant was made, is the handwriting of John Hardy, although the name signed is that of Tomas M. Hardy.

2d. To the evidence that the peculiarities of person, of habits and manners exhibited by John Hardy were exhibited also by Tomas M. Hardy; and,

3d. To his declarations that he was from Canada, and had left a family there.

As to the first point. We cannot but think that there is great doubt of the principle of this rule of evidence. The man being ascertained, it is competent to prove that a signature in question is his by those who have seen him write and know his handwriting. Although a comparison of handwritings is not generally allowable, the evidence of a witness is based upon a mental comparison of the writing presented with that before seen by him. But it is a different proposition when the identity of a man is to be established by proving that a paper whose origin is disputed looks like one which he is proved to have signed.

In relation to comparison of handwritings, *i.e.* where genuine signatures are put in evidence to enable the jury to judge by comparison, Bennett, J., in *Adams* v. *Field*, 21 Vt. R. 256, says: "Those having much experience in the trial of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable or where courts and juries are more liable to be imposed upon."

In the present case the evidence of this character is entirely unreliable. It is given by persons in Canada unskilled in the subject, but who from relationship to John Hardy, or early acquaintance with him, seem to be supposed to be especially qualified to speak on the subject. Some men are called who claim to be skilled in the subject of genuine handwritings, and who have experience in comparison of handwritings. No intelligent court should be willing to base a judgment on evidence so little satisfactory as this evidence is as given in this case. A note for five dollars and fifty cents, signed by John Hardy, bearing date in 1831, and proved by some witnesses to have been signed by him, is taken as the standard. This note is not admitted to be genuine. (See 1 Green. Ev. § 577.) The proof is in 1864 of a signature made in 1831. The competency of this evidence is quite doubtful. A writing to Mr. Leese is also produced. The body of the note is plainly in a different handwriting from the signature, and was so proved to be, and yet some of the experts who assume to identify the signatures as made by one man are not able to state whether it was written by the same hand that signed the note. Hardy was a mechanic not much accustomed to writing while at home, and his signature to the note is of that stiff, unpractised character common to the signatures of such men. Although the letters proving the signature of Tomas M. Hardy are in many instances like those in the signature of John Hardy, the signature is in its general appearance more easy and flowing than that of John Hardy.

Again. How is it possible that John Hardy signed the papers containing the statements to be found in these documents? Tomas M. Hardy may well have done so, but we find it difficult to believe that John Hardy could have done it. The *espediente* is a petition signed Tomas Hardy, to the military commandant of the frontier of Sonoma for a grant of land, and is dated at Sonoma, September 20, 1843. Accompanying this is a document styled the loose paper, signed also by Tomas Hardy, which states that he arrived

at the Port of Vera Cruz in the year 1825, in the Victoria vessel of war, in the position of lieutenant of the same; that on various occasions he has rendered services to the Mexican nation in the same manner previously, and for this reason he is considered as naturalized. This statement may have been made of some Hardy who came to Vera Cruz on the Victoria in 1825, and entered into the maritime service of Mexico, but it was not true of John Hardy, who did not leave Canada until 1831, and who was in Natchez during the winter of 1836–7, as testified by Mr. Lindsay, and who never performed any maritime service for Mexico, so far as is proved by the evidence. We do not find evidence under this head to sustain a finding of the identity of John and Thomas Hardy.

2d. Nor do we find the case supported either by the evidence that the peculiarities of person of John Hardy were found in Thomas Hardy, or that Hardy's declarations respecting himself and the condition of his family afford any satisfaction on this point.

The testimony is unsatisfactory, both in the character of the witnesses testifying in some instances and as to the result of their evidence generally. An illustration of the extravagant absurdity of some of the witnesses is found in the evidence of Wm. B. Frazer, to which reference is made without reciting it.

The evidence of Hardy's statements regarding his nativity, his family, and his whereabouts in his previous life, are contradictory and uncertain. Several witnesses testify that he stated that he was born in Canada; a larger number state that he said he was from Canada; a still larger number testify that he told them he was born in England, and still a larger number either state that he said he was from England or was an Englishman. Baldridge says he told him he sat upon the mountains of Wales and saw ships sail out of Liverpool, and that he had been imprisoned in England for contempt of court.

It is proved that John Hardy was a carpenter and working on boats on the Mississippi as late as 1836–7, and yet Thomas Hardy stated that he had been sent to sea by his father at the age of fourteen, had sailed over the world in ships; that he had taken part in the revolutions in Peru and on one occasion had there commanded a battery of artillery.

Many witnesses testify that he spoke of the children he had left at home, while others testify that when sober he refused to speak of himself or his family.

Some testify that he spoke of his having a wife at home. Still

others that he said he left Canada on account of a dissension with his wife, while others make him refer to his children only.

John Hardy is described by his cousin, Thomas Hardy, as being five feet seven or eight inches high, weighing one hundred and sixty-five to one hundred and eighty pounds, eyes nearly black, "large, full, expressive, bright," hair black and curly, good-looking face, high forehead, bold and determined look, and when he laughed he did it heartily and showed it over his whole face, with a mark over his right eye about an inch above his eyebrow, having full and smooth voice, with distinct articulation, and a good singer. "He was the life of a company, quick tempered, but with fine feelings."

Mr. John Bidwell was called by the complainants to identify Hardy of Cache Creek as the father of the complainants. No witness called appears more favorably upon the record than Mr. Bidwell. He describes the Hardy he knew from 1843 to 1847, as being five feet seven or eight inches high, swarthy complexion, low forehead, full cheek bones, chin broad and blunt, his nose inclined to turn up, giving him an Irish or pugnacious appearance, upper lip short, mouth rather broad, broad, blunt chin. His manner was reserved and uncommunicative. Never heard of his singing; thinks he should have known it if he did. Spent many evenings with him but never heard him tell an anecdote and never saw him laugh. He says his eyes were of the gray order, hair dark, inclined to be gray, and thinks he had a scar on his face, but can't tell where. His manner was repulsive, and witness did not associate with him on account of his habits and disposition.

This description, if not positively repugnant to Thomas Hardy's, certainly affords no reason to suppose that the two men were identical. Departing from this reasonable description, we find nearly every characteristic of the human face and form attributed to Thomas Hardy, from the clumsy determination of Frazer at identification, to particulars totally different from those belonging to John Hardy. The general result of the evidence of John Hardy's family gives him black hair, dark eyes, large, full, and expressive, dark complexion, straight nose, a little broad on the top, pleasant, open countenance, bold and determined, a scar across his right eye, social disposition, genial and agreeable, of good habits and good moral character.

The testimony of many of the California witnesses called by the complainants describes Hardy of Cache Creek as having light hair and whiskers, nearly sandy, deep-set eyes, pug nose, with a scar

which some locate on his brow and some on his nose, silent, reserved, and ungracious in his manners, having the English peculiarity of omitting the *h* and aspirating the vowels, frequently drunk, and fond of the society of loose women. It is not intended to say that, among the great number of witnesses called by the complainants, there are not many who give the California Hardy the appearance, manners and conversations which tend to the belief that he was the father of the complainants. We are, however, clear and emphatic in the opinion that a consideration of the entire body of the testimony does not prove that Thomas Hardy, who died in California in 1848, was the man, John Hardy, who left Canada in 1831.

On the contrary, we are strongly inclined to the belief that it is proved affirmatively that the two men described were different men.

We have not attempted to analyze or to classify the three thousand folios of testimony which this record presents. It would be impossible to do so within the limits of an opinion of this court. We have, however, examined it carefully, and have no doubt of the correctness of the result we have reached.

This conclusion renders unnecessary a consideration of the other questions in the case, and leads to an affirmance of the decree dismissing complainants' bill. *Affirmed.*

Mr. Henry Beard, *Mr. B. S. Brooks*, *Mr. N. P. Chipman*, *Mr. W. W. Chapman* and *Mr. C. T. Botts* for appellants.

Mr. J. B. Harmon, *Mr. E. Janin*, *Mr. E. L. Goold* and *Mr. J. P. Hoge* for appellees.

NORTHWESTERN UNION PACKET CO. *v.* VILES.

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

No. 70. Argued and submitted November 17 and 18, 1874. — Decided December 7, 1874.

Northwestern Union Packet Co. v. *Clough*, 21 Wall. 317, followed.

Mr. Justice Strong delivered the opinion of the court.

The errors assigned in this case are the same as those which were considered in the case of these plaintiffs against Clough and wife, just decided, except that some assigned in that case have not been assigned in this. The rejection of Turner's deposition, and the admission of the captain's declarations to Mrs. Clough are the only matters now brought to our attention. We need add nothing to what we have said in the former case. The same reasons that

required the reversal of the judgment obtained by Clough and his wife require the reversal of this judgment. Indeed the error here is more apparent. It does not appear that the conversation of the captain with Mrs. Clough occurred before the plaintiff left the boat, and before the relation as a passenger to the defendants or to the captain had ceased. In fact, the contrary appears.

The judgment of the Circuit Court is reversed, and a *venire de novo* is directed. *Reversed.*

Mr. John W. Cary and *Mr. J. P. C. Cottrell* for plaintiff in error.

Mr. M. H. Carpenter for defendant in error.

LEE COUNTY *v.* CLEWS.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 79. Argued and submitted November 30, 1874. — Decided December 21, 1874.

Chambers County v. *Clews*, 21 Wall. 317, followed.

Mr. Justice Hunt delivered the opinion of the court.

The case of *The County of Lee*, plaintiff in error, v. *Clews*, defendant, (No. 79,) involves the same questions and is decided by the same principles as *Chambers County* v. *Clews*, 21 Wall. 317. The judgment is *Affirmed.*

Mr. R. T. Merrick for plaintiff in error.

Mr. Samuel F. Rice for defendant in error.

SCHOW *v.* HARRIMAN.

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

No. 101. Argued December 4, 7 and 8, 1874. — Decided January 25, 1875.

Schulenberg v. *Harriman*, 21 Wall. 44, followed.

Mr. Justice Field delivered the opinion of the court.

This case depends upon the same principles for its disposition as the case of *Schulenberg* v. *Harriman*, just decided, 21 Wall. 44, and upon its authority the judgment is *Affirmed.*

Mr. E. C. Palmer for plaintiff in error.

Mr. John C. Spooner, Mr. B. J. Stevens, Mr. P. L. Spooner and *Mr. J. C. Sloan* for defendant in error.

BASSE *v.* BROWNSVILLE.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 109. Argued December 18, 1874. — Decided January 11, 1875.

The treaty of Guadaloupe Hidalgo had no relation to property within the State of Texas.

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

This writ of error is dismissed for the want of jurisdiction. In *McKinney* v. *Saviego*, 18 How. 240, it was decided that the treaty of Guadaloupe Hidalgo had no relation to property included within the State of Texas. The record does not show that any question was made in the court below or decided, as to the effect of the act of 7th February, 1853, upon the plaintiff's title. So far as anything does appear, the case was disposed of without reaching that question. *Dismissed.*

Mr. Edgar Ketchum, *Mr. James R. Cox* and *Mr. C. Robinson* for plaintiff in error.

Mr. Thomas J. Durant and *Mr. Charles W. Honor* for defendant in error.

ROGERS LOCOMOTIVE AND MACHINE WORKS *v.* HELM.

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

No. 134. Argued January 12, 1875. — Decided February 1, 1875.

To justify a decree for the specific performance of a parol contract for the sale of real estate, the contract sought to be enforced, and its performance on the part of the vendee must be clearly proved; and in this case it is not so proved in several particulars.

THE case is stated in the opinion.

MR. JUSTICE HUNT delivered the opinion of the court.

The complainants, who are also the appellants, filed their bill to enforce the performance of a parol contract for the sale of a house and lot in the city of Jackson.

The alleged contract was made with the Mississippi Manufacturing Company, which has since gone into bankruptcy, and all its rights, by means of the mortgage hereafter to be mentioned and a conveyance from its assignee, are alleged to have become vested in the complainants.

The bill alleges that in the year 1866 Helm was the owner of a

certain lot in Jackson, on which was a brick storehouse; that the house and lot were purchased of Helm by the manufacturing company for the price of $12,000, which sum was to be paid to Helm by one hundred and fifty shares of the stock of said company, for which a certificate was to be issued to him, and on the issuance thereof Helm was to make conveyance of the said lot; that the contract was not in writing, but afterwards, on the 4th of March, 1867, by a letter in writing, Helm acknowledged the receipt of the one hundred and fifty shares, and acknowledged that the lot was to be conveyed by deed to the company (this was contained in Exhibit A, which is set forth at length); that some work was needed to be done upon said house, which Helm agreed to have done for the company and for which the company agreed to pay; that in June, 1867, Helm made out an account of the expenditures for said work, amounting to $919.35, among the items of which was a receipt for taxes on said house and lot for $45, on which was written by direction of Helm a receipt of the same for the Mississippi Manufacturing Company. It is alleged that by reason of these transactions Helm is estopped from denying that the lot is in equity the property of the Manufacturing Company. It is further alleged that in 1867 the company was put in possession of said lot by Helm; that he acted as their agent in renting the same on their account and paying the rents to them. That Helm now repudiates the sale, alleging that the same was verbal only and not binding, whereas it is alleged that the contract had been acknowledged by Helm in writing; that it had been fully performed on the part of the company by paying the purchase money, and partly performed by Helm by giving possession to the company, making improvements thereon on their account, and receiving payment therefor from them.

It is further alleged that in 1869 the company, being indebted to the complainants in a large sum, executed to them a mortgage of the premises before referred to; that the company became bankrupt, and for a valuable consideration the assignee sold and conveyed to the complainants all his right and interest in the property.

The allegations of the bill respecting the terms of the contract and the alleged performance are denied in the answer, and a certain other contract, quite different from the one set up in the bill, is stated to have constituted the understanding between the parties.

To justify a decree for the specific performance of a parol contract for the sale of real estate, the contract ought to be enforced

and its performance on the part of the vendee must be clearly proved. Omitting the consideration of the question whether possession by the vendee in such a case is a controlling circumstance, omitting also the consideration of the point whether the terms of the alleged contract can be established otherwise than by writing in some form or of some character, we think it cannot be questioned by any one that all the material points of the alleged contract must be proved by some competent evidence and the substantial performance of the conditions undertaken by the vendee must be proved in like manner.

It appears from what has already been stated, that the complainants base their case upon an alleged contract by which Helm agreed to sell to the Manufacturing Company his house and store lot in Jackson, for the sum of $12,000, and that Helm agreed to receive the payment of that sum by a certificate for one hundred and fifty shares of the capital stock of their company, which certificate it is alleged was received and accepted by Helm in satisfaction of that sum.

This involves the specifications following, to wit:

1. The agreed price of $12,000 for the house and lot.

2. A description of the particular house and lot so agreed to be sold.

3. Helm's agreement to accept a certificate of one hundred and fifty shares of the capital stock of the Manufacturing Company in payment of that amount.

4. That he did so receive and accept it.

The answer is at least to be construed as putting in issue each of these allegations and requiring that proof of them be made by the complainants. Taking the evidence and the admissions of the pleadings into account, we may hold that the identity of the house which is the subject of the contract is sufficiently established. On the other points there is a failure of proof.

The complainants allege that the price of the house was $12,000 pure and simple. The answer after denying this statement alleges that so far as there was any understanding, it was to this effect: that Helm was to take not one hundred and fifty shares, but three hundred shares of the manufacturing stock, not at par, but at an agreed value per share; that the company agreed to establish a banking house in said building at Jackson, with a capital of $100,000 and that Helm should be the permanent cashier thereof, at a salary of $2000 per year; that in part payment for the three hundred shares Helm was to fit up the house in question for a

banking house and convey it to the company for that purpose, at an estimate to be ascertained by the parties, and that the balance in payment of the stock should be paid by him in money.

That an agreement to take three hundred shares of stock is different from an agreement to take one hundred and fifty shares; that an agreement to receive one hundred and fifty shares in payment for a banking house is different from an agreement to receive three hundred shares at an agreed value in part payment of the house to be fitted up by the vendor for a banking house, the vendor to be appointed and hold the office of cashier in permanence, at a salary of $2000, and to pay for the balance of the stock in money, are propositions that need not be argued.

How stands the proof as to which of these was the agreement made?

Annexed to the complainants' bill are four exhibits and seventeen vouchers, by which the case is sought to be sustained. None of them, unless it be Exhibit A, has even a tendency to support the complainants' view of the case rather than the defendant's. They are all equally consistent with either theory. They show that each party understood that the Manufacturing Company had an interest in the Jackson house, and that the defendant was making expenditures thereon and receiving rent therefrom, for which an account was expected by the company. This would be equally the case whether the house was sold upon a simple agreement to pay $12,000 for it in stock, or whether it was connected with the other conditions claimed to exist by the defendant. The parties were then acting in confidence with each other, and were not particular in their actions or expressions.

Exhibit A is a letter from the defendant acknowledging the receipt of a certificate for one hundred and fifty shares of stock, and sending to the company a statement of their indebtedness to him. Whether the certificate and the indebtedness had any connection with each other it is impossible to say.

The letter proceeds: "You can send me the company's obligation for the amount over and above the $12,000 I pay for the one hundred and fifty shares, and continue to give me acknowledgments of the company's indebtedness as I make other payments." This assumes that the writer has paid $12,000 for the shares, but without specifying the manner, the conditions, or connections, and assumes that the company owes him money, but that he expects to make still other payments for those shares. — "Continue to give me acknowledgments of the company's indebtedness as I make

other payments." The very slight effect to be attributed to this letter must entirely cease when we read the evidence of the president of the Manufacturing Company introduced by the complainants, in which he testifies that "Price of the house was what it cost to build it, which was less than ten thousand dollars," and also "the letters marked A, C and D were written by Helm and refer to the house in controversy, and were in part payment of a contract which was never executed." If the price of the house was less than $10,000, and the one hundred and fifty shares were in part payment only of a contract for its purchase, the allegations that $12,000 was the price, and the one hundred and fifty shares received in full payment, are of course to be disregarded. Not only is the complainants' theory unsustained, but the defendant's theory is greatly aided by the further testimony of the same witness. In answer to the question "What connection had the banking arrangement referred to in the exhibits of Helm with the conveyance and sale of the property in dispute? Were they or not in any way dependent one upon the other, or what were the true facts relative thereto?" he says "the house was sold by Helm and bought by Mississippi Manufacturing Company for the express purpose of a banking house for said company, of which Helm was to be cashier. I think the sale would not have been made, but for the purpose of a banking house. One hundred thousand dollars was to be the capital of the bank, and two thousand dollars to be Helm's salary. The bank was never established."

If the arrangements and conditions were of this character, it is not pretended that they were ever carried out in form or in substance, and it would be far from an equitable disposition of the case to compel Mr. Helm to give a deed of the property. The certificate he offers to return and it no doubt belongs to the bankrupt's estate.

There is no evidence in the record that the title of the assignees in bankruptcy has been conveyed to the complainants. Without such conveyance, or without making them parties defendant, there can be no recovery in this action. The point, however, is not made by the defendant, and we do not base our decision upon it.

For the reasons before stated we are of the opinion that the decree dismissing the bill should be

Affirmed.

Mr. P. Phillips for appellant.

Mr. R. M. Corwine and *Mr. Quinton Corwine* for appellee.

OULTON *v.* SAVINGS AND LOAN SOCIETY.

CARY *v.* SAME.

SAME *v.* GERMAN SAVINGS AND LOAN SOCIETY.

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

Nos. 169, 172 and 173. Argued February 3, 1875. — Decided February 22, 1875.

Cary v. *San Francisco Savings Union*, 22 Wall. 38, followed.

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

The material facts in these cases are the same as in *Cary* v. *The San Francisco Savings Union*, 22 Wall. 38, just decided. The judgments are all reversed for the reasons assigned in that case, and the causes are all remanded with instructions to render judgment in each of them for the defendant. *Reversed.*

Mr. Attorney General for plaintiffs in error.

Mr. H. J. Tilden and *Mr. C. E. Whitehead* for defendants in error.

OULTON *v.* CALIFORNIA INSURANCE CO.

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

No. 170. Argued February 3, 1875. — Decided February 22, 1875.

Barnes v. *Railroad Co.*, 17 Wall. 294, and *Stockdale* v. *Atlantic Ins. Co.*, 20 Wall. 323, followed.

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

The judgment of the Circuit Court is reversed upon the authority of *Barnes* v. *Railroad Co.*, 17 Wall. 294, and *Stockdale* v. *Atlantic Insurance Co.*, 20 Wall. 323, decided at the last term, and the cause remanded with instructions to enter judgment in favor of the defendant.

Mr. Attorney General for plaintiff in error.

Mr. C. E. Whitehead, Mr. F. M. Pixley and *Mr. H. J. Tilden* for defendant in error.

LANE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 176. Argued December 9 and 10, 1874. — Decided January 18, 1875.

Haycraft v. *United States*, 22 Wall. 81, followed.

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

This action, like that of *Haycraft* v. *United States*, in which the opinion has just been read (22 Wall. 81), was commenced in the Court of Claims, after the expiration of two years from the close of the rebellion, to recover the proceeds of the sale of cotton taken under the authority of the captured and abandoned act. The judgment of the Court of Claims is affirmed for the reasons assigned in that opinion.

Mr. T. W. Bartley and *Mr. S. E. Jenner* for appellants.

Mr. Attorney General for appellee.

BAILEY *v.* WORK.

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

No. 540. Argued March 30, 1875. — Decided April 12, 1875.

Bailey v. *Clark*, 21 Wall. 284, followed.

Mr. Justice Field delivered the opinion of the court.

This case involves the same question which was considered and determined in the case of *Bailey* v. *Clark*, 21 Wall. 284, just decided, and upon the authority of that case the judgment is

Affirmed.

Mr. Attorney General for plaintiff in error.

Mr. J. E. Burrill for defendant in error.

BLAKE *v.* FOURTH NATIONAL BANK.

BLAKE *v.* PARK BANK.

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

KENNY *v.* PHILADELPHIA &c. RAILROAD.

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

Nos. 554, 555 and 318. Argued February 19, 1875. — Decided March 22, 1875.

Blake v. *National Banks*, 23 Wall. 307, followed.

Mr. Justice Hunt delivered the opinion of the court.

These cases involve the same principles as the case of the National City Bank, (*Blake* v. *National Banks*, 23 Wall. 307,) and the judgment in each case is

Reversed.

Mr. Attorney General for plaintiffs in error.

Mr. Charles C. Beaman, Jr., and *Mr. Francis C. Barlow* for the Banks, and *Mr. James E. Gowen* for the Railroad Co.

WINDSOR *v.* McVEIGH.

ERROR TO THE CORPORATION COURT OF THE CITY OF ALEXANDRIA.

No. 583. Submitted April 9, 1875. — Decided May 3, 1875.

Gregory v. *McVeigh*, 23 Wall. 294, followed.

MOTION TO DISMISS.

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

The motion to dismiss this writ of error was submitted with a similar motion in *Gregory* v. *McVeigh*, 23 Wall. 294, just decided. In the argument, counsel on both sides have treated the two cases as though they were in all respects identical.

We, therefore, deny the motion for the reasons assigned in the other case. *Denied.*

Mr. S. F. Beach for plaintiff in error.

Mr. P. Phillips and *Mr. John Howard* for defendant in error.

COMMERCIAL BANK OF CLEVELAND *v.* IOLA.

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

No. 741. Submitted December 9, 1874. — Decided February 1, 1875.

Loan Association v. *Topeka*, 20 Wall. 655, followed.

MR. JUSTICE MILLER delivered the opinion of the court.

The only difference between this case and that of *The Citizens' Bank* v. *Topeka*, just decided, (*Loan Association* v. *Topeka*, 20 Wall. 655,) is that the bonds were issued before the general act of February 29, 1872, there being at that time no statute of Kansas which professed to authorize the proceeding. But after the vote in favor of issuing the bonds, an act of the legislature ratified the vote and authorized the city officers to deliver the bonds and to levy the taxes necessary to pay their principal and interest. They were issued to a private corporation to aid in constructing and operating foundry and machine shops.

This is all that is necessary to be said, and it shows that the

case comes within the principles of the one just decided, and that the judgment of the Circuit Court holding the bonds void must be

Affirmed.

Mr. Alfred Ennis for plaintiff in error.

Mr. A. L. Williams for defendant in error.

THE ELIZA HANCOX *v.* LANGDON.

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

No. 36. Argued November 9 and 10, 1875. — Decided November 15, 1875.

The decree below is affirmed on the facts.

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

This is one of a class of cases in admiralty, in which appeals are taken to this court upon questions of fact when there have been two concurring opinions in the court below. We think the finding below, as to the culpable fault of the Hancox, was clearly right, and are not satisfied that, as to the damages, it was wrong.

The decree of the Circuit Court is *Affirmed.*

Mr. E. C. Benedict and *Mr. Robert Failigant* for appellant.

Mr. Rufus E. Lester and *Mr. William U. Garrard* for appellee.

TURNER *v.* WARD.

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

No. 129. Argued and submitted January 31, 1876. — Decided February 14, 1876.

In a suit in equity to set aside a sale of personal property as induced by false representations, a decree in favor of the plaintiff will be sustained if the representations proved are of the same general character as those averred in the bill, though not in its precise language.

The case is stated in the opinion.

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

This case presents for our consideration little else than a question of fact. The plaintiffs charge in substance that they were induced by false representations to sell the defendants certain goods, and asked to have the contract of sale rescinded, and their goods restored. The testimony is all embraced in the depositions of one of the plaintiffs and one of the defendants and an agreed statement. There is some discrepancy between the statements of

the two witnesses, but it is apparent from the testimony of the defendant, who made the representations complained of, that he himself had been deceived in respect to the pecuniary condition of his firm. It would be but natural, therefore, that he should mislead the plaintiffs. He supposed the firm had stock on hand to the amount of twenty or twenty-five thousand dollars, and owed from five to eight thousand. According to his own statement, he so told the plaintiff. In point of fact, he was mistaken, and his statement was untrue. The firm was largely in debt, and in less than sixty days it failed and made an assignment. Before this, however, it executed two chattel mortgages upon the stock, each purporting upon its face to secure the payment of ten thousand dollars, though it appears that the amount actually owing to the mortgagees was not so much.

The representations proven are not in the precise language of those averred in the bill, but they are of the same general character, and in our opinion, sufficient to justify the decree rendered in the court below, and it is, therefore, *Affirmed.*

Mr. Charles P. Crosby, Mr. J. M. Carlisle and *Mr. J. D. McPherson* for appellants.

Mr. Ashley Pond and *Mr. Henry B. Brown* for appellees.

CRARY *v.* DEVLIN.

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

No. 527. Submitted January 31, 1876. — Decided February 21, 1876.

Dismissed on the authority of *Mining Co.* v. *Boggs*, 3 Wall. 304.

The finding by a state court that the facts on which a party relies to bring his case within a statute of the United States do not exist is no decision against the validity of that statute.

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

The motion to dismiss this cause is granted upon the authority of *Mining Co.* v. *Boggs*, 3 Wall. 304. There could have been no decision of the Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation. *Dismissed.*

Mr. Edward T. Wood, Mr. Lyman Elmore and *Mr. M. H. Carpenter* for plaintiffs in error.

Mr. R. Fendall for defendant in error.

ATHERTON *v.* FOWLER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 648. Submitted November 15, 1875. — Decided December 6, 1875.

Atherton v. *Fowler*, 91 U. S. 143, followed.

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

The motion to dismiss this cause for want of jurisdiction is denied for the reasons stated in the opinion just read, *Atherton* v. *Fowler*, 91 U. S. 143. The cases are in all material respects identical. *Motion denied.*

Mr. M. Blair for plaintiffs in error.

Mr. M. A. Wheaton for defendants in error.

MEAD *v.* PINYARD.

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

No. 754. Submitted January 20, 1876. — Decided February 7, 1876.

The proof does not make out a case that calls upon this court to overrule the judgment of the trial court on questions of fact.

The case is stated in the opinion.

Mr. Justice Hunt delivered the opinion of the court.

The appeal in this case is based chiefly upon alleged errors of the court below in determining the facts. The points of fact most strongly presented, in which it is alleged that the error was committed, are the following:

1. The finding that the contract held by Collins was assigned and delivered by him to his sister, Mrs. Gamble, in November, 1862; 2. The finding that Willard did not, in June, 1861, convey by deed to Collins, the property described in his contract; and 3dly, The denial of the statement that Willard, after having held his deed unrecorded for about a year, returned it to Collins and had another deed made to Mrs. Gamble. The importance of these propositions of fact is undoubted.

If title had been vested in Collins by the delivery of a deed from Willard, it could not be devested, except by a deed signed and sealed by Collins. Handing back the deed received by him would not produce that result. A new deed, therefore, from Willard to Mrs. Gamble, would be entirely ineffectual. Nothing would pass by it. The performance of the contract on his part by Pinyard,

and which performance must be made out to enable him to sustain this action, depends upon the validity of the deed from Collins to Mrs. Gamble. The fact disputed is, therefore, the point upon which the case turns.

We do not, however, agree with the appellants in their estimate of the testimony. Willard and Collins are the only persons who could certainly know how the fact was. They were both called as witnesses, and testified on the subject. Collins testified positively and explicitly, as of his own knowledge and recollection, that the assignment to Mrs. Gamble was made at its date, in 1862; that no deed was ever made to him by Willard or to his wife, but that the deed was made to Mrs. Gamble in 1863. He denies that he ever made any statement to the contrary to John R. Parsons.

Willard testifies that he gave a deed to Collins, which was afterwards returned to him, and a deed made, at his request, in the name of Mrs. Gamble. Parsons testified that Collins told him, in December, 1862, that he had a deed of the premises, and that he received them free and clear.

There are many circumstances connected with the evidence of the witnesses to which it is not necessary to allude. It may, however, be mentioned that Mr. Willard admits that he afterwards gave a third deed of the same premises to Mr. Parsons. Mr. Parsons is one of the prominent actors in the drama throughout, and a party defendant in the suit. Again, no trace or memorandum is pretended to be found of the existence of the deed said to have been given to Mr. Collins. Mr. Willard was a business man, a real estate dealer; he always made duplicates of his contracts and preserved all his papers, occasionally overhauling them and burning up. It would be quite likely, if such a prior deed had been made, that there would have been some sign of it remaining. This witness testifies, after the lapse of ten years, (as all of them do,) after having suffered severely from malarial fever, from cerebro-spinal-meningitis, which affected him so seriously that a commission of lunacy was issued against him, and his property was given in charge of a commission.

We certainly do not see a case that calls upon us to overrule the judgment of the court trying the cause, upon these questions of fact.

It is strenuously insisted again, by the appellants, that Pinyard never performed that part of his contract where he agreed that "the title to the premises deeded to Spallinger should be perfected and the mortgage settled between A. M. Collins and Parsons." If

it became clear that the Parson mortgage was invalid, and if the possession of the premises was placed in Spallinger, as his assignee, and that the title was completed to their satisfaction or that their conduct was such as to create a satisfaction in law of their rights under this covenant, the mortgage will be deemed to have been "settled."

The court below found as a fact, and we believe correctly, that when Collins gave the mortgage referred to he had no title to the premises mortgaged, either legal or equitable. As he never received a deed to himself from Willard he never had the legal title. His equitable title was based upon the contract of purchase and sale executed to him by Willard, but this he had assigned to Mrs. Gamble in November, 1862, while his mortgage to Parsons was not executed until a period subsequent to that date. When he executed the mortgage to Parsons he had no title to the premises mortgaged, either legal or equitable. There was nothing to settle.

This property in question under the mortgage to Parsons was the same that was conveyed by Willard to Mrs. Gamble. She conveyed to Pinyard and Pinyard to Spallinger, in performance of the contract to enforce which this suit is brought. As has been stated, Collins having no title, legal or equitable, made a mortgage upon the same to John R. Parsons. A contest arose between Parsons and Spallinger which became the subject of a foreclosure suit, an ejectment and a forcible entry and detainer. This was while Spallinger was the owner under his deed from Mrs. Gamble, and he was the party to these contests against one Hubbard, in possession under Parsons, who defended the suit. Spallinger was at first unsuccessful, but finally regained possession, moving upon the premises, as Collins testifies, with his wife, children and furniture. Spallinger continued in possession until he left for parts unknown. While having the title and being thus in possession he settled the difficulties with Hubbard and sold to the defendant the Reed contract for the farm he had previously sold to Pinyard, and disappeared.

This seems to dispose of the difficulty. Spallinger settled his controversies with Hubbard and Parsons as he thought best, and if the defendants are his representatives by assignment or otherwise, settlement is conclusive upon them. If Spallinger made no transfer of his contract with Pinyard, as we understand to be the fact, then no one represents him, and the difficulty is settled by the acquiescence of the only person interested. Neither Mr. Mead, Mr. Parsons, Mr. Gates or Mr. Bill had anything to do with the mat-

ter. Pinyard testifies that he gave a warranty deed to Spallinger, and that he seemed to be entirely satisfied, and that he never requested that anything further should be done.

Pinyard alleges in the complaint that Spallinger conveyed the lot to Parsons. This Parsons in his answer denies. It is not alleged by any one, so far as we can discover, that Spallinger gave to any person an interest in or claim growing out of the covenant referred to. All questions upon the contract between Pinyard and Spallinger and its performance, may be considered as at an end.

We agree with the court below that the equities are strongly in favor of Pinyard, and we see no legal objections to their enforcement.

The decree of the court below is *Affirmed.*

Mr. E. S. Smith for appellants.

Mr. J. B. Fitzgerald and *Mr. Edward Bacon* for appellee.

BERREYESA *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

No. 83. Argued November 2 and 3, 1876. — Decided December 11, 1876.

When it does not appear that a grant from the Mexican Republic had been deposited and recorded in the proper public office, among the public archives of the republic, this court must decide adversely to a claim under it.

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

Notwithstanding the great ability with which this cause has been argued before us on behalf of the appellant, we are unable to distinguish it from a large number of cases to be found in our reports, in which we have felt compelled to decide adversely to claims made under alleged Mexican grants, because it did not appear that a grant from the Mexican government had been "deposited and recorded in the proper public office among the public archives of the republic." (*United States* v. *Cambuston*, 20 How. 64; *United States* v. *Castro*, 24 How. 349; *United States* v. *Knight, Adm.*, 1 Black, 251; *Peralta* v. *United States*, 3 Wall. 440.)

The decree of the District Court is, therefore, affirmed upon the authority of those cases. *Affirmed.*

Mr. H. W. Carpenter and *Mr. P. Phillips* for appellant.

Mr. Attorney General, Mr. Montgomery Blair and *Mr. S. O. Houghton* for appellee.

HERHOLD *v.* UPTON.

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

No. 125. Submitted November 29, 1876. — Decided December 4, 1876.

Upton v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; and *Webster* v. *Upton*, 91. U. S. 65, followed.

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

The principles decided in *Upton* v. *Tribilcock*, 91 U. S. 45; *Sanger* v. *Upton*, 91 U. S. 56; and *Webster* v. *Upton*, 91 U. S. 65, are conclusive of this case. The judgment of the Circuit Court is, therefore, affirmed upon the authority of those cases. If the stock held by Herhold is part of the increased capital, he is estopped by his acceptance of the certificate from denying the regularity of the proceedings under which the increase was effected. If it is part of the original stock, his liability exists whether the increase was made or not. In either event the testimony offered to show that he did not sign the assent to the increase of the capital stock, filed with the auditor of public accounts, was immaterial and properly excluded. *Affirmed.*

Mr. E. A. Otis for plaintiff in error.

Mr. L. H. Boutell for defendant in error.

MACKALL *v.* RICHARDS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 184. Argued and submitted March 15, 1877. — Decided March 19, 1877.

Affirmed upon the facts.

Mr. Chief Justice Waite announced the opinion of the court.

This record presents for our consideration only a question of fact, and without discussing the testimony it is sufficient to say that after a careful examination of the case we are entirely satisfied with the decree below, which is consequently affirmed. No further opinion will be delivered. *Affirmed.*

Mr. C. Ingle for appellants.

Mr. W. B. Webb and *Mr. Thomas Wilson* for appellees.

JOHANSSON *v.* STEPHANSON.

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

No. 194. Argued March 23 and 26, 1877. — Decided April 9, 1877.

The decree below is affirmed upon the facts.

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

We have carefully examined the voluminous record in this case, and while it is possible that the appellee took advantage of the inexperience of the appellant, and of his ignorance of the country in which he was, to secure an advantageous bargain, the evidence fails to show such fraud or misrepresentation as would justify us, under the established rules of equity jurisprudence by which our judgment must be governed, in decreeing a rescission of the contract, executed as it has been and acted upon by the parties. Many of the representations complained of are clearly nothing more than expressions of opinion. The appellant was taken to and shown the property before the bargain was concluded. The only fact about which there seems really to have been an error in statement was as to the boundary of the land on the river, and if that had been correctly described we do not think it would have changed the conduct of the parties. As to the overflow of the land and the health of the locality, the truth seems to have been stated in respect to the past and an opinion only given as to the probabilities in the future. *We must, therefore, affirm the decree.*

Mr. S. Corning Judd for appellant.

Mr. H. G. Miller and *Mr. Thomas G. Frost* for appellee.

DAVIES *v.* SLIDELL.
HUPPENBAUR *v.* SLIDELL.
AMES *v.* SLIDELL'S HEIRS.
SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF LOUISIANA.

Nos. 417, 435, 668 and 669. Submitted November 20, 1876. — Decided November 27, 1876.

Affirmed upon the authority of *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 156; and *Wallach* v. *Van Riswick*, 92 U. S. 202.

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

We are not inclined to hear a re-argument of the Federal ques-

tions presented by the records in these cases. They were decided in *Bigelow* v. *Forrest*, 9 Wall. 339; *Day* v. *Micou*, 18 Wall. 156; and *Wallach* v. *Van Riswick*, 92 U. S. 202. The court below has followed these decisions, with which we are entirely satisfied.

We, therefore, affirm the judgment in each of the several cases, under the practice authorized by the amendment to Rule 6, section 3, promulgated at the last term. *Affirmed.*

Mr. L. Madison Day, Mr. D. C. Labatt, Mr. T. J. Durant and *Mr. Charles W. Hornor* for plaintiffs in error.

Mr. Thomas Allen Clarke for defendants in error.

MORRILL *v.* WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 685. Submitted March 14, 1877. — Decided March 19, 1877.

Welton v. *Missouri*, 91 U. S. 275, followed.

Mr. Chief Justice Waite announced the opinion of the court.

The judgment in this case is reversed, upon the authority of *Welton* v. *Missouri*, 91 U. S. 275, which has already been followed by the Supreme Court of Wisconsin in *Van Buren* v. *Downing*, decided since this writ of error was taken and not yet reported.

The cause is remanded with instructions to enter a judgment reversing the judgment of the Circuit Court and directing that court to discharge the defendant from imprisonment and suffer him to depart without day. *Reversed.*

Mr. J. P. C. Cottrill for plaintiff in error.

Mr. I. C. Sloan for defendant in error.

PITTSBURGH LOCOMOTIVE AND CAR WORKS *v.* NATIONAL BANK OF KEOKUK.

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

No. 718. Submitted April 30, 1877. — Decided May 7, 1877.

Dismissed because the jurisdictional amount is not involved. *Bennett* v. *Butterworth*, 8 How. 124, distinguished.

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

The motion to dismiss this case is granted. The only matter in dispute between the parties is the judgment of $1508, recovered against the plaintiff in error and the surety upon the delivery

bond. The plaintiff has the possession of the property, and both that and the ownership have been adjudged in its favor, except to the extent of the lien which the defendants have to secure the payment of the judgment. Of this the defendants do not complain, so that the only question brought here for us to decide is whether the judgment for the money was properly rendered against the plaintiff. This is not sufficient in amount to give us jurisdiction. The case is not one where the value of the property in controversy shows the value of the matter in dispute, as was that of *Bennett* v. *Butterworth*, 8 How. 124, 128, relied upon by the counsel for the plaintiff. *Dismissed.*

Mr. H. Scott Howell for plaintiff in error.

Mr. James H. Anderson for defendant in error.

VAN NORDEN *v.* WASHBURN.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 795. Submitted April 23, 1877. — Decided April 30, 1877.

Van Norden v. *Benner*, 131 U. S. clxv., followed.

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

This case is in all its material facts precisely like that of the same plaintiffs in error against Benner, just decided, and is dismissed for the reasons stated in that opinion.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for plaintiffs in error.

Mr. Charles B. Singleton, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for defendant in error.

HAYNES *v.* PICKETT.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 837. Submitted January 15, 1877. — Decided March 13, 1877.

Ray v. *Norseworthy*, 23 Wall. 128, followed.

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

There is a Federal question in this case, but it was decided in *Ray* v. *Norseworthy*, 23 Wall. 128, and we are not inclined to hear it re-argued. The motion to dismiss is, therefore, denied, and that to affirm granted, upon the authority of that case. *Affirmed.*

Mr. B. R. Forman for plaintiff in error.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for defendants in error.

McCREADY *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 992. Stipulation to abide decision in No. 625 filed April 6, 1877. — Decided April 30, 1877.

McCready v. *Virginia*, 94 U. S. 391, followed by stipulation of parties.

MR. CHIEF JUSTICE WAITE announced the judgment of the court.

The parties having stipulated that this case shall abide the event of that just decided, (No. 625,) *McCready* v. *Virginia*, 94 U. S. 391, the judgment of the Supreme Court of Appeals of Virginia is affirmed.

Mr. L. R. Page and *Mr. Robert Ould* for plaintiff in error.

Mr. R. I. Daniel for defendant in error.

FIRST NATIONAL BANK OF CINCINNATI *v.* COOK.

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

No. 182. Argued January 28, 1878. — Decided February 11, 1878.

The order of the Circuit Court in this case, directing an assignment to the trustees in bankruptcy of the judgment against the oil company on bills transferred by the bankrupt to the appellant, is affirmed.

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

All the questions involved in this case were considered and decided at the present term in *Merchants' National Bank* v. *Cook*, 95 U. S. 342, and *West Philadelphia Bank* v. *Dickson*, 95 U. S. 180, except that which relates to the order of the Circuit Court directing an assignment to the trustees in bankruptcy of the judgment against the Ohio Lard and Sperm Oil Company upon the bills of that company, transferred by the bankrupt to the appellant with the other securities, and as to this we see no error in the action of the court below. The transfer of these bills as well as the others was void under the bankrupt law, and the title to them passed to the trustees in bankruptcy when appointed. The fact that in the hands of the bankrupt or his assignees the bills may not be good against the oil company does not affect this case. The bills whether good or bad belonged to the trustees, who have consequently the right to the judgment into which they have been merged. Whether the oil company will have the same defences

to the judgment in the hands of the trustees that it would have had to the bills before judgment, is a question which we need not now decide. It is certain that the appellant cannot hold the judgment as against the trustees, any more than it could the bills.

The decree is affirmed.

Mr. T. D. Lincoln for appellant.

Mr. George Hoadly and *Mr. Edgar M. Johnson* for appellees.

CORRY *v.* CAMPBELL.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No 187. Argued February 12, 1878. — Decided February 18, 1878.

Affirmed on the authority of *Davidson* v. *New Orleans*, 96 U. S. 97.

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

The only Federal question presented by this record was decided at the present term in *Davidson* v. *New Orleans*, 96 U. S. 97, and the judgment is affirmed upon that authority. We have no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice. *Affirmed.*

Mr. John W. Okey, Mr. Thos. L. Young and *Mr. Wm. M. Corry* for plaintiff in error.

Mr. T. B. Paxton, Mr. E. A. Ferguson and *Mr. J. W. Warrington* for defendant in error.

HUTCHINSON *v.* THE NORTHFIELD.

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

No. 213. Argued February 7 and 8, 1878. — Decided February 18, 1878.

On a review of the facts it is held that the Northfield was free from fault and the decree below is affirmed.

The case is stated in the opinion.

Mr. Justice Hunt delivered the opinion of the court.

The leading facts in this case were concurred in by the District Court and by the Circuit Court. Upon a careful review we are of the opinion that the conclusions reached were correct.

The schooner was free from fault, and her owner is confessedly entitled to his damages for her loss.

The misconduct of the Hunter (the tug) is so clearly established that it would be time wasted to illustrate it, and while the absence of fault on the part of the Northfield is a subject of more strenuous contention, we do not find much difficulty on that point.

The charges against her are, that she ran at too great speed, and that she held her speed too long.

She was a ferry boat running between New York and Staten Island, her ordinary rate of speed being sixteen miles to the hour, or thereabouts. On this occasion she put out of her New York slip at that rate of speed, with a helm partly ported, in the forenoon of a pleasant day, on an ebb tide, with smooth water, heading about southwest, with the tug and its tow on her starboard side and in full view. She made her speed and her course with deliberation and upon the facts as they were before her. Her officers perfectly understood that under the 13th of the sailing rules the responsibility devolved on her of keeping out of the way of the tug. The officers of the tug also perfectly understood that under the 18th of the same rules 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 upon that assumption. The evidence shows that the two vessels kept their courses and their speed, the tug going from four to six miles per hour, until the Northfield was within some eight hundred or nine hundred feet of the tug, when the latter stopped, so that, as the captain of the lost schooner says, she lay perfectly still on the water and ported her helm. The Northfield at once reversed her engine, but could not check her speed sufficiently to prevent a collision, and struck the schooner just forward of the mizzen rigging, about thirty feet from her stern, the schooner projecting aft of the tug.

If the tug had made thirty feet while the Northfield was making eight hundred feet, between the stopping of the tug and the collision, it is plain there would have been no collision. If the speed of the tug was five miles to the hour, it would have been about one-third of that of the Northfield, if not stopped or checked, and she would have gone one-third of this distance, that is, two hundred and sixty-three feet, before the Northfield could have reached her by traversing the eight hundred feet. All this was evident to the experienced eye of the manager of the Northfield, and no negligence can be charged in relying and acting upon it.

If the tug was moving at the speed of two miles only to the hour, as is assumed in some places, the proposition would not be so manifest, but the fault on the one side and the accurate judgment on the other would be equally certain. The convergence of the lines would have caused no material difference in the position of the vessel.

It is not alleged in the briefs that the failure of the engine of the Northfield to turn on its centre, by which the reverse motion could have been sooner obtained, is evidence of a defective machine, or of improper management of it. It is alleged simply as evidence of unreasonable speed, by which the prompt handling of the vessel was embarrassed.

This depends entirely upon the suggestions already discussed, and if the speed was reasonable, the course correct and the judgment wise, the failure of the engine to act as desired is an incidental result merely and no fault in consequence of it can be charged upon the Northfield.

There was no good reason at any time to suppose that the Northfield intended to cross the bows of the tow. As she came out of her slip she headed to the south, swinging gradually to the west, and for a time her course pointed across the bow of the tow; but this was temporary, and was constantly altering. The attempt thus to cross would have been rash and attended with many dangers, and never was, in fact, entertained for a moment by the Northfield.

We are of the opinion that the Northfield was free from fault, and that the decree should be *Affirmed.*

Mr. Henry J. Scudder and *Mr. James C. Carter* for appellant.

Mr. W. A. Beach and *Mr. Miles Beach* for appellee.

CLARK *v.* BEECHER.

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

No. 214. Argued February 8, 1878. — Decided March 25, 1878.

A decree setting aside a conveyance by a bankrupt to his wife as fraudulent is sustained; but it is also held that a personal decree against her for rents, issues and profits, and for the use and occupation of the premises was error.

Mr. Justice Swayne delivered the opinion of the court.

The bill charges that a fraudulent settlement was made by

Abraham Clark, the bankrupt, upon the appellant, his wife. The Circuit Court decreed against her and she brought the case here for review.

Recently several of these cases in their aspects of both fact and law have been very fully considered by this court.

Each controversy must necessarily depend for its termination upon its own facts and circumstances. The rules of law which apply are well settled. In this case nothing could be gained either to the profession or the parties by going in detail over the facts or the law, however elaborately the work was done.

We, therefore, deem it sufficient to say that we are satisfied with the judgment of the Circuit Court upon the main point brought before it for consideration. We think the conveyance complained of was properly condemned as fraudulent, and, therefore, held to be void.

But it is equally clear that the personal decree against the appellant for the rents, issues and profits, and the use and occupation of the premises, was erroneous.

Upon this subject it is sufficient to refer to the opinion of this court in the cases of *Phipps* v. *Sedgwick*, and of *Place* v. *Sedgwick*, 95 U. S. 3, and to the opinion in the *United States Trust Company* v. *Sedgwick*, 97 U. S. 304, just delivered.

This case will be remanded to the Circuit Court, with directions to modify the decree in conformity to this opinion.

Mr. Luther R. Marsh and *Mr. W. F. Shepherd* for appellant.

Mr. Francis N. Bangs for appellee.

STRONG *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 387. Submitted January 14, 1878. — Decided February 11, 1878.

By the terms of a charter party to the United States, the owner of a vessel undertook to keep her tight, staunch, strong and sound, and her machinery, boilers and everything pertaining to her in perfect working order, and to provide her with everything necessary for efficient sea-service. The government undertook to deliver the vessel to the owner in New York at the expiration of the charter party in as good condition as she was at the signing of it, ordinary wear and tear, damage by the elements, bursting of boilers, breaking of machinery excepted. The vessel was injured and sunk by a marine risk assumed by the charterer while engaged in the transportation of stores and men in the waters of North Carolina. She was raised and taken to New Berne, where she was tem-

porarily repaired by the government; but, being found out of order, was discharged at Port Royal by the government, and taken to New York by the owner. *Held*, that by reason of the failure of the owner to keep the vessel tight, staunch, strong and sound, the government was relieved from its liability to deliver the vessel to the owner in New York.

Mr. Justice Harlan delivered the opinion of the court.

In this action upon a charter party, executed March 15, 1862, between Strong and the United States, for the use of his steamer Ocean Wave, he asks judgment for the amount he expended in repairing her after she had been discharged from the service of the government, and also for *per-diem* compensation, at the rate fixed in the contract, for the time occupied in taking her from Port Royal, North Carolina, to New York, and in repairing her.

The Court of Claims was equally divided upon the question of his right to recover, and his petition was dismissed.

By the terms of the charter party the government was entitled to the whole and exclusive use of the steamer during the term she was in its service. To the extent of her capacity, it was the duty of Strong to receive and transport all the "passengers" and the "stores, wares and merchandise" which the government might send to her. Her use was not limited to any particular waters, and as it was clearly within the contemplation of the contracting parties that she would be employed in aid of the military forces then engaged in the war for the maintenance of the Union, sending her to the waters of North Carolina and there employing her for the transportation of stores and men were clearly authorized by the charter party. Munitions of war were "stores," and soldiers, "passengers," within the meaning of that instrument.

Nor was it an unauthorized use of the vessel to send her up the Neuse River with other boats, on the expedition ordered in December, 1862, by General Foster, of the Federal forces. Before starting, a thirty-pound Parrott gun and its carriage, such as are used on naval vessels, together with ammunition for the gun, and seventeen artillerymen, with their small arms and provisions for the expedition were put on board. The presence of the artillerymen on the vessel was certainly not inconsistent with the terms of the charter party. In reference to the gun, it is claimed by Strong that the vessel had not the capacity to bear safely such a heavy piece of artillery, and, consequently, that such a use of her was prohibited by the charter party. Her captain objected at the time to the gun being placed on her, but his objections were disregarded. It is not stated in the findings whether the gun was placed on the

vessel for her protection, or for offensive operations against the rebels. But it is found that after she left the vicinity of the rebel fort, the reduction of which seemed to be the object of the expedition, the gun was used to meet an attack of rebel infantry, who fired from the shore into the vessel. The concussion of the firing "swept off the bulwarks and netting in the track of the explosion," and one of the effects was "to start the joiner work, and to break in some of the panels of the doors, and to take a part of the rail off." Upon the same occasion she struck an overhanging tree, which took off a part of the wheel house and swept off both of the flagstaffs, and all the awning stanchions. Proceeding down the river, and when three miles above New Berne, she struck a snag and sunk. She was raised and taken to New Berne, and there "temporarily repaired by the government."

Casualties such as striking trees and snags, and sinking, were clearly marine risks which the owner expressly assumed, and the fact that during the expedition when they occurred the vessel was managed by a pilot placed on her by the government officers cannot affect the rights of the parties. The captain does not appear to have made any objection to such a pilot, nor is it claimed that the latter was negligent or unskilful in the discharge of his duty. On the contrary, he belonged to the neighborhood, and was familiar with the river. In regard to the claim for damages resulting from the firing of the gun, we remark that if such use of the vessel were conceded to be in violation of the charter party, we should be unable to ascertain from the record the amount of those damages. How far they were met by the temporary repairs made by the government, upon the return of the vessel from the expedition, is not stated. When she reached New York, after having been discharged from service, it is stated in the findings that she was "generally repaired throughout." What portion of these general repairs was chargeable to the injuries occasioned by the marine risks which the owner assumed, and what portion, if any, was chargeable to the injuries caused by war risks which the government assumed, cannot be determined from the record.

The only question which remains to be considered, is that arising on the asserted liability of the government for the *per-diem* compensation for the time spent in taking the vessel from Port Royal, and in repairing her in New York. The charter party, it is true, expressly provided that she "was to be delivered to the owner in the port of New York, at the expiration of the charter, in as good condition" as she was at its date, "ordinary wear and tear, damage

by the elements, bursting of boilers, breaking of machinery, excepted." In view of this stipulation, was the government, under the facts established, relieved from the duty of delivering her at New York? We think it was. By the terms of the charter party the owner was bound, at his own expense, to keep the vessel tight, staunch, strong and sound, and her machinery, boilers and everything pertaining to her in perfect working order, and to provide her with everything necessary for efficient sea-service. Any time which might be lost by reason of the machinery not being in order was to be deducted from the amount claimed to be due at the expiration of the charter. Now, it appears that on the 4th of March, 1863, the vessel was out of order and condemned by the government inspectors, and for those reasons was discharged at Port Royal from the service of the government. It does not appear that this condemnation was improper or unjust. It is not pretended that she was at that time fit for efficient sea-service. The agreement of the government to pay two hundred dollars per day for the use of the vessel was upon the condition — whether precedent or concurrent is immaterial — that the owner would keep her in good order. His neglect of that duty, by reason of which she became unsafe and worthless for the purposes for which she had been hired, authorized the government to abandon the contract and discharge her from its service. Its obligation to deliver her at New York was concurrent only with his to keep her in proper condition, and inasmuch as she was out of order and unfit for use, it had the right to discharge her at Port Royal, and was relieved from the duty of delivering her to him at New York. His refusal to execute the contract gave the government the option to rescind it.

Judgment affirmed.

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for appellant.

Mr. Attorney General and *Mr. Assistant Attorney General Smith* for appellee.

GOODENOUGH HORSE-SHOE MANUFACTURING CO. *v.* RHODE ISLAND HORSE-SHOE CO.

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

No. 665. Submitted October 15, 1877. — Decided November 5, 1877.

Until the record of a judgment in a state court which this court is called upon to examine discloses the question necessary to give it jurisdiction, this court cannot proceed.

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

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

The Rhode Island Horse-Shoe Company, a citizen of Rhode Island, sued the Goodenough Horse-Shoe Manufacturing Company, a citizen of New York, in the Supreme Court of the State of New York to recover an amount alleged to be due upon an account for goods sold. Summons was served September 14, 1876, and October 5, 1876, judgment was rendered against the defendant upon default, in accordance with law and the practice of the court in such cases. The record of the judgment as sent here shows this state of facts and nothing more.

On the 9th of October the defendant moved the court to vacate the judgment, and in support of that motion produced affidavits tending to prove that on the 3d of October it had filed its petition for the removal of the cause to the Circuit Court of the United States. No effort was made, however, to correct the record as it stood so as to disclose this fact. This motion being denied the defendant below sued out this writ of error which the plaintiff now moves to dismiss for want of jurisdiction.

We can only reëxamine the final judgment in the suit, and for that purpose must look alone to the record of that judgment as it is sent to us. If parts of the record below are omitted in the transcript we may by *certiorari* have the omissions supplied, but we cannot here correct errors which actually exist in the record as it stands in the state court. For that purpose application must be made there, and, if necessary, upon sufficient showing we may remand the case in order that the court may proceed.

In this case the judgment was rendered October 5, and the record of the *judgment* stopped then. What took place afterwards was nothing more than an attempt to avoid the judgment. The facts which it is claimed give us jurisdiction appear only in the record of this subsequent proceeding, over which we have no supervision. If the defendant below desires to bring the case here it must take the necessary steps to correct the record, if in fact any error exists, so as to present the question it seeks to have decided. It is unnecessary for us to determine how this may be done or whether the courts of the United States have authority to require the state court to act in that regard. All we do decide is that until the record of the judgment we are called upon to examine discloses the question necessary to give us jurisdiction, we cannot proceed.

The motion to dismiss for want of jurisdiction is granted.

Mr. H. M. Ruggles for plaintiff in error.

Mr. Charles Tracy for defendant in error.

UNITED STATES *v.* ATCHISON, TOPEKA &c. RAILROAD CO.

APPEAL FROM THE COURT OF CLAIMS.

No. 875. Submitted February 20, 1878. — Decided April 8, 1878.

The mandate of this court in this case was fully complied with by the Court of Claims.

THE case is stated in the opinion of the court.

MR. JUSTICE FIELD delivered the opinion of the court.

The question originally involved in this case, and decided at the October Term of 1876, was whether the provision contained in the land grant to the company, that its road should be a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of its property and troops, not only entitled it to the free use of the road, but also to have the transportation made by the company without charge. The company claimed that the use of the road was all that could be required of it. The government, insisting that it was also entitled to have such transportation without charge, refused compensation therefor, and referred the matter to the Court of Claims for determination. That court estimated the cost of the transportation according to the ordinary tariff rates of the road with other parties for similar services, after making a deduction of one-third from the rates. This deduction had been deemed by the War Department, upon careful consideration, to be the equivalent of any toll or charge for the use of the road itself, and upon that basis the services had been rendered. But the judges of the Court of Claims, being equally divided upon the question of the liability of the United States to make any compensation, gave judgment *pro forma* in their favor against the company. On appeal this court reversed the judgment, holding that the government was entitled only to the free use of the road, and that compensation must be made for the transportation, with a fair deduction for such use. The case was accordingly remanded with directions to enter a new decree awarding compensation with such deduction.

On the return of the case to the court below the claimant moved for judgment for the amount previously found according to the ordinary tariff rates less the deduction of one-third, as established by the War Department. By agreement of the parties such judgment was entered, the government reserving the right to show that a judgment for that amount was not required by the mandate of

this court, and, if it should be so decided, to try the question as to what was a fair deduction.

On the subsequent hearing of the point reserved, which was had upon a motion to set aside the judgment, the opinions of eminent "railroad experts" were read, by stipulation of the parties, to show what would be a fair deduction from the ordinary tariff rates for the use of the road. There would seem to have been some difference of opinion among the experts, but their evidence failed to show, in the opinion of the court, that the reduction agreed upon between the parties and the War Department was not a fair one. On the trial of the case it was not pretended by the claimant that the amount was arbitrarily fixed or that it was illegal or oppressive, or by the government that any greater reduction should have been made. Nor was the authority of the War Department to make an arrangement of this kind questioned, if under the law the government was liable for the transportation. If such authority do not now exist, as contended, under the subsequent legislation of Congress, and upon which point we express no opinion, there can be no doubt of its existence when the services were rendered for which compensation is claimed here.

We are of opinion that the mandate of this court was fully complied with by the Court of Claims, and its judgment is, therefore,

Affirmed.

Mr. Attorney General and *Mr. Assistant Attorney General Simons* for appellant.

Mr. Thomas H. Talbot for appellee.

INDIANAPOLIS & ST. LOUIS RAILROAD CO. *v.* VANCE.

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

No. 897. Argued February 1, 1878. — Decided April 1, 1878.

Railroad Co. v. *Vance*, 96 U. S. 450, followed.

Mr. Justice Harlan delivered the opinion of the court.

The decision just rendered in Case No. 896, 96 U. S. 450, between the same parties, controls the decision in this case.

Decree affirmed.

Mr. B. W. Hanna for appellant.

Mr. James K. Edsall for appellees

HAGAR *v.* CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 898. Submitted October 15, 1877. — Decided November 12, 1878.

This court has no jurisdiction over a judgment of a state court when it does not appear that a Federal question was raised, and that it was either decided or necessarily involved in the judgment pronounced.

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

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

It nowhere appears from this record that any Federal question was actually decided by the court below. None is specifically made by the pleadings, and we cannot find that any was raised under the general allegations in the answer or demurrer. The whole defence seems to have been predicated upon a supposed repugnancy between the law authorizing the assessment and the state constitution, and upon certain alleged irregularities in the proceedings under the law. It is not enough that a Federal question might have been raised. We have no jurisdiction unless it actually was raised and either decided or necessarily involved in the judgment pronounced. Mr. Justice Story, in *Crowell* v. *Randall*, 10 Peters, 368, decided in 1836, after reviewing all the cases down to that time, thus states the rule: "It is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise and was applied by the state court to the case." To the same effect is *Edwards* v. *Elliott*, 21 Wall. 532, 558.

The motion to dismiss is granted.

Mr. Montgomery Blair for plaintiff in error.

Mr. A. A. Sargent, Mr. S. W. Sanderson and *Mr. Wm. Blanding* for defendants in error.

KEOGH *v.* ORIENT FIRE INS. CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 917. Submitted January 14, 1878. — Decided January 28, 1878.

The facts stated in the opinion show that there is not a sufficient amount involved in this case to give this court jurisdiction.

THE case is stated in the opinion.

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

We have no jurisdiction in this case. The litigation below involved in the appeal was between Keogh and the Orient Fire

Insurance Company as to the ownership of a fund in court for distribution, amounting to $1411.44. Each of the parties claimed the whole, but the court divided it between them, giving Keogh $729.16, and the Insurance Company $682.29. Keogh alone appeals. The Insurance Company is satisfied. It is clear, therefore, that the value of the matter in dispute here is only $682.29. To give us jurisdiction in appeals from the Supreme Court of the District of Columbia, the matter in dispute must exceed $1000. — (Rev. Stat. Sec. 705.) *Appeal dismissed.*

Mr. Enoch Totten for appellant.

Mr. S. R. Bond for appellees.

NORTHWESTERN LIFE INSURANCE CO. *v.* MARTIN. SAME *v.* WELLBORN.

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

Nos. 1009 and 1008. Submitted December 17, 1877. — Decided January 7, 1878.

Thompson v. *Butler*, 95 U. S. 694, followed.

THE case is stated in the opinion.

MR. CHIEF JUSTICE WAITE announced the decision of the court.

Verdicts having been rendered in each of these cases against the plaintiff in error (the defendant below) for more than five thousand dollars, the plaintiffs respectively remitted all over that sum, and judgments were entered by the court, against the remonstrance of the defendant for five thousand dollars and no more. The cases having been brought here by the defendant below, the defendants in error (plaintiffs below) moved to dismiss because the amount in controversy is not sufficient to give us jurisdiction.

The question thus presented has just been decided in *Thompson* v. *Butler*, 95 U. S. 694, and the motions are granted for the reasons stated in the opinion read in that case.

Mr. Wm. P. Lynde and *Mr. L. D. McKisick* for plaintiff in error.

Mr. Josiah Patterson for defendants in error.

WILSON *v.* GOODRICH.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 100. Argued December 20, 1878. — Decided December 23, 1878.

Claflin v. *Houseman*, 93 U. S. 130, followed.

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

In *Claflin* v. *Houseman*, 93 U. S. 130, we held that an assignee in bankruptcy under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring suit in the state courts, whenever those courts were invested with appropriate jurisdiction suited to the nature of the case. This suit was begun March 18, 1872, before the Revised Statutes were in force. Section 5597 provides that the repeal of the acts embraced in the revision should not affect any suit or proceeding had or commenced in any civil cause before the repeal. This leaves the present case, therefore, within the rule settled in *Claflin* v. *Houseman*, and renders it unnecessary to consider whether the jurisdiction in this class of cases was taken away by the revision as to suits afterwards commenced.

Judgment affirmed.

Mr. Edward Avery for plaintiff in error.

Mr. N. B. Bryant for defendant in error.

JAEGER *v.* MOORE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 232. Argued April 15, 16, 1879. — Decided May 5, 1879.

On the facts, the decree below is reversed in part, and in part affirmed.

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

This decree is reversed as to the appellant Ulman, but in all other respects affirmed. The cause is remanded with instructions to dismiss the bill as to Ulman, and to enforce the deed of trust under which the appellee claims only against that part of the premises therein described which was not conveyed to him. The costs of this court are to be paid, one-half by the appellants Jaeger, and one-half by the appellee. No further opinion will be delivered.

Mr. Enoch Totten and *Mr. Linden Kent* for appellants.

Mr. Robert D. Morrison and *Mr. E. J. D. Cross* for appellee.

BURKE *v.* TREGRE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 253. Submitted April 23, 1879. — Decided May 5, 1879.

Burke v. *Miltenberger*, 19 Wall. 579, followed.

The finding of the Supreme Court of the State as to the suspension of General Orders Nos. 60 and 70 is sustained by the evidence.

MR. CHIEF JUSTICE WAITE announced the judgment of the court.

The only Federal question presented for our consideration in this case not decided adversely to the present appellant in *Burke* v. *Miltenberger*, 19 Wall. 579, is that which relates to the effect of General Orders Nos. 60 and 70 upon the judicial sale under which the appellees claim. As to these orders it was found as a fact by the Supreme Court of the State that they were suspended by a special permit allowing the sale to be made, and we think this finding is sustained by the evidence. *Judgment affirmed.*

Mr. George S. Lacey for plaintiff in error.

Mr. Thomas L. Bayne for defendants in error.

LEAVENWORTH *v.* KINNEY.

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

No. 744. Submitted January 10, 1879. — Decided March 3, 1879.

Commissioners v. *Sellew*, 99 U. S. 624, followed.

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

This case is substantially disposed of by that of *Board of County Commissioners of the County of Leavenworth* v. *Sellew*, just decided, 99 U. S. 624. A peremptory writ of mandamus has been ordered against the mayor and council of the city of Leavenworth in their corporate capacity, and the objection is that it should have been directed to the persons who were mayor and councilmen. The principle upon which the decision in the other case rests is conclusive of this, and the judgment of the Circuit Court is consequently affirmed, and the cause remanded with authority, if necessary, to so modify the order which has been entered, in respect to the time for the levy and collection of the tax, as to make the writ effective for the end to be accomplished. *Affirmed.*

Mr. M. H. Carpenter for plaintiff in error.

Mr. T. A. Hurd and *Mr. L. B. Wheat* for defendant in error.

CASE *v.* MARCHAND.

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

No. 804. Submitted January 13, 1879. — Decided January 27, 1879.

In a case of conflicting evidence on a question of fact, the court affirms the decree of the court below.

THE case is stated in the opinion.

MR. JUSTICE MILLER delivered the opinion of the court.

The Crescent City National Bank of New Orleans having failed to redeem some of its circulating notes, on a demand made March 17, 1873, was put into liquidation, and the present appellant appointed receiver by the comptroller of the currency. In the process of liquidation the comptroller issued a call of seventy per cent upon the amount of the capital stock held by each shareholder at the time of the failure, and the suit now before us on appeal is a bill in equity brought in the Circuit Court of the United States to discover who was liable under this order on fifty shares of the stock, standing in the name of Edward Lubie, and for a decree for the sum assessed.

The bill charged that Lubie was insolvent, and that the transfer of the shares on the books of the corporation, made by Keenan, one of the defendants, to Lubie, a day or two before the failure, was a device to evade the liability under the act of Congress, which it is the purpose of this bill to enforce, and that Alfred Marchand, the other defendant, was the real owner of the stock when the bank failed.

Lubie permitted a decree to be taken *pro confesso* against himself, and then became a witness against Marchand, and swears that he merely acted for Marchand and permitted the stock to be transferred to his name, because he was insolvent and could not be hurt, and that Marchand furnished the money paid to Keenan for the shares. Marchand denies all this under examination as a witness. There is much other conflicting and doubtful testimony. The case is one whose decision involves no question of law, and is otherwise unimportant, and we shall not criticise the evidence closely in this opinion. Lubie renders himself incredible by his own confessions and by his manner of testifying. The books of the company and the certificates of the shares delivered to him are record evidence against him, and while there are suspicious circumstances against Marchand, there is not enough to justify us in reversing the decree of the Circuit Court in his favor, and it is accordingly

Affirmed.

Mr. J. D. Rouse and *Mr. William Grant* for appellant.

Mr. Joseph P. Hornor for appellees.

FAXON *v.* RUSSELL.

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

No. 846. Submitted January 13, 1879. — Decided January 20, 1879.

Arthur v. *Davies*, 96 U. S. 135, followed.
Arthur v. *Rheims*, 96 U. S. 143, applied.

MR. CHIEF JUSTICE WAITE announced the judgment of the court.

The judgment in this case is reversed upon the authority of *Arthur* v. *Davies*, 96 U. S. 135, and the cause remanded for further proceedings in accordance with this decision. Upon another trial, however, no allowances can be made for the reduction of ten per cent claimed under Sec. 2. of the act of June 6, 1872, (17 Stat. 232,) that point having been decided adversely to the plaintiff in error in *Arthur* v. *Rheims*, 96 U. S. 143. *Reversed.*

Mr. Charles Levi Woodbury for plaintiff in error.

Mr. Attorney General for defendant in error.

BETTS *v.* MUGRIDGE.

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

No. 870. Submitted January 6, 1879. — Decided January 13, 1879.

A bill of exceptions cannot bring up the whole testimony for review whether the case has been tried by the court, or by a jury.

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

This cause was tried by the court below without the intervention of a jury. The facts were not agreed upon and there is no special finding. No exceptions were taken to the rulings of the court in the progress of the trial, but all the evidence has been embodied in a bill of exceptions, and the only error assigned is that the general finding of the court was in favor of the defendant below when it should have been for the plaintiff. We have often decided that a bill of exceptions cannot be used to bring up the whole testimony for review when the case has been tried by the court, any more than when there has been a trial by jury. *Norris* v. *Jackson*, 9 Wall. 125, 128; *Insurance Co.* v. *Sea*, 21 Wall. 158.

The judgment is affirmed.

Mr. Alfred B. Mason for plaintiff in error.

Mr. Charles M. Sturges for defendants in error.

INGERSOLL *v.* BOURNE.

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

No. 949. Submitted November 25, 1878. — Decided December 2, 1878.

An appeal to this court will not lie from the judgment of a Circuit Court in a proceeding by a creditor to prove his demand against the estate of a bankrupt.

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

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

In *Wiswall* v. *Campbell*, 93 U. S. 347, we decided that an appeal to this court would not lie from the judgment of a Circuit Court in a proceeding by a creditor to prove his demand against the estate of a bankrupt. This is clearly such a case. Although on account of the peculiar character of the demand, the proceeding assumed to some extent the form of a suit in equity, it was instituted and carried on solely for the purpose of obtaining the allowance of the demand against the estate of the bankrupt.

The motion to dismiss is, therefore, granted upon the authority of the case cited. *Dismissed.*

Mr. G. Gordon Adam and *Mr. P. Phillips* for the motion.

Mr. W. B. Pittman and *Mr. A. B. Pittman* opposing.

DOLD *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 955. Submitted December 10, 1878. — Decided December 23, 1878.

The judgment of the Court of Claims is affirmed on the facts.

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

The facts found below present the following case:

In October, 1864, the Chief Commissary of Subsistence for the Military Department of New Mexico advertised that he would receive proposals at his office in Santa Fé, until January 2, 1865, for the delivery of 1,000,000 pounds of corn at Fort Sumner in three instalments, to wit: 500,000 pounds not later than May 31, 250,000 pounds not later than June 30, and 250,000 pounds not later than July 15. Dold, the appellant, then being at Las Vegas, N.M., was the successful bidder. He was notified January 15, and on the 30th C. W. Kitchen wrote the commissary from Las Vegas as follows: "My corn train is now close at hand. Would you have the kindness, if convenient, to authorize the A. C. S. at

Fort Sumner to receive corn on Andres Dold's contract? I will have about 85,000 pounds, I think, which I will get an order from Mr. Dold to turn in on his contract." On the 5th February, the commissary replied that he could not give an order to Dold to deliver or to the acting commissary to receive, until the contracts were signed and approved by the general commanding. On the same day the commissary forwarded the contract from his office to the commanding general for approval. On the next day, the 6th, he wrote Kitchen, who was one of the sureties for Dold on the contract, as follows:

"I am just in the receipt of the contract signed by Andres Dold and securities. Your proposition on behalf of Andres Dold to deliver 85,000 pounds which you now have on hand, on his (Dold's) contract, is accepted. You will proceed to deliver it without delay. The A. C. S. at Fort Sumner will be directed to receive it."

After this, February 18, Kitchen delivered to the officers of the commissary department at Fort Sumner, 28,747 pounds, and, February 24, 34,580 pounds, for which the chief commissary forwarded to the commanding general, March 24, accounts or vouchers in the name of Dold, for his approval. In a communication accompanying the accounts, he wrote as follows:

"This corn, delivered on the contract of Mr. Dold, was, as I was made to understand from a statement made to me by Mr. Dold, brought from the States by Mr. C. W. Kitchen, and was *en route* from the States before the contract was given. Mr. Kitchen himself told me when the bids were opened in my office, that his train from the States with corn was within striking distance, which would account for the early delivery."

The commanding general, however, disapproved the vouchers and directed that the delivery be not accepted under the contract. The corn was actually used in the public service, and in March, reported by the commissary who made the purchase, to the Commissary General of Subsistence of the Army, as purchased from Dold at the lowest market rates, not paid for, but certified accounts given. The price stated in the report was that fixed by Dold's contract.

No deliveries were made by Dold until July 16, when he delivered 407,561 pounds. On the 22d July, the commanding general from his headquarters at Santa Fé, through the chief commissary at the same post, communicated to Kitchen the fact that he withheld his approval of the accounts for his deliveries, and at the

same time proposed to pay him for the corn at the price it could have been purchased for at the time of delivery in the open market. On the 23d a voucher for this corn was made out in the name of Kitchen "as purchased in open market by order of the department commander," at 16.37 cents per pound, and Kitchen was paid at that rate, he receipting therefor "as in full of the above account." On the same day Dold addressed a letter to the chief commissary, in which he said he had just received information that the Kitchen delivery would not be accepted on his contract, and concluding as follows:

"Having made my arrangements for the delivery of the million pounds of corn, including the 63,327 pounds, if I am required now to deliver the million of pounds exclusive of the 63,327 pounds referred to, I most respectfully ask for an extension of time for the delivery of said amount until some time in the coming fall."

On the 29th July this request was acceded to and the time extended to November 15.

On the 25th and 31st July deliveries were made by Dold sufficient to complete the first instalment under the contract. The second instalment was filed between July 31 and August 28; and between August 21 and December 30, 240,545 pounds were turned in on account of the third instalment. There was no further delivery, and, for such as were made, Dold was paid in full according to the contract.

When Kitchen was paid upon the vouchers in his favor, July 23, it was understood that an appeal might be made to the War Department for the difference between the amount paid and the contract price. An appeal to that effect was prosecuted April 8, 1866, but without success.

This suit was commenced, February 16, 1871, to recover such difference, and judgment having been rendered in favor of the United States, Dold appealed.

A bare statement of the case seems to us sufficient to show that the judgment below was right. It is not pretended that Dold owned the corn delivered by Kitchen, or that he has been in any manner injured by the refusal of the commanding general to receive it under the contract. If this were a suit against him to recover damages for not delivering, and he were defending because of the tender by Kitchen, the question would be whether that was such an offer to perform on his part as would excuse him from liability for a failure to deliver to that extent.

But instead of being such a suit it is one to recover for a deliv-

ery actually made under the contract. To this the government answers:

"The corn for which you now claim was not accepted as a delivery under the contract. You were so informed at the time and, acquiescing in the decision, asked further time to complete your performance. This was granted. Your other deliveries have been made and accepted and you have been paid in full. Kitchen, who actually owned the corn not accepted, has been paid for it at the market price upon a voucher in his name. He cannot claim under the contract, for he was no party to it, and you cannot complain because, acquiescing in the refusal to accept his corn, you have performed your contract in another way and been paid in full."

It seems to us this answer is conclusive. We need not consider any question arising upon the exclusion of Kitchen as a witness, which the appellant has attempted to put into the record, for had his testimony all been admitted the result must have been the same. Dold did not stand on his rights under the tender of Kitchen's delivery and refuse to yield to the decisions made against him, but went on and fulfilled his contract in accordance with the claim of the government as to his obligation, and now, apparently for Kitchen's benefit alone, seeks to compel the government to pay for Kitchen's corn at the contract price instead of the market rates. *Judgment affirmed.*

Mr. Harvey Spalding for appellant.

Mr. Attorney General and *Mr. Solicitor General* for appellee.

WILLIAMS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1058. Submitted January 24, 1879. — Decided February 3, 1879.

The acceptance by a supernumerary officer in the Continental line of an appointment in the regiment of guards authorized by the State of Virginia took him out of the line and put him into the new organization.

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

From the finding of facts sent up with this appeal we are clearly of the opinion that Dr. Taylor did not "continue in service until the end of the war," within the meaning of the Resolutions of Congress of October 21, 1780, and of March 22, 1783, under which the claim in this case is made. When he accepted his appointment in the regiment of guards, January 9, 1779, he ceased to be a supernumerary surgeon's mate and became an active officer in the

new regiment. Consequently when that regiment was discharged because its term of enlistment had expired, he was out of service. When the new regiment was raised the Governor and Council of Virginia were authorized by Congress to appoint its officers out of those in the Virginia line who were then supernumerary. Although it is said in one of the additional findings, that Dr. Taylor was "assigned to active duty," this is to be construed in connection with the resolution to which reference is made, and that being done it is apparent there was no intention by that language to modify the previous finding that "he was appointed surgeon's mate of the regiment of guards authorized by the resolution of January 9, 1779, of the Continental Congress." By the resolution Congress permitted the supernumerary officers in the line to accept appointments in the new regiment. Such an acceptance took them out of their former position in the line and put them into the new organization. *The judgment of the Court of Claims is affirmed.*

Mr. P. E. Dye for appellant.

Mr. Attorney General, *Mr. Solicitor General* and *Mr. Assistant Attorney General Smith* for appellee.

NORTH *v.* McDONALD.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

No. 41. Submitted November 4, 1879. — Decided November 10, 1879.

On the case made by the pleadings the court will not disturb the judgment below.

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

The plaintiffs below evidently intended to bring this action under sec. 5129 of the Revised Statutes, but the averments in their petition are only sufficient to make a case under sec. 5046. While the court would certainly have been justified in leaving the question of fraud to the jury upon the evidence as it stood, we think, if a judgment had been rendered against the defendants, it might with propriety have been set aside as being contrary to what had been proven. For this reason, although it might have been more in accordance with correct practice not to take the case from the jury, we will not disturb the judgment. No request was made for leave to amend the petition, and we must consider the case here as made by the pleadings, and not as the parties may have intended to make it. *The judgment is affirmed.*

Mr. C. W. Bramel and *Mr. W. W. Corlett* for plaintiffs in error.

Mr. Edward P. Johnson for defendants in error.

LAMMERS *v.* NISSEN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 72. Argued and submitted November 17, 1879. — Decided November 24, 1879.

When the District Court in a State has given a judgment which involves the finding of a fact in dispute, and that judgment is affirmed by the Supreme Court of the State, this court will not disturb the judgment of the latter unless the error be clear.

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

The only question in this case is whether as a matter of fact, when Lammers, the plaintiff in error, purchased from the United States, lot 1, sec. 12, T. 33, R. 1, Dakota City land district, there was in front and outside of the meandered line of the lot any land that could be cultivated, or that bore trees of value, or grass sufficient for grazing purposes. There is no dispute between the parties as to the law. The District Court of Cedar County found there was such land and this finding has been affirmed by the Supreme Court of Nebraska on appeal. Under such circumstances we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way, on a question of fact.

After a careful examination of the evidence, we are satisfied with the result reached by the court below, and the judgment is, consequently, *Affirmed.*

Mr. M. H. Carpenter, Mr. S. W. Packard, Mr. James Coleman, and *Mr. G. C. Moody* for plaintiff in error.

Mr. B. F. Grafton and *Mr. H. E. Paine* for defendants in error.

WOOLFOLK *v.* NISBET.

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

No. 73. Argued November 17–18, 1879. — Decided December 1, 1879.

On the facts it is held that the conveyance which is the subject of dispute in this suit was fraudulent under the bankrupt laws.

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

After full consideration of all the evidence in this case we are satisfied —

1. That James H. Woolfolk was insolvent when he made the conveyance to Sowell C. Woolfolk, which is complained of;

2. That Sowell C. Woolfolk had reasonable cause to believe such insolvency when he received the conveyance; and

3. That the conveyance was made with a view to defeat the object and operation of the bankrupt law.

There is no dispute about the law applicable to this state of facts, and as we deem it unnecessary to discuss the evidence in detail, no further opinion will be delivered.

The decree of the Circuit Court is *Affirmed.*

Mr. Clifford Anderson for appellants.

Mr. R. F. Lyon for appellee.

FOLLANSBEE *v.* BALLARD PAVING CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 102. Argued December 10 and 11, 1879. — Decided December 15, 1879.

The decree from which this appeal was taken was not a final decree.

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

The motion to dismiss this appeal is granted. The decree appealed from is not a final decree. The amount due from the appellant has not been ascertained. *Dismissed.*

Mr. William A. Cook and *Mr. J. H. Bradley* for appellant.

Mr. A. S. Worthington and *Mr. E. L. Stanton* for appellee.

PONDER *v.* DELAUNEY.

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

No. 204. Argued March 16, 1880. — Decided March 29, 1880.

This case presents only a question of fact, which was properly decided in the court below.

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

This case presents only a question of fact which we are satisfied was decided right in the court below. There is no sufficient evidence to set aside the settlement between the parties as expressed in the receipt in full executed when the sum agreed on was paid. As that is the only matter in dispute the decree is *Affirmed.*

Mr. R. J. Moses for appellant.

Mr. Charles N. West and *Mr. William Reynolds* for appellees.

FONTAINE *v.* McNAB.

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

No. 205. Argued March 17, 1880. — Decided March 29, 1880.

The court finds the disputed facts in favor of the appellee, and enters a decree accordingly.

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

From the evidence in this case we find:

1. That the trust deed from Flewellyn to Shorter was duly executed and delivered. Under the ruling of the Supreme Court of Georgia in *Dinkins* v. *Moore*, 17 Ga. 62, there was sufficient proof of delivery to authorize the record.

2. That the deed, when executed and delivered, had upon it internal revenue stamps to the amount of thirty dollars, which was all that was required.

3. That the deed, including the stamp, was properly recorded, March 15, 1867. And —

4. That at the time of the advertisement for sale under the trust deed there was no newspaper published in Quitman County, and that the Cuthbert Appeal had a general circulation in that county.

There is no dispute but that upon this state of facts the decree below must be affirmed, and it is consequently so ordered.

Affirmed.

Mr. R. J. Moses for appellant.

Mr. A. R. Lawton for appellee.

UNITED STATES *v.* WILLIAMS.

APPEAL FROM THE COURT OF CLAIMS.

No. 216. Argued December 23, 1879. — Decided January 5, 1880.

The judgment of the court below is affirmed on the case presented to this court.

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

We are satisfied with the judgment below. The points raised and considered below have not been presented here, and that raised and argued here does not seem to have been presented there. We think upon the facts found it sufficiently appears that the terms and conditions of the promised reward were complied with, and

that the claimant was entitled to recover what was offered for the services he rendered. *Judgment affirmed.*

Mr. Attorney General for appellant.

Mr. O. S. Lovell and *Mr. Lewis Abraham* for appellee.

GRAND TRUNK RAILWAY COMPANY *v.* WALKER.

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

No. 219. Submitted March 23, 1880. — Decided April 5, 1880.

A railroad company which runs its line by telegraph, is bound to have a suitable telegraph line, with a proper number of operators, and in case of an accident it is for the jury to decide whether their duty in this respect has been performed.

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

Although much and probably all the testimony in this case is embodied in the bill of exceptions, the only exception taken below was to the following instruction to the jury:

"The defendants, if they undertook to manage and conduct the business of running their trains by telegraph, were bound to have a proper and fit telegraph line for this purpose, with a reasonable number of telegraph stations and operators to properly conduct and control the movements of the trains. And it is for the jury to decide whether this duty was performed by the defendants or whether they were guilty of negligence and want of ordinary care in this respect by not having the requisite number of telegraph stations and operators for conducting the business of the road. If they were guilty of such negligence and want of care and thus occasioned the injury which otherwise would not have occurred, then the jury would be authorized to find a verdict for plaintiff."

We see no error in this instruction as an abstract principle of law, and no complaint is made of it here on that account. The whole effort on the part of the plaintiff in error has been to show that upon the evidence the verdict ought to have been in its favor. That question we cannot consider. The instruction was right, and certainly not so far inapplicable to the allegation in the writ as to justify a reversal of the judgment on that account.

The judgment is affirmed.

Mr. John Rand for plaintiff in error.

Mr. A. A. Strout for defendant in error.

BURR *v.* MYERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 223. Argued March 24, 1880. — Decided April 5, 1880.

The court has no jurisdiction in this case.

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

The matters in dispute on this appeal are those presented by the exceptions to the master's report. These are:

First exception			$1500.00
Second exception. — First item		$ 13.25	
	Second item	125.46	
	Third item	17.50	
	Fourth item	117.55	
			273.76
Total as of February 25, 1873			$1773.76

The addition of interest to this amount from the date at which the master made up the account until the decree below will not make the value of the amount in dispute equal to that necessary to give us jurisdiction. *Appeal dismissed.*

Mr. C. H. Armes for appellant.

Mr. John F. Hanna and *Mr. James M. Johnston* for appellee.

DALLAS COUNTY *v.* HUIDEKOPER.

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

No. 225. Argued March 25, 1880. — Decided April 5, 1880.

County of Macon v. *Shores*, 97 U. S. 272, and *Smith* v. *Clark County*, 54 Missouri, 59, followed.

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

We think the only question in this case was settled by the Supreme Court of Missouri in *Smith* v. *County of Clark*, 54 Mo. 59, where it was held on a petition for rehearing, after the case had been once decided, p. 81, that "whether the corporation had a legal existence or not when the subscription was made, is a question that cannot be raised in a collateral proceeding." In this case, as in that, the corporation "did exist as a matter of fact, and was in the exercise of all its chartered franchises when the

subscription was made and the bonds issued." That case, like this, was a suit upon coupons for interest attached to bonds issued by the county in payment for its subscription to the capital stock of a railroad corporation, and the point made was, "that the charter of the company had ceased before the company was organized." That, the court said, was "a question between the State and the company," and gave judgment against the county. We had occasion to consider the same question in *County of Macon* v. *Shores*, 97 U. S. 272, 276, and held the same way.

Judgment affirmed.

Mr. S. H. Boyd, Mr. A. D. Matthews and *Mr. B. L. Brush* for plaintiff in error.

Mr. Joseph Shippen for defendant in error.

DALLAS COUNTY *v.* HUIDEKOPER.

SAME *v.* DAVOL.

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

Nos. 224 and 226. Argued March 25, 1880. — Decided April 5, 1880.

Dallas County v. *Huidekoper*, *ante*, 654, followed.

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

These are suits in equity to enjoin the collection of judgments against Dallas County on coupons for interest attached to the same class of bonds just considered in *Dallas County* v. *Huidekoper*, No. 225, *ante*, 654, and relief is asked on the ground that the charter of the railroad company had expired before any organization was effected under it, and that this fact was not known to the county until after the judgment was rendered. After what has been said in the other case, it is clear that the bills were properly dismissed without considering the power of a court of equity to sustain such a suit, and the decree in each of the cases is consequently

Affirmed.

Mr. S. H. Boyd, Mr. A. D. Matthews and *Mr. B. L. Brush* for appellant.

Mr. Joseph Shippen for appellees.

BANK OF THE REPUBLIC *v.* MILLARD.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 240. Submitted October 27, 1879. — Decided November 3, 1879.

Railroad Co. v. *Grant*, 98 U. S. 398, followed.

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

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

The value of the matter in dispute in this case is less than twenty-five hundred dollars, and, therefore, under our ruling in *Railroad Co.* v. *Grant*, 98 U. S. 398, the judgment is not now reviewable here. The special allowance of a writ of error to reverse a former judgment in the same cause, under which a reversal was had, cannot be made applicable to this writ, because the case as now presented is entirely different from what it was before. In fact, after the case went back, it was made to conform to what, as was suggested in the opinion reported in 10 Wall. 157, might perhaps entitle the plaintiff to recover.

The motion to dismiss is granted, each party to pay his own costs. *Dismissed.*

Mr. J. H. Bradley for plaintiff in error.

Mr. R. D. Mussey for defendant in error.

GAGE *v.* CARRAHER.

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

No. 243. Submitted April 6, 1880. — Decided April 12, 1880.

Removal Cases, 100 U. S. 457, followed.

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

The order remanding this cause to the state court is affirmed on the authority of *Meyer* v. *Construction Co.*, 100 U. S. 457. Carraher occupies one side of the controversy about which the suit is brought, that is to say, the title to the property in question, and Portia Gage, Henry H. Gage and John Forsythe the other. Henry H. Gage and Forsythe are citizens of the same State with Carraher. There is no controversy in the suit which is wholly between citizens of different States and which can be fully determined as between them. *Affirmed.*

Mr. Henry D. Beam for appellant.

Mr. James E. Munroe and *Mr. W. C. Goudy* for appellee.

THE LOUISVILLE, GIBSON, Claimant, *v.* HALLIDAY.

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

No. 278. Argued April 23, 1880. — Decided April 26, 1880.

The findings of fact by the Circuit Court in an admiralty suit are conclusive upon this court.

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

It is conceded that upon the facts found by the Circuit Court the decree appealed from was right. That finding is conclusive upon us. *The Abbotsford*, 98 U. S. 440. No exceptions were taken to the rulings of the court in the progress of the trial.

An appeal in admiralty from the District Court to the Circuit Court vacates the decree appealed from. The case is heard *de novo* in the Circuit Court, without any regard to what was done below. An entire new decree is entered, which the Circuit Court carries into execution. The cause is not remanded to the District Court. After the suit once gets into the Circuit Court it is proceeded with substantially in the same way as it would have been if originally begun in that court. *The Lucille*, 19 Wall. 74; *Montgomery* v. *Anderson*, 21 How. 388; *Yeaton* v. *United States*, 5 Cranch, 283.

Affirmed.

Mr. T. D. Lincoln for appellants.

Mr. William B. Gilbert for appellee.

JOUAN *v.* DIVOLL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 485. Submitted December 22, 1879. — Decided January 5, 1880.

This decree is affirmed on the facts on the various points stated in the opinion of the court.

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

We think the evidence shows that Divoll was induced to make his purchase from Cooke on the representation of Jouan that Cooke was the owner of one-half the claim. For this reason Jouan is now estopped from denying Cooke's title. As Jouan and Cooke have settled all their disputes, and Jouan has been released by Cooke from all further liability to him under the original assignment, Cooke's representatives are not necessary parties to this suit. This objection does not seem to have been made below.

By the terms of the assignment to Cooke he was bound to pay all costs and expenses incurred in prosecuting the claim. It was right, therefore, to deduct from Divoll's share of the money recovered a corresponding share of the expenses.

The decree is *Affirmed.*

Mr. J. D. McPherson for appellant.

Mr. J. G. Kimball for appellee.

WOODFOLK *v.* SEDDON.

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

No. 943. Submitted January 21, 1880. — Decided March 2, 1880.

The court, being satisfied that the various matters detailed in the opinion were part and parcel of a scheme devised to hinder and delay creditors in the collection of their debts, affirms the decree of the court below in this case.

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

After a careful consideration of this case, we are entirely satisfied that the consideration of the note executed by William W. Woodfolk to his son, William Woodfolk, on which alone the title of the son to the property in controversy depends, was fictitious, and that the confession of judgment by the father in favor of the son, and the purchase of the property in controversy by the son under execution, were but parts of a scheme devised by the father and son through which it was hoped something might be saved from the wreck of the father's fortune at the expense of his *bona fide* creditors. There is no dispute about the law applicable to these facts, and as it will serve no useful purpose to discuss the evidence in detail, a further opinion on this point will not be delivered.

The purchase of the property at tax sale by the son was, as we think, under the circumstances, nothing more in legal effect than payment of the taxes, so far as the rights of this appellant are concerned. We cannot divest ourselves of the conviction that it was part and parcel of the scheme devised to hinder and delay creditors in the collection of their debts. *Decree affirmed.*

Mr. T. D. W. Yonley for appellants.

Mr. A. H. Garland for appellee.

GURNEE *v.* BLAIR.

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

No. 988. Submitted December 1, 1879. — Decided December 8, 1879.

Railroad Company v. *Blair*, 100 U. S. 661, followed.

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

This case is not materially different from No. 987, *Railroad Co.* v. *Blair*, 100 U. S. 661, and

An order may be entered similar to the one in that case.

Mr. S. Corning Judd and *Mr. W. F. Whitehouse* for appellants.

Mr. E. C. Larned and *Mr. W. C. Larned* for appellees.

SEA *v.* CONNECTICUT MUTUAL LIFE INSURANCE CO.

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

No. 1066. Submitted April 29, 1880. — Decided May 10, 1880.

Carroll v. *Dorsey*, 20 How. 204, followed.

MOTION TO DISMISS.

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

This motion is granted on the authority of *Carroll* v. *Dorsey*, 20 How. 204, because of the omission to state with certainty the return day of the writ of error. The defect is one that is amendable under section 1005 Rev. Stat., but as no application is made by the plaintiff in error for leave to amend, and no citation has ever been served, we are not inclined, on our motion, to make any order in that behalf. *Dismissed.*

Mr. H. O. McDaid for plaintiff in error.

Mr. E. S. Isham and *Mr. Robert T. Lincoln* for defendant in error.

COWDREY *v.* VANDENBURGH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1076. Submitted January 14, 1880. — Decided March 8, 1880.

Cowdrey v. *Vandenburgh*, 101 U. S. 572, followed.

MR. JUSTICE FIELD delivered the opinion of the court.

The decree in this case is affirmed for the reasons given in the above opinion (*Cowdrey* v. *Vandenburgh*, 101 U. S. 572). *Affirmed.*

Mr. Joseph H. Bradley for appellant.

Mr. James G. Payne for appellees.

GROAT *v.* O'HARE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 35. Argued October 21, 1880. — Decided November 8, 1880.

This case is reversed because this court is not satisfied that the court below reached a proper conclusion on the facts.

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

We are not satisfied from the evidence that the court below was right in directing the auditor, in stating the account of the partnership, to credit O'Hare with $2926.20, for items set out in Schedule D, annexed to the first report. It is clear to us that the items, amounting in the aggregate to $1650, for hire of horse and buggy, are not proven, but it is impossible, from the case as it now stands, to determine what amount, if any, should be allowed for these and the other claims in that schedule.

We think, also, that the parties should be permitted to produce further evidence in respect to the certificates amounting to $5600, which O'Hare, on his cross-examination before the auditor under the reference from the general term, admits he received from the Evans Concrete Company. It is clear that he should be now charged with this amount, unless it has already been included in the accounts as stated by the auditor. It is impossible to determine from the case as it is now presented whether he has been so charged or not.

We find no other errors in the action of the court below. The decree is reversed and the cause remanded with instructions to permit the parties, if they desire, to take further testimony in respect to the items of charge by O'Hare, as stated in Schedule D, and the certificates received by O'Hare from the Evans Concrete Company, and for such further proceedings, not inconsistent with this opinion, as shall seem to be necessary.

Reversed.

Mr. T. T. Crittenden for appellants.

Mr. R. T. Merrick and *Mr. M. F. Morris* for appellee.

BANK OF MONTREAL *v.* WHITE.

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

No. 61. Submitted November 8, 1880. — Decided November 22, 1880.

The refusal of a charge asked for which is wholly immaterial is no ground for reversal.

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

There can be no pretence in this case that the note in suit was ever actually delivered to the bank as collateral security for past or future indebtedness. In the letter transmitting it, the bank manager was asked to discount it and place the proceeds to the credit of the manufacturing company. In that event the "overdraft kindly allowed on Friday" was to be charged against the credit, but it is nowhere, even in the remotest degree, intimated that if the discount was declined the note might be kept as collateral. The charge asked and refused was, therefore, wholly immaterial, and the judgment cannot be reversed because it was not given. No complaint can be made of the charge as given if this refusal was right. All the errors assigned hinge on this one proposition. *Judgment affirmed.*

Mr. Wirt Dexter for plaintiff in error.

Mr. Allan C. Story and *Mr. Robert Hervey* for defendant in error.

WHITE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 82. Argued November 29, 1880. — Decided December 13, 1880.

When a charter party provides that the hirer of the vessel need not make good any loss arising from ordinary wear and tear, a finding by the court that repairs sued for resulted from ordinary wear and tear is a bar to recovery.

Money paid to a person on a vessel chartered to the government by the owner of the vessel cannot be recovered from the United States unless authorized by them.

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

The Court of Claims has found expressly that the condition of the vessel (when she was discharged from the charter, which made the repairs sued for necessary) resulted from the ordinary wear and tear of the service in which she was engaged under the charter party. This is conclusive against any recovery for these repairs. It was expressly provided in the charter party, that the government need not make good any loss arising from ordinary wear and tear. Although, if this one fact had been omitted from the findings, a different judgment might with more propriety have been contended for, with it found, the conclusion reached by the court below was unavoidable.

This finding is not inconsistent with anything else that appears

in the case. The vessel was sent up the Ashepoo River as a transport. She did land, under the orders of the general in command of the expedition, at a place selected by him against the objection of the master put in charge of her navigation by her owner, and she did ground and was badly strained while at the landing, but it is nowhere found that she would have grounded, or that she would have been unusually strained, if the master had obeyed the further order of the general and moved her away from the shore into the stream after the troops and horses were off. Certainly the government cannot be held responsible for losses arising from a disobedience by the master of the orders of a military officer in command of any expedition on which she was properly sent under her charter. She was chartered for war service and bound accordingly. If loss happened from a "war risk," that is to say, if the war was the proximate cause of the loss, the damage was to be made good by the government; but if it was caused by the refusal of the master to obey those in command of a military expedition to which the vessel was attached, the neglect of the master and not the war would be the proximate cause. This neglect of the master was a marine risk which the owner assumed. Damages arising from such a risk the owner was bound to repair under his covenant to keep and maintain the vessel tight, staunch and strong during the continuance of the charter. The findings, taken as a whole, are to be construed as meaning that the repairs put on the vessel after she was discharged from service were not rendered necessary by any of the risks assumed by the government under the charter.

What has thus been said is applicable also to the claim for deductions from the pay of the vessel during the month of August, 1864, for lost time and repairs after her return from the Ashepoo River. The charter expressly provided that time lost in consequence of any breach of the covenants by the owner should not be paid for, and the court below in effect found that the damages repaired were caused by the neglect of the master to move the vessel out into the stream after the landing had been completed. No complaint is made in the petition of the amount of the charge. The right to recover is put entirely on the ground that the damages were such as the government was bound to repair, and, therefore, that the repairs were not chargeable against the owner. In the petition the quartermaster's and commissary's stores are included as part of the costs of the repairs, which was, no doubt, in accordance with the facts.

The money paid to Cannon for his services on board the vessel cannot be recovered from the United States. The claim was made by Cannon against the owner and not by the United States. It was voluntarily paid, with a full knowledge of all the facts. It may be that the payment was made to avoid a controversy with the United States, but that furnishes no ground of recovery. *Silliman* v. *United States,* 101 U. S. 465.

The judgment is affirmed.

Mr. John J. Weed and *Mr. M. H. Carpenter* for appellant.

Mr. Attorney General and *Mr. Assistant Attorney General Smith* for appellee.

McLAUGHLIN *v.* FOWLER.

SAME *v.* THORPE.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Nos. 94 and 95. Argued December 2, 1880. — Decided December 13, 1880.

In cases brought here from state courts this court can only look beyond the Federal question when that has been decided erroneously.

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

The only Federal question in these cases is whether the patents to the Western Railroad Company for lands within the limits of the Moquelomnes grant are valid. If that question was not decided by the court below we have no jurisdiction; if it was, the judgment was right, because in accordance with *Newhall* v. *Sanger,* 92 U. S. 761, brought here in 1875 for the determination of the same identical question. Such being the case the judgment must be affirmed. We can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. *Murdock* v. *Memphis,* 20 Wall. 591.

The judgment in each of these cases is affirmed on the authority of Newhall v. *Sanger.*

Mr. Henry Wise Garnett for plaintiff in error.

No appearance for defendants in error.

RICHMOND MINING CO. *v.* EUREKA MINING CO.
SAME *v.* SAME.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Nos. 116 and 117. Argued March 25 and 30, 1881. — Decided April 25, 1881.

Richmond Mining Co. v. *Eureka Mining Co.*, 103 U. S. 839, followed.

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

These are suits in equity and are dependent on the suit in ejectment between the same parties which has just been decided.

The decrees of the Circuit Court are affirmed for the reasons stated in the opinion filed in that case. *Affirmed.*

Mr. Thomas Wren, *Mr. P. Phillips* and *Mr. S. M. Wilson* for appellant.

Mr. T. T. Crittenden and *Mr. Harry I. Thornton* for appellee.

WHITNEY *v.* FIRST NAT. BANK OF BRATTLEBORO.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 125. Argued December 8, 1880. — Decided December 20, 1880.

National Bank v. *Graham*, 100 U. S. 699, followed.

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

This case is clearly settled by that of *National Bank* v. *Graham*, 100 U. S. 699. The identical question there decided is presented by the record, and we have no doubt it was the only question considered by the Supreme Court of the State. We certainly cannot say, from anything that appears in the bill of exceptions, that there might not have been enough evidence of negligence on the trial in the lower court to make it necessary to send the case to the jury. There is nothing whatever in the record to indicate that the positive instruction to the jury to bring in a verdict for the defendant below was based on anything else than a ruling that, as a matter of law, a national bank was not liable for the loss of special deposits.

The judgment is reversed and the cause remanded with instructions to reverse the judgment of the county court, and award a *venire de novo*. *Reversed.*

Mr. Charles N. Davenport for plaintiff in error.

Mr. E. J. Phelps for defendant in error.

BENTON COUNTY *v.* ROLLENS.

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

No. 147. Argued December 15, 1880. — Decided December 20, 1880.

Scotland County v. *Thomas*, 94 U. S. 682, and *Schuyler County* v. *Thomas*, 98 U. S. 169, followed.

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

This judgment is affirmed on the authority of *Scotland County* v. *Thomas*, 94 U. S. 682, and *Schuyler County* v. *Thomas*, 98 U. S. 169. Under the rulings in those cases the amendment to the charter of the Osage Valley and Southern Kansas Railroad Company adopted in 1871, and changing somewhat the route of the road, did not extinguish the power granted to counties by the origi. nal charter to subscribe to the stock of the company. The amendment was not a new charter, but an alteration of the old one in a way which left the power to subscribe in full force. *Affirmed.*

Mr. T. T. Crittenden for plaintiff in error.

Mr. John D. Stevenson and *Mr. J. B. Henderson* for defendants in error.

SEWARD *v.* COMEAU.

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

No. 240. Submitted March 3, 1881. — Decided March 21, 1881.

Affirmed on the facts.

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

We think the court below was right in dissolving the injunction which had been obtained in the state court and dismissing the bill. There cannot be a doubt from the evidence that the Magenta plantation contains in fact the full quantity of land which was guaranteed, and that the deficiency, if there is any, arises from a mistake in the description of one of the parcels intended to be conveyed. The grantee was put in actual possession of the whole plantation, and he, and those claiming under him, have never been disturbed since. No person has ever set up any adverse claim whatever, either to the possession or the title. The complainants have shown no reason to fear that they will ever be disquieted, and certainly they have not proven that they were in danger of eviction. They have never asked a correction of the mistake in

the description, if any there is, and it is by no means certain that the language of the whole deed does not really embrace what it is claimed has been omitted.

What we have thus said applies to all the alleged defects in the title. No adverse claim has been set up by any one, and, so far as anything appears, there is no danger whatever that the complainants will be disturbed in their possession, either because patents have not been issued, or because Mrs. Delhommer was not authorized by the court to obtain a judicial separation of property.

The fact that the sheriff advertised to sell in parcels, presents no ground for an injunction. As the injunction granted by the state court has been dissolved, and the bill dismissed, we need not inquire whether the proceeding by executory process in the state court was removed to the Circuit Court or not. The parties may now proceed with the execution of that process in such manner as they shall be advised is proper. The appellants cannot object to such removal as was actually effected to the Circuit Court, because it was brought about on their application. *Affirmed.*

Mr. H. N. Ogden for appellants.

Mr. E. T. Merrick and *Mr. G. W. Race* for appellees.

WIGHT *v.* CONDICT.

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

No. 280. Argued April 22, 1881. — Decided May 2, 1881.

Members of a limited partnership purchased and paid for the interest of one of the members. Subsequently the remaining members became bankrupt. *Held*, that the assignee in bankruptcy had no claim against the outgoing partner as a debtor by reason of this transaction.

Mr. Chief Justice Waite announced the judgment of the court.

The decree in this case is affirmed. There can be no pretence that Condict owed the bankrupts anything. They bought his interest in the limited partnership of which he was once a member and paid him for it. If the creditors of that partnership have any just claims against him on account of what has been done, they must proceed as they may be advised to enforce their rights, but the assignee of the bankrupts is in no respect their representative for that purpose. He can reduce to his possession whatever is owing to the bankrupts and also what they have disposed of in fraud of the bankrupt law; but Condict was not their debtor when

the bankruptcy occurred, and there is no allegation that what they did in respect to his interest in the limited partnership was forbidden by the bankrupt law.

Mr. John E. Risley and *Mr. Daniel S. Riddle* for appellant.

Mr. William P. Chambers for appellee.

FRANCE *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 915. Submitted October 18, 1880. — Decided October 25, 1880.

No Federal question is raised in this case.

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

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

This was a proceeding by *quo warranto* to exclude the plaintiffs in error, who were the defendants below, from the further use of the franchises of a lottery, known as the Missouri State Lottery, on the ground that the event had happened which fixed the period for the termination of the grant under which they were acting. This was in legal effect all that the petition contained. The defendants in their answer conceded that their grant was to terminate on the happening of a certain event, but insisted that this event had not yet taken place, because they had for a time been prevented from carrying on their business by judicial proceedings against them in the courts of the State. This presented the only question in the case. It was agreed by both parties that the grant or contract under which the defendants claimed was valid and binding on the State and that the grant was not limited to an arbitrary period, but to the happening of a particular event. All these questions had long before been decided by the highest court of the State, and there was no attempt to overturn or modify the decisions. No claim was made under any of the statutes of the State passed for the suppression of lotteries, and the single question put to the Supreme Court of the State for determination was, whether the event had in fact happened which all agreed was to terminate the franchise. The court decided that it had, and gave judgment accordingly. No effect whatever was given to any law of the State impairing the obligations of the grant. Nothing was done but to decide that upon the evidence the grant had expired by its own limitation. The contracts as presented and agreed on by both parties were construed and full effect given to all the obligations

they were found to contain. No Federal question was raised or decided. *The motion to dismiss is, therefore, granted.*

Mr. C. H. Krum and *Mr. Wm. O. Bateman* for plaintiffs in error.

Mr. Leverett Bell for defendant in error.

GREEN *v.* FISK.

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

No. 965. Submitted March 21, 1881. — Decided April 4, 1881.

Green v. *Fisk*, 103 U. S. 518, followed.

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

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

This, like *Green* v. *Fisk*, just decided, is a motion to dismiss an appeal in a partition suit, because the decree appealed from is not final, and also, because the value of the matter in dispute does not exceed five thousand dollars. The appellees, complainants below, claim to be the owners each of one-eighth of the property to be divided, which it is admitted is worth only ten thousand dollars. In the petition it is alleged that the value of the annual income was five thousand dollars, and an account of the revenue is asked as well as a partition. This suit, like the other, was begun in a state court, and removed by Green to the Circuit Court, where, by an express order, it was put on the equity docket and a change in the pleadings directed so as to make it conform to rules governing equity cases.

The decree appealed from simply adjudges that the appellees are the owners each of one-eighth the property, and refers the matter "to J. W. Gurley, Esq., master, to proceed to a partition according to law, under the directions of the court." As was decided in the other case, this is not a final decree, but if it was we would be without jurisdiction, because the property only has been adjudged to the appellees, and the value of that is less than the amount required to bring a case here. There has been no order even for an accounting, and as yet we are not advised there ever will be one, much less that if it should be made a balance would be found due from the appellant sufficient to make the value of the matter in dispute on an appeal by him such as our jurisdiction requires. As the appellant to sustain his appeal must show affirmatively that more in pecuniary value than our jurisdictional

requirement has been adjudged against him, he has failed to make a case for us to consider. *The motion to dismiss is granted.*

Mr. Thomas J. Durant and *Mr. Charles W. Hornor* for the motion.

Mr. Thomas J. Semmes opposing.

HEARST *v.* HALLIGAN.

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

No. 6. Submitted November 14, 1881. — Decided December 5, 1881.

Affirmed on the facts.

Mr. Justice Harlan delivered the opinion of the court.

A very thorough examination of the record and the printed arguments in this case fails to disclose any difficult question of fact or of law. We are entirely satisfied with the conclusions reached by the Circuit Judge, and with the reasons given in support thereof. All the relief to which the appellant was entitled, under the evidence, was accorded to him by the final decree. We are not sure but that the court might have gone farther, and adjudged that, as to a material portion of appellant's cause of action, the statute of limitations of Missouri constituted a complete defence.

No further opinion will be delivered. *The decree is affirmed.*

Mr. Jacob Klein, Mr. Samuel Knox and *Mr. W. M. Stewart* for appellant.

Mr. T. W. B. Crews for appellees.

PRICE *v.* KELLY.

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

No. 13. Submitted October 12, 1881. — Decided October 25, 1881.

Affirmed on the facts.

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

This case is very imperfectly presented. No one appears for the appellee, and the record is incomplete. The bill charges the appellee with an infringement of certain letters patent issued to and owned by the appellant. The answer attacks the validity of the patent, and denies the infringement. The court below, with-

out passing on the other questions, held there was no infringement. The appellee evidently claimed under a patent to himself, which, with the accompanying drawings and certain models, was in evidence. This evidence is not before us. Neither the patent nor the drawings are in the record, and the models have not been brought up. Nor have we been able to find anywhere in the record a satisfactory description of the structure which the appellee uses. The burden of proving the infringement is on the appellant. The necessary proof in this respect has not been made, and the decree below is consequently *Affirmed.*

Mr. J. J. Noah and *Mr. C. K. Davis* for appellant.

No appearance for appellee.

ROBERTS *v.* BOLLES.

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

No. 48. Submitted October 20, 1881. — Decided October 25, 1881.

Roberts v. *Bolles*, 101 U. S. 119, followed.

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

The judgment in this case is affirmed on the authority of *Roberts* v. *Bolles*, 101 U. S. 119, which we see no reason for reconsidering. *Affirmed.*

Mr. Andrew J. Bell for plaintiff in error.

Mr. George O. Ide for defendants in error.

GLOVER *v.* LOVE.

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

No. 62. Submitted October 28, 1881. — Decided November 7, 1881.

Affirmed on the facts.

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

We have carefully examined all the testimony in this case, and are satisfied with the decree below. It is abundantly proven that the stock which the assignee in bankruptcy now seeks to reach, never was in equity the property of the bankrupt. Unless all the testimony is to be disbelieved, the original purchases were made honestly and in good faith with the proceeds of the separate

estate of the wife, and years before the bankrupt became involved in the liabilities which caused his failure.

The decree is affirmed.

Mr. John R. Shepley and *Mr. S. T. Glover* for plaintiff in error.

Mr. J. E. McKeighan for defendants in error.

LEVY *v.* DANGEL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 72. Submitted November 4, 1881. — Decided November 14, 1881.

Railway Co. v. *Heck*, 102 U. S. 120, followed.

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

The judgment in this case is affirmed. The demurrer to the complaint was properly overruled, and we cannot consider the questions presented on the motion for a new trial. *Railway Co.* v. *Heck*, 102 U. S. 120.

Mr. Fillmore Beall for plaintiff in error.

Mr. George Ainslie for defendant in error.

CONTINENTAL BANK NOTE CO. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 216. Argued March 6 and 7, 1882. — Decided March 20, 1882.

A contract with the United States for the delivery of postage stamps to it construed.

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

The appellant by its several contracts sued on was bound to furnish the Post-office Department all the adhesive postage stamps that might be required during a period ending on the 30th day of April, 1877. As part of the several contracts, also, it bound itself to keep on hand at all times a stock of the several denominations of stamps sufficient to meet all the orders of the Department, and to provide against any and all contingencies likely to occur, so that each and every order might be promptly filled. For this the United States agreed to pay at the stipulated prices for all stamps delivered, and by express stipulation this was to be "full compensation for everything required to be done or furnished under" the contracts. Deliveries were to be made at the post-office in New York, or the Department in Washington. From this it is apparent there was no liability on the part of the United

States to pay until — 1, there had been a requisition by the Department; and 2, a delivery in conformity with what was required. The contracts were limited to a fixed period. The United States were neither bound to order nor the appellant to deliver after the end of the term. Although the stock on hand was manufactured and stored under the supervision of an agent of the Department, it remained the property of the appellant until delivered under the contracts. The inspection and supervision of the agent during the manufacture and storage were to guard against losses and frauds, and to insure promptness in delivery. The ownership was not changed until the delivery which the contracts provided for was complete. If loss occurred by reason of the failure of the United States to call for the whole stock on hand before the end of the term, it was compensated for in the payment for what was delivered. Such was the express agreement of the parties.

The judgment is affirmed.

Mr. John R. Dos Passos and *Mr. William McMichael* for appellant.

Mr. Attorney General and *Mr. Solicitor General* for appellee.

BONNIFIELD *v.* PRICE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

No. 230. Submitted March 16, 1882. — Decided March 27, 1882.

Hecht v. *Boughton*, 105 U. S. 235, followed.

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

This is a writ of error to bring here for review a judgment of the Supreme Court of the Territory of Wyoming in a case where the trial was not by jury. It is therefore dismissed on the authority of *Hecht* v. *Boughton*, 105 U. S. 235, decided at the present term. The appropriate remedy in this case, under the act of April 7, 1874, ch. 80, Sup. Rev. Stat. 12, was by appeal.

But if we could treat this writ of error as an appeal, the case is in no condition for examination here, because there is no such statement of facts in the record as the law requires. The bill of exceptions taken in the District Court contains all the evidence, and as the Supreme Court directed a judgment in favor of the defendant, it is clear that court passed on other questions than such as were presented on the rulings in the admission of evidence. Under these circumstances a statement of facts such as

the statute requires is necessary to enable us to reëxamine the case. *The writ is dismissed.*

Mr. John W. Hammond, Mr. C. N. Potter and *Mr. E. P. Johnson* for plaintiff in error.

Mr. George F. Price for defendant in error.

MELLON *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO.

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

No. 244. Submitted March 24, 1882. — Decided April 3, 1882.

The burden of proving this case is on the appellant, but the weight of the evidence is with the appellee.

Mr. Justice Woods delivered the opinion of the court.

The bill charged infringement of letters patent, dated October 2, 1866, granted to Edward Mellon, one of the complainants, for an improvement in the mode of attaching tires to wheels of locomotives. Mellon had assigned a one-half interest in his letters patent to William Matthews and they two were joined as complainants.

The defendant pleaded that while Mellon was the sole owner of the patent, to wit: on May 15, 1867, he had, for a valuable consideration granted a license in writing to the defendant for the full term of the patent to use the improvement described therein upon all its locomotives, locomotive tires and wheels.

The complainants took issue on this plea. The Circuit Court heard the cause upon the pleadings and evidence and dismissed the bill. The appeal of the complainants has brought up the case for our consideration.

To support the issue on its part the defendant produced a license in writing, signed and sealed by Mellon, dated May 15, 1867, which, its execution being admitted by Mellon, proved every allegation of the plea.

The appellants asserted, however, that the license had been delivered as an escrow to John Brisbin, the president of the appellee, in order that he might present it at the next meeting of the board of directors of the company, and if the board consented to pay and did pay thirty-five hundred dollars for the license, it was to take effect, otherwise not; and that nothing whatever had been paid for it. The appellee denied this, and asserted that the delivery was upon a valuable consideration received by Mellon, was

absolute and without condition or reference to any future contingency.

As the license is in the possession of appellee and is produced by it on the trial, and on its face is absolute and without any limitation or condition, the burden of proof is upon the appellants to show that it was delivered as an escrow.

The only evidence to maintain their side of the controversy is in the deposition of Mellon. On the part of the appellee is the testimony of Brisbin, its president, to whom the license was delivered. His deposition contains a direct and explicit denial of the testimony of Mellon in reference to the delivery of the license, and he is corroborated by the evidence of another witness, who was superintendent of the rolling stock of the appellee at the time the license was delivered.

The case turns upon a single question of fact. The burden of proving that fact is on the appellants, but the weight of the evidence is with the appellee.

The decree of the Circuit Court dismissing the bill was right, and must be *Affirmed.*

Mr. Hector T. Fenton and *Mr. Furman Sheppard* for appellants.

No appearance for appellee.

UNITED STATES *v.* CANDA.

A CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 257. Submitted April 3, 1882. — Decided April 10, 1882.

United States v. *Rosenburgh*, 7 Wall. 580, and *United States* v. *Avery*, 13 Wall. 251, followed.

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

This case comes here on a certificate of division as to questions arising on a motion to quash an information, and must be dismissed for want of jurisdiction, on the authority of *United States* v. *Rosenburgh*, 7 Wall. 580, and *United States* v. *Avery*, 13 Wall. 251. It is consequently so ordered. *Dismissed.*

Mr. Attorney General and *Mr. Solicitor General* for plaintiff.

No appearance for defendants.

UPTON *v.* MASON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

No. 262. Submitted April 3, 1882. — Decided April 10, 1882.

Hecht v. *Boughton*, 105 U. S. 235, followed.

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

This suit is dismissed on the authority of *Hecht* v. *Boughton*, No. 912, of this term, 105 U. S. 235. The remedy is by appeal instead of a writ of error. *Affirmed.*

Mr. Homer Cook and *Mr. E. P. Johnson* for plaintiff in error.

Mr. E. W. Mann for defendant in error.

UPTON *v.* STEELE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

No. 263. Submitted April 3, 1882. — Decided April 10, 1882.

Hecht v. *Boughton*, 105 U. S. 235, followed.

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

This suit is dismissed on the authority of *Hecht* v. *Boughton*, No. 912, of the present term, 105 U. S. 235. As there was no trial by jury, the case should have been brought here by appeal instead of a writ of error. *Dismissed.*

Mr. Homer Cook and *Mr. Edward P. Johnson* for plaintiff in error.

Mr. William R. Steele in person.

RALLS COUNTY COURT *v.* UNITED STATES *ex rel.* GEORGE.

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

No. 278. Argued and submitted April 13, 1882. — Decided May 8, 1882.

Ralls County Court v. *United States*, 105 U. S. 733, followed.

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

This judgment is affirmed on the authority of *County Court of Ralls County* v. *The United States ex rel. Douglass*, 105 U. S. 733,

just decided, from which it cannot be distinguished. The cause is remanded, with an order like that in No. 277.

Mr. H. A. Cunningham for plaintiffs in error.

Mr. J. H. Overall for defendant in error.

UNITED STATES *v.* BARNETT.

APPEAL FROM THE COURT OF CLAIMS.

No. 901. Argued January 18, 1882. — Decided March 6, 1882.

United States v. *Kaufman*, 96 U. S. 567, followed.

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

This judgment is affirmed on the authority of *United States* v. *Kaufman*, 96 U. S. 567, from which it cannot be distinguished in principle. *Affirmed.*

Mr. Attorney General and *Mr. William Lawrence* for appellant.

Mr. J. W. Douglass and *Mr. George L. Douglass* for appellees.

GRAME *v.* MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

GODDIN *v.* MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 1049 and 1050. Submitted November 28, 1881. — Decided December 12, 1831.

Steines v. *Franklin County*, 14 Wall. 15, followed.

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

The motions for writs of *certiorari* are denied. A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment. *Steines* v. *Franklin County*, 14 Wall. 21.

The motions to affirm are also denied. The further consideration of the motions to dismiss is postponed until the causes come up for hearing on the merits. *Denied.*

Mr. W. B. Webb and *Mr. James Lyons* for plaintiffs in error.

Mr. P. Phillips, *Mr. W. A. Maury* and *Mr. W. H. Phillips* for defendant in error.

THOMPSON *v.* PERRINE.

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

No. 75. Argued January 10 and 11, 1883. — Decided January 22, 1883.

Thompson v. *Perrine*, 106 U. S. 589, followed.

Mr. Justice Harlan delivered the opinion of the court.

This case is controlled by the decision just made in case No. 76 between the same parties. *The judgment is affirmed.*

Mr. F. N. Bangs and *Mr. Timothy F. Brush* for plaintiff in error.

Mr. William M. Evarts, Mr. James K. Hill and *Mr. H. T. Wing* for defendant in error.

KAHN *v.* HAMILTON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 149. Submitted November 1, 1882. — Decided November 13, 1882.

Hecht v. *Boughton*, 105 U. S. 235, followed.

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

This writ of error is dismissed upon the authority of *Hecht* v. *Boughton*, 105 U. S. 235. The case is in all respects like that of *Woolf* v. *Hamilton*, just decided. *Dismissed.*

Mr. J. R. McBride for plaintiffs in error.

Mr. S. A. Merritt for defendants in error.

BADGER *v.* RANLETT.

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

No. 587. Submitted November 27, 1882. — Decided December 11, 1882.

Badger v. *Ranlett*, 106 U. S. 255, followed.

Mr. Justice Blatchford delivered the opinion of the court.

The questions presented in this case are the same as those in the other suit between the same parties, decided herewith, and for the reasons assigned in the opinion in that case the judgment in this case is *Affirmed.*

Mr. Attorney General and *Mr. Solicitor General Phillips* for the plaintiff in error.

Mr. W. W. Howe and *Mr. J. H. Kennard* for the defendants in error.

CHICAGO & ALTON RAILROAD *v.* WIGGINS FERRY CO.

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

No. 839. Submitted January 8, 1883. — Decided January 29, 1883.

Chicago & Alton Railroad v. *Wiggins Ferry Co.*, 108 U. S. 18, followed.

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

This case is in all material respects like that between the same parties just decided, and the order of the Circuit Court remanding the case is affirmed for the reasons there given. *Affirmed.*

Mr. C. H. Krum and *Mr. C. Beckwith* for plaintiff in error.

Mr. S. T. Glover and *Mr. J. R. Shepley* for defendant in error.

STEEVER *v.* RICKMAN.

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

No. 67. Argued December 4 and 5, 1883. — Decided December 17, 1883.

Affirmed on the facts.

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

If all that is charged in this bill were true, there could be no doubt of the right of the appellant to the relief she asks, as well on account of the actual as constructive fraud of the appellee. But the answer, which is under oath, is as emphatic and direct in its denials as the bill is in its charges. There is no disputed question of law. The only controversy is as to the facts. The testimony is voluminous and it would serve no useful purpose to discuss it in an opinion. It is sufficient so say that we are entirely satisfied with the conclusion reached by the Circuit Court.

Decree affirmed.

Mr. William Stone Abert, Mr. West Steever and *Mr. Sterling B. Toney* for appellant.

Mr. W. O. Dodd for appellee.

TABLE OF CASES NOT HITHERTO REPORTED.

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ADMIRALTY.

1. When a vessel, libelled for smuggling and for violations of the Chinese Exclusion Act, is discharged on giving the bond required by law, it may be again libelled in another district for similar offences, alleged to have been committed prior to the offences charged in the first libel; but if both suits proceed to judgment, there can be but one forfeiture of the vessel. *The Haytian Republic*, 118.
2. On the 31st day of July, 1891, proceedings were commenced in the Supreme Court of the State of New York for the voluntary dissolution of a Steam Tow Boat Company, a corporation organized under the laws of that State, and an order was made on that day restraining creditors from bringing action and requiring all to show cause, on the 16th day of November, 1891, before a referee, why the prayer of the petitioner should not be granted. An order was made at the same time for the appointment of a receiver, which required him to give bonds before entering on the duties of his office. On the 1st of August, 1891, in the forenoon of that day, these orders were entered and the papers filed in the office of the clerk of the court. On the afternoon of the same day, which was Saturday, and on Monday, August 3, libels in admiralty were filed in the District Court of the United States for the Eastern District of New York to enforce maritime liens against six of the vessels of said Tow Boat Company's fleet. On the 1st of August the marshals for the district seized and took into custody three of the six, and on the 3d of August did likewise with the other three. On the 4th of August the receiver filed his official bond, duly approved, and entered upon the discharge of his duties. On the same day he went to take possession of the six vessels and found them in the custody of the marshal. Thereupon, on his motion, process issued against the several libellants, to bring them before the Supreme Court of the State, where, after hearing, they were enjoined from taking any further proceedings on their libels. This judgment of the Supreme Court being affirmed by the Court of Appeals, and the judgment of the latter court being remitted to the Supreme Court and entered there as its judgment, the libellants sued out a writ of error to this court. *Held*, that the state court had no jurisdiction *in personam* over the libellants as holders of maritime

CASES DECIDED ON THE FACTS OR WITHOUT OPINION.

CASES DISTINGUISHED.

COMMON CARRIER.

CONFLICT OF LAWS.

See ADMIRALTY, 2, 3.

CONSTITUTIONAL LAW.

and made it obligatory upon the company to maintain an office and sell tickets in Kentucky at those rates. The company refusing to comply with the requirements of this act, an indictment was found against it. This was demurred to, and such proceedings were had thereafter that the defendant was adjudged guilty and fined $1000, and the judgment was sustained as constitutional by the Court of Appeals of the State. The case being brought here by writ of error, it is by the whole court *Held*, that the Kentucky act of March 3, 1890, in its effect upon the Bridge Company, violated the provisions of the Constitution of the United States.

3. The judges concurring in the opinion of the court, (BROWN, HARLAN, BREWER, SHIRAS and JACKSON, JJ.,) after reviewing in detail the course of the decisions, announce the following as their grounds for concurring in this result and in the judgment: (1) That the traffic across the river was interstate commerce; (2) that the bridge was an instrument of such commerce; (3) that the statute was an attempted regulation of such commerce, which the State had no constitutional power to make; (4) that Congress alone possesses the requisite power to enact a uniform scale of charges in such a case, the authority of the State being limited to fixing tolls on such channels of commerce as are exclusively within its territory.

4. The minority of the court (consisting of FULLER, C. J., and FIELD, GRAY and WHITE, JJ.) gave the reasons for their concurrence in the result and the judgment as follows: (1) The several States have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one State, or between two adjoining States, subject to the paramount authority of Congress over interstate commerce. (2) By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each State, and authorized to fix rates of toll. (3) Congress, by the act of February 17, 1865, c. 39, declared this bridge "to be, when completed in accordance with the laws of the States of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be as established by the two States. (4) The original acts of incorporation constituted a contract between the corporation and both States, which could not be altered by the one State without the consent of the other. *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 204.

5. Without passing upon the validity of the 5th and 14th sections of the act of the legislature of Texas of April 3, 1891, establishing a railroad commission with power to classify and regulate rates, the remainder of the act is a valid and constitutional exercise of the state sovereignty, and the commission created thereby is an administrative board, created for carrying into effect the will of the State, as expressed by its legislation. *Reagan* v. *Farmers' Loan & Trust Co.*, 362.

CONTEMPT.

CONTINENTAL ARMY.

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CRIMINAL LAW.

testimony sought and the books, papers, etc., called for relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused by the law on some personal ground from doing what the Commission requires at his hands. *Ib.*

4. Power given to Congress to regulate interstate commerce does not carry with it authority to destroy or impair those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. *Ib.*
5. It was open to each of the defendants in this proceeding to contend before the Circuit Court that he was protected by the Constitution from making answer to the questions propounded to him or that he was not bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for related to the particular matter under investigation, nor to any matter which the Commission was entitled under the Constitution or laws to investigate. This issue being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits. *Ib.*
6. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Todd's Case*, 13 How. 52; *Gordon* v. *United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222, examined and distinguished. *Ib.*
7. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for *final* determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. *Ib.*
8. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 6 Wheat. 204, and in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. *Ib.*
9. A proceeding under the twelfth section of the Interstate Commerce Act is not merely ancillary and advisory, nor is its object merely to obtain an opinion of the Circuit Court that would be without operation upon the rights of the parties. Any judgment rendered will be a final and indisputable basis of action as between the Commission

B. OF CIRCUIT COURTS.

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MANDATE.

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