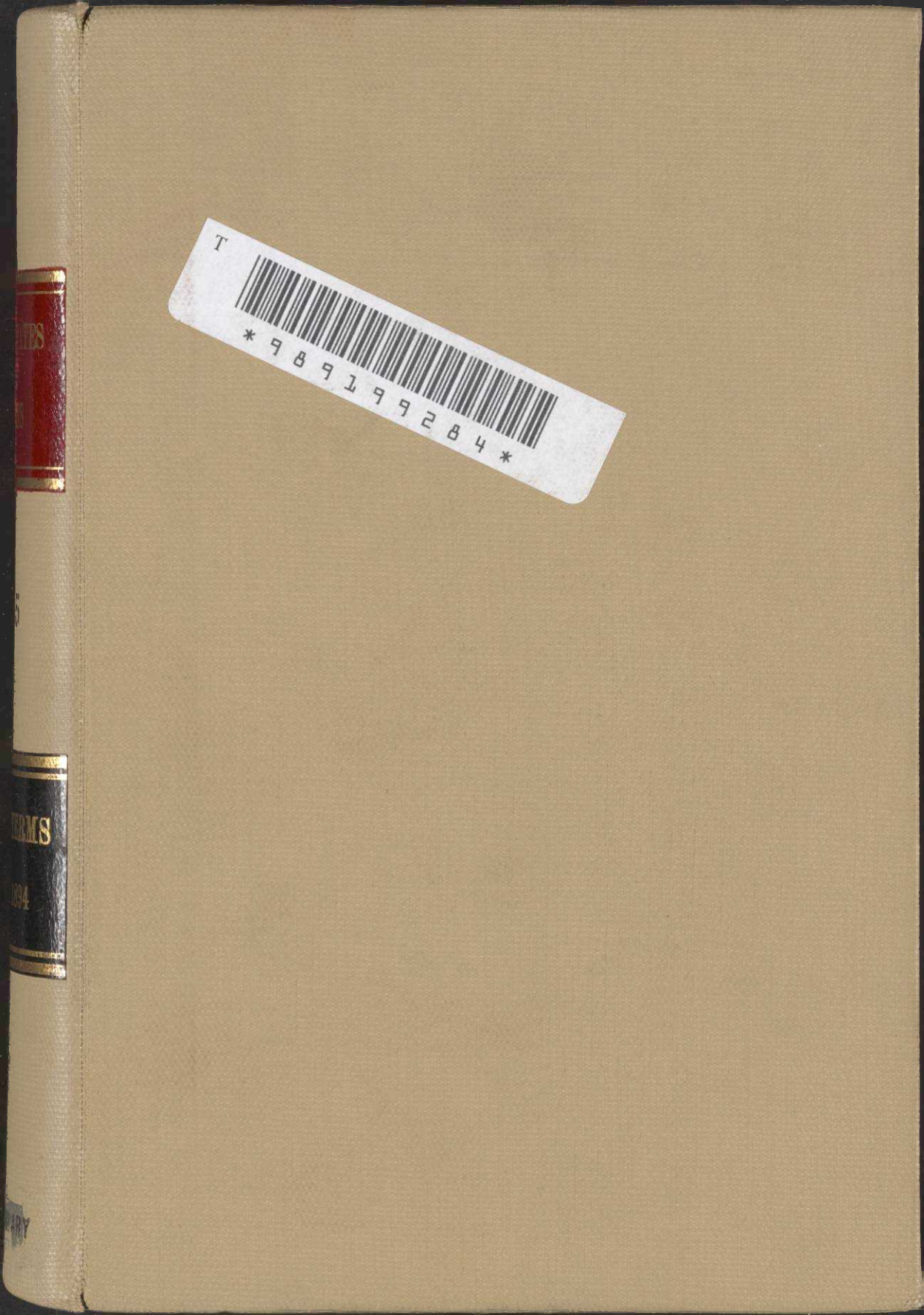

UNITED STATES REPORTS

VOLUME 155

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1893

AND

OCTOBER TERM, 1894

J. C. BANCROFT DAVIS

REPORTER

THE BANKS LAW PUBLISHING CO.
21 MURRAY STREET, NEW YORK
1905

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.[1]
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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[1] Mr. Justice Jackson, by reason of illness, heard argument in no case argued after October 23, 1894.

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I.

OCTOBER TERM, 1893.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

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. — Dissenting Opinion, filed October 26, 1894.

This case is reported in 154 U. S., pages 447 to 490. The dissenting opinion was filed after the publication of that volume.

MR. JUSTICE BREWER, with whom concurred THE CHIEF JUSTICE and MR. JUSTICE JACKSON, dissenting.

I dissent from the opinion and judgment of the court in this case. I notice, as a preliminary matter, a practice which I think is not to be commended and ought not to be pursued. The application to punish the three appellees was denied by the Circuit Court. The reason given for the decision was the unconstitutionality of that portion of the interstate commerce act which requires a court to treat and punish as a contempt of its authority the refusal of a witness before the commission to answer questions. In the opinion this court considers that reason, holds it unsound, and remands the case for further proceedings. On such further proceedings the Circuit Court may, without disobedience of the mandate, again deny the application, for the further reason that the questions propounded by the commission to the witnesses are deemed irrelevant or incompetent; and on a second appeal it may be that this court will also be of the same opinion; and then this curi-

ous result will appear: Of two successive judgments in the same case, each denying the same application, this court sustains one and reverses the other. I had supposed the rule was settled that the inquiry in this court was simply whether that which was adjudged by the trial court was erroneous, and not whether the reasons given therefor were good or bad, and that a correct judgment was always sustained, even if the reasons given therefor were erroneous. But this is a minor matter, and I only notice it to express my dissent from the practice.

I pass, therefore, to the important question considered by the court in its opinion. With the bulk of that opinion I have no disposition to quarrel. I agree as to the power of the United States over interstate commerce, but that throws no more light on the real question involved herein than an inquiry into the power of Congress to enact laws would upon the question determined in *Kilbourn* v. *Thompson*, 103 U. S. 168, of the right of the House of Representatives to punish as for contempt one who refused to disclose the business of a real estate partnership of which he was a member. The power of Congress to use all reasonable and proper means for exercising its control over interstate commerce carries with it no right to break down the barriers between judicial and administrative duties, or to make courts the mere agents to assist an administrative body in the prosecution of its inquiries. For, if the power exists, as is affirmed by this decision, it carries with it the power to make courts the mere assistants of every administrative board or executive officer in the pursuit of any information desired or in the execution of any duties imposed. It informs Congress that the only mistake it made in the *Kilbourn case* was in itself attempting to punish for contempt, and that hereafter the same result can be accomplished by an act requiring the courts to punish for contempt those who refuse to answer questions put by either House, or any committee thereof.

It must be borne in mind that this is purely and solely a proceeding for contempt. No action is pending in the court to enforce a right or redress a wrong, public or private. No

inquiry is being carried on in it with a view to the punishment of crime, nothing sought to be done for the perpetuation of testimony or in aid of any judicial proceeding. The delinquent is punished for a contempt of court in refusing to testify before a commission in aid of an investigation carried on by such commission. What is this power vested in courts of punishment for contempt, and for what purpose is it vested? It is a power of summary punishment and existing to enable the courts to discharge their judicial duties. "Contempt of court is a specific criminal offence." *New Orleans* v. *Steamship Company*, 20 Wall. 387, 392. In *Anderson* v. *Dunn*, 6 Wheat. 204, 227, it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence and submission to their lawful mandates." So in *Ex parte Robinson*, 19 Wall. 505, 510: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." And in *Cooper's Case*, 32 Vermont, 253, 257: "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied because it is necessary to the exercise of all other powers."

A contempt presupposes some act derogatory to the power and authority of the court. But before this proceeding was initiated the only authority disregarded was that of the commission. The court treats such act derogatory to the powers of the commission as derogatory to its own, and punishes, as for a contempt of its own authority, one who disobeys the order of the commission. It is no sound answer to say that the court orders the witness to testify and punishes for disobedience of that order. The real wrong is in not testifying before the commission, and that is the ground of the punish-

ment. Otherwise any disregard of any duty can be treated as a contempt of court and punished as such. It will be sufficient to cite the delinquent and order his punishment as for a contempt of court unless he discharges that duty. His failure to obey the order of the court is only the nominal, while the failure to discharge the prior duty is the real, ground of punishment. No forms of statement can change the substantial fact that the inherent power of courts to punish for contempt is exercised, not to preserve the authority of the court, not in aid of proceedings carried on in them, but to aid a merely administrative body, and to compel obedience to its requirements. It makes the courts the mere assistants of a commission.

It is said that this proceeding is substantially, if not precisely, similar to that which would arise if Congress had passed an act imposing penalties on parties refusing to testify before a commission and a proceeding was commenced to recover such penalties. But surely the differences are vital. If such proceeding were a criminal prosecution, defendants would have the constitutional guarantee of a trial by jury, and this, too, in an action at law if the amount of the penalty exceeded $20. By making it a proceeding for contempt, these constitutional protections are evaded. Further, there is no penalty prescribed. Refusal to answer is not made an offence, misdemeanor, or felony.

Suppose a law was enacted making criminal the refusal to answer questions put by a commission, (and a statute would be necessary before such refusal could be adjudged criminal, for there are no common law offences against the United States — *United States* v. *Eaton*, 144 U. S. 677,) would it not be necessary that the statute define the questions, or at least the scope of the questions to be asked? Would not an act be void for indefiniteness and lack of certainty which simply made criminal the refusal to answer relevant questions in any proper investigation carried on before a commission? Would it not be like the famous Chinese statute:

"Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any

specific part of it, shall be punished with at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

Could it be left to the commission to select the matter of investigation, determine the scope of the inquiry, and thus, as it were, create the crime?

Can all these difficulties be avoided by bringing the refusal to testify before a commission within the reach of the comprehensive inherent power of the courts to preserve their authority by proceedings for contempt?

But again, it is said that the act of Congress imposes upon all persons and corporations engaged in interstate commerce a duty to answer every proper question which the commission may see fit to ask, and that a refusal to answer constitutes a refusal to discharge a duty upon rightful demand. It is true that authority is conferred upon the commission to obtain information, but the act does not impose the duty to furnish it upon all persons interested in interstate commerce; and Congress cannot invest the commission with discretionary power to create or not create a duty. If, when a question is asked, a duty is established, then the court would have no power to do anything except to enforce the act of the commission, if valid, or punish its violation without inquiry, which, as has been stated, would make the court the mere ministerial agent of the commission. If the duty is not established, then the court is called upon to take part in a mere inquiry as to whether it would be lawful or expedient that the duty be established. It is not pretended that the court can take cognizance of the whole investigation on petition, and this application is not a part of any judicial proceeding, nor could the order adjudicate anything. It is clear that the duty, if it exists at all, is a political and not a judicial duty. Would mandamus lie to compel the discharge of this duty? Yet mandamus is the recognized proceeding for the enforcement of a duty.

It may be that it is the duty of every citizen to give information to the commission when demanded, but it is no more a duty than it is to avoid murder or other crimes; to lead a

life of social purity; to avoid fraud in business transactions, or neglect of other duties of good citizenship. Will it be pretended that these obligations can be enforced by the courts through proceedings as for contempt?

To say that there is a case, something that calls for judicial action, because there are parties on the one side or on the other, is a breadth of definition hitherto unrecognized. Every effort at administrative or executive action, which is not voluntarily assented to by those whom it affects, creates a dispute between parties. Can it be that every such dispute justifies an appeal to the courts, and presents a case for judicial action? If so, there is nothing which any administrative body or executive officer shall attempt to do which cannot be carried into the courts, and every failure to comply with the orders of such body or officer makes the delinquent subject to punishment by the process of contempt. Hitherto the power to punish for contempt has been regarded as a power lodged in judges and courts to compel obedience to their orders, decrees, and judgments, and to support their authority.

This is something more important than a mere question of the form of procedure. It goes to the essential differences between judicial and legislative action. If this power of the courts can be invoked to aid the inquiries of any administrative body, or enforce the orders of any executive officer, why may not the power to punish for contempt be vested directly in the administrative board or in the executive officer? Why call in the court to act as a mere tool? If the interstate commerce commission can rightfully invoke the power of the courts to punish as for contempt those who refuse to answer their questions, why may not like power be given to any prosecuting attorney, and he be authorized to summon witnesses, those for as well as those against the government, and in advance compel them, through the agency of the courts, to disclose all the evidence they can give on any expected trial? If these appellees have committed crime, punishment therefor comes only through the courts, and by the recognized procedure of information or indictment. They cannot be tried by the commission for any act done.

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

One often-declared difference between judicial and legislative power is that the former determines the rightfulness of acts done; the latter prescribes the rule for acts to be done. The one construes what has been; the other determines what shall be. As said in Cooley's Constitutional Limitations (side page 92):

"In fine the law is *applied* by the one, and *made* by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct;' because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

So, for whatever the appellees have done in the past, whether they have violated any law of the land or not, an inquiry is to be made in and by the courts. The judicial power cannot be invoked to sustain an investigation into past conduct which, when disclosed, may or may not be at the will of an administrative board or executive officer presented for judicial consideration or action. It is not meant to be affirmed that no inquiry can be made into past conduct or actions except through the power and processes of the courts. On the contrary, the full power of legislative or executive departments to inquire into what has been is conceded. But if designed to aid legislative or executive action it must be by legislative or executive proceedings. Can the courts be turned into commissions of inquiry in aid of legislative action?

In short, and to sum it up in a word: If these appellees have violated any law their punishment should be sought in the ordinary way, by prosecution therefor in the courts. If they have violated no law, and the simple purpose is to elicit information for the guidance of the commission or the legislature, let that information be sought by the ordinary processes of legislative or administrative bodies.

Take a familiar illustration: Once in ten years a census is

ordered by authority of Congress, and the scope of that census, constantly enlarged, is to elicit from the citizens of the United States information as to a variety of topics. No thought of punishment for past misdeeds enters into such an inquiry. Information, and that only, is sought. It is unquestionably the duty of every citizen to respond to the inquiries made by the census officers and furnish the information desired. Can it be that courts can be authorized to make the refusal of a citizen to furnish any such desired information a contempt of their authority and to be punished as such? There is no question of the lawful power of Congress to elicit this information; possibly none as to its power to provide that a refusal to give the information shall be deemed a misdemeanor and prosecuted and punished as such. But it seems to me to obliterate all the historic distinction between judicial and legislative or administrative proceedings to say that the courts can be called upon to punish as for a contempt of their authority a mere refusal to respond to this administrative inquiry as to facts.

This question was fully considered by Mr. Justice Field, while holding the Circuit Court, in *In re Pacific Railroad Commission*, 32 Fed. Rep. 251, and the power of Congress to make the courts the mere assistants of an investigating committee was most emphatically denied.

I am authorized to say that THE CHIEF JUSTICE and MR. JUSTICE JACKSON concur in the views herein expressed.

II.

OCTOBER TERM, 1894.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1894.

ROBB *v.* VOS.[1]

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

No. 38. Argued March 7, 1894. — Decided October 15, 1894.

When an attorney at law appears, without the knowledge or consent of his principal, on behalf of a defendant of record in an action at law of the existence of which the principal is ignorant, and consents to judgment and the issue of execution and the sale of the party's interest in real estate thereunder, and such sale is made, all the proceedings being regular on their face, the remedy of the injured party, when the facts come to his knowledge, is in equity.

A Circuit Court of the United States has jurisdiction of such a suit in equity, if the citizenship of the parties permits, although the proceedings at law under which the sale was made were had in a state court.

When a party has two remedies, inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines his election of his remedy.

When a claim is founded upon an act done without the claimant's knowledge and authority by a person assuming to act as his agent, the bringing of an action by him based upon that act is a ratification of it.

In this case it appeared that, after the said sale on execution of the plaintiff's interest in the realty, the proceeds passed, under order of court,

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[1] The docket title of this case is *John Hampden Robb and Charles E. Strong, Trustees* v. *August Vos and William Stix.*

into the hands of said attorney of record for the benefit of his principal; and that the principal, after knowledge of all the facts, appeared in an action in the state court to which he had been summoned, and set up a claim to those proceeds, founded upon the proceedings under the judgment and execution. *Held*, that he was estopped from proceeding in equity, to set aside the sale on the ground that the attorney had no authority to appear for him, and that this estoppel was not affected by the fact that, before filing his bill in equity in the Circuit Court, he withdrew his pleading in the state court, and filed instead thereof a demurrer which was sustained.

On the facts in this case detailed in the opinion it is further *Held*, that, by the payment into court by the purchaser at the execution sale of the amount of the principal and interest due the plaintiff in the equity suit, and the conveyance of the lands to the purchaser, the latter became vested with a fee simple to said lands.

In the year 1883, James Robb, a resident of Hamilton County, Ohio, died, leaving an estate, and James Hampden Robb, May R. Miltenberger, and Charlotte M. Pancoast as his surviving children. Charles A. Kebler, an attorney at Cincinnati, was appointed administrator. Mrs. Miltenberger and Ellen W. Robb had claims against the estate. A written agreement was executed by all concerned in the following terms:

"For an amicable settlement of all claims and controversy as to the estate of James Robb, deceased, late of Hamilton County, Ohio, it is mutually agreed by the undersigned as follows:

"That Mrs. Miltenberger's claim for an annuity of one thousand dollars, in accordance with her agreement with her father for her son's education from the time he became ten years of age until he became twenty-one years of age, which is now in suit No. 37,317 in the Superior Court of Cincinnati, and James Hampden Robb's claim in suit No. 37,820 in the same court, and Mrs. Ellen W. Robb's claim in suit No. 67,460 in the court of common pleas of the said county of Hamilton, are all hereby allowed by Charles A. Kebler, administrator, by and with the consent of the undersigned and at their request, as valid claims against said James Robb's estate, and shall be satisfied and discharged in the manner hereinafter provided and agreed to as to each of them, respectively; the claim of Mary Robb in suit No. 67,459, common pleas, to be also provided for and discharged as hereinafter agreed.

Statement of the Case.

"2. The deed which is alleged to have been made by the said James Robb on or about November 14th, 1879, to his daughter, Mrs. Isabella San Raman, conveying to her the tract of land near Cheviot, then owned and occupied by him, being without consideration and in consequence of his insolvency at that time wholly void as to his creditors, it is agreed by Charles A. Kebler, as administrator of said estate, that in pursuance of the statute in such case provided and by request of the other subscriber hereto he shall and will immediately bring an action for the recovery of the said land, or for the sale of said land and avoidance of the said pretended conveyance for the benefit of said estate and its creditors.

"3. Besides the outstanding debts for personal and household expenses of James Robb, the cost of the monument heretofore agreed by the undersigned to be erected at Spring Grove Cemetery in memory of the said James Robb and all the proper costs and expenses of the administration of his estate and of the suit for the recovery of the land above mentioned, including the administrator's counsel's fees, shall first be paid out of the moneys now in his hands.

"4. After paying the same the remaining moneys in his hands and the proceeds of the sale of the land aforesaid, or so much as necessary, shall be set apart and invested for two trust funds, as follows: One of the said funds shall be made sufficient to pay Mrs. Miltenberger the amount already due of said annuity, in compliance with the agreement made with her father for account of her son's education, and also to yield and pay the said annuity year by year until her son becomes twenty-one years of age, if he lives, and the surplus of said fund, if any remaining after he becomes of age, or in case he dies before becoming of age, shall fall into the residuary estate to be divided as hereinafter agreed; the other of the said trust funds to be sufficient to secure and pay to Mrs. Ellen N. Robb an annuity of six hundred dollars ($600.00) for and during the term of her life, payable semi-annually, and to commence from the — day of ———, A.D. ——, and from and after her decease to pay the said Mary Robb, her daughter, if she survives her mother, an annuity of three hundred dollars ($300,)

payable semi-annually, for and during the term of the life of said Mary, and that the annuities so to be paid to the said Mary R. Miltenberger, Ellen W. Robb, and Mary Robb, respectively, shall be in full satisfaction and discharge of all their claims aforesaid as creditors of the said estate.

"The appointment of trustees and appropriation of funds necessary and sufficient for the two trusts aforesaid shall be effected as soon as practicable by the said Charles A. Kebler, the administrator, and the parties concerned.

"5. All the pictures, library, letters and papers, plate and other chattels, useful or ornamental, belonging to the said estate shall be turned over to James Hampden Robb, reserving for Mrs. Charlotte M. Pancoast some one article to be agreed upon by them, which portions of the estate shall be received and taken by the said James Hampden Robb in full satisfaction and discharge of all his claim aforesaid as a creditor of the said estate.

"6. The residue, if any, of the moneys now in the administrator's hands and which shall arise from the sale of the real estate aforesaid, after providing for said trusts, and also any residue which may be left of the trust funds so set apart, after fulfilling the said trusts respectively, shall be divided and paid in four equal shares to and among the children and heirs of the said James Robb, deceased, viz., James Hampden Robb, Mrs. Isabella San Raman, Mrs. Mary R. Miltenberger, and Mrs. Charlotte M. Pancoast.

"It is understood that the foregoing agreement shall take effect immediately upon the order of the court for the sale of said real estate, and the setting aside the deed from James Robb to Isabella San Raman herein referred to and not before.

"In witness whereof the said Charles A. Kebler, administrator of the said estate, Mary R. Miltenberger, Charlotte M. Pancoast, James Hampden Robb, Ellen M. Robb, and Mary Robb have hereunto set our hands and seals in five parts interchangeably this — day of June, in the year 1883."

In carrying out the settlement provided for in the said agreement, ten thousand dollars in the hands of the adminis-

trator were invested in the purchase of certain pieces of real estate in the city of Cincinnati from one Moritz Loth, who conveyed the same to James Hampden Robb and Charles E. Strong, trustees, by a deed dated February 5, 1885. This deed expressed a consideration of ten thousand dollars as paid by the said Robb and Strong, as trustees, but did not define a trust or name any *cestui que trust.* By an instrument bearing date the same day, Robb and Strong, trustees, leased the same property to Moritz Loth during the joint life of Ellen W. Robb and Mary Robb, and during the life of the survivor, Loth, as lessee, agreeing to pay to the trustees a rent of $500, payable semi-annually, and to purchase the same property, on the death of Mary and Ellen W. Robb, for the sum of $10,000.

Robb and Strong, the trustees, were residents of the city of New York, and Ellen W. Robb, Mary Robb, and Moritz Loth resided in Hamilton County, Ohio, and the deed and lease were duly recorded in that county.

On March 30, 1885, Moritz Loth mortgaged his interest in said property and in other real estate to one William Stix, to secure a loan of ten thousand dollars.

In November, 1885, one Meyer Gugenheim, a judgment creditor of Moritz Loth, brought an action in the Court of Common Pleas of Hamilton County, Ohio, to subject all the real estate of Loth to the satisfaction of his judgment, making parties defendant a number of creditors of Loth, who held title to or liens upon the property claimed to be his, including Robb and Strong, trustees, and William Stix. A summons in that action was issued for Robb and Strong, trustees, and also for William Stix, as well as for the other defendants. On the 19th day of November, 1885, Kebler accepted service of that summons for Robb and Strong, trustees, and for William Stix, as follows:

"We accept service of summons in the within cause for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, this 19th November, 1885.

"KEBLER & ROELKER,

"*Attorneys for above-named defendants, duly authorized.*"

Statement of the Case.

The petition described various parcels of real estate claimed to be the property of Loth, and asked that the several defendants be required to show what interest they respectively had therein, and that the liens be marshalled and priorities determined, and a sale be made. As to the parcels owned by Robb and Strong, as trustees, the petition averred that they held the property only as security, and asked that the court so find. As bearing on this averment, interrogatories were attached to the petition, requiring Robb and Strong, trustees, to state what sum of money was paid to Loth as the consideration of the conveyance to them; what indebtedness existed at the time of the conveyance in reference to said property; whether any contract existed between them and Loth in reference to the property, etc.

The sheriff returned the summons: "Service accepted by Kebler & Roelker, attorneys for Charles E. Strong and James Hampden Robb, trustees, and for William Stix, as per acceptance above written."

On December 18, 1885, Kebler filed the answer and cross-petition of Robb and Strong, trustees, correctly setting forth their title to the premises, and prayed that their interest be protected therein. He answered under oath the interrogatories as attorney for Robb and Strong, trustees, assigning as a reason therefor that they were non-residents of the State and absent therefrom.

Kebler also filed in the same case the answer and cross-petition of said William Stix, and at a later stage of the case he filed an amended answer and cross-petition of William Stix setting up the maturity of several of the mortgage notes, breach of condition of the mortgage, and prayed a sale of the leasehold in the premises now in controversy, and of other property mentioned in that cross-petition. To these pleadings of Stix, Kebler filed answers for Robb and Strong, trustees, which he himself swore to.

On February 15, 1887, he consented to an elaborate decree on the cross-petition of William Stix, selling all the property described in the petition, and appointing George Sidney Tyler master commissioner to make the sale. That part of the

decree which referred to Robb and Strong, trustees, was as follows:

"And it is ordered with the consent of Henry W. Taylor, and Charles E. Strong, and James Hampden Robb, trustees, that the fee-simple title of the premises described in said mortgage to William Stix be sold and said premises be sold freed from the claims of Henry W. Taylor, and Charles E. Strong, and James Hampden Robb, trustees, and all other parties in this suit, their respective rights in and to said premises being transferred to and reserved in the proceeds of such sale."

By proceedings under this decree, on April 16, 1887, the property in question was sold, a part thereof to August Vos and a part to William Stix, and on May 24, 1887, conveyed, by a master, to them in fee simple, Vos paying into court the amount of his bid, $9100, and Stix paying $3131.32.

In the final decree of distribution it was ordered that the sum of $11,361.66, being principal and interest, should be paid over by the master to Robb and Strong, trustees, or Kebler, Roelker & Jelke, attorneys, and $7926.02 to William Stix or Kebler, Roelker & Jelke, attorneys, and those sums were paid to Charles A. Kebler, attorney.

On June 23, 1887, Charles A. Kebler gave to F. G. Roelker a conveyance of lands as security for moneys due by Kebler to Roelker, and also to indemnify the latter against any loss he might sustain or liability that he might be under by reason of the partnership business of Kebler & Roelker, attorneys.

On November 25, 1887, Charles A. Kebler died by his own hand, intestate and insolvent.

In January, 1888, in the Court of Common Pleas of Hamilton County, Ohio, at No. 79,812, William J. Coppock, as administrator of Charles A. Kebler, deceased, filed a petition setting forth, among other things, the death of Kebler intestate and insolvent; that there was a large amount of real estate which it was necessary to sell in order to provide means to pay debts; that certain persons had, or claimed to have, title to or liens against said real estate, etc. The minor children of Kebler and F. G. Roelker were made parties defendant. To this petition Roelker filed an answer, in which he alleged

the existence of the conveyance or mortgage made to him in June, 1887, by Kebler, and that J. Hampden Robb and Charles E. Robb, as trustees, claimed to have had dealings with Charles A. Kebler, acting and professing to act as a partner of him, the said Roelker, whereby they claimed that the said partnership and the said Roelker were indebted to them; that he, the said Roelker, did not know, and was unable to state, the particulars of said transactions; that they were concealed from him by the said Charles A. Kebler during his lifetime, etc.; and that he, Roelker, if liable by reason of said transactions, was entitled to the protection of the said conveyance of June, 1887; and he further alleged that the said Robb and Strong, trustees, were necessary parties to the determination of the rights of the parties to the litigation, and asked that they be made defendants and be called upon to answer and to set up their claims, etc.

In this suit Robb and Strong, trustees, appeared and filed an answer and a cross-petition, in which they set forth the particulars of their title to or interest in the lands described in their conveyance to Moritz Loth and the lease of the latter to them, and the proceedings in the Gugenheim case. In respect to that case their averments were as follows:

"And these defendants further say that on said day one Meyer Gugenheim, having recovered by the consideration of this court a judgment against the said Moritz Loth, brought suit in this court, case No. — in this court, against the said Moritz Loth, and the defendants and divers other persons, praying, among other things, that these defendants may be declared to hold said lands by way of mortgage as security for the said purchase price on said lands of $10,000, and that said lands might be free from the claim of these defendants and all other persons parties thereto to satisfy the said judgment of the said Meyer Gugenheim and the claims of divers persons therein made defendants.

"And these defendants further say that thereafter, to wit, on the 18th day of December, 1885, Charles A. Kebler and Frederick G. Roelker, then partners engaged in the practice of law under the firm name and style of Kebler & Roelker, of

the city of Cincinnati, entered the appearance of these defendants in such cause and filed an answer therein on behalf of these defendants; further say therefore, to wit, upon the 10th day of May, 1887, said firm of Kebler & Roelker was dissolved, and Charles A. Kebler, Frederick G. Roelker, and Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of law in the city of Cincinnati under the firm name and style of Kebler, Roelker & Jelke, as the successors of said firm of Kebler & Roelker, and these defendants say that thereafter all steps in said cause on behalf of these defendants were taken by said firm of Kebler, Roelker & Jelke, and by none others; and these defendants further say that such proceedings were afterwards had in said cause that the said premises were sold, free of the claims of these defendants and of all other persons whatsoever, by one George Sidney Tyler, who was appointed special master commissioner by this court in said cause for the purpose of making such sale, and such proceedings were thereafter had in said cause that a decree was made in said cause on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that said George Sidney Tyler, special master commissioner in said cause, pay to these defendants or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale, the sum of $11,361; and these defendants further say that said sum was duly paid on the 16th day of June, 1887, to said firm of Kebler, Roelker & Jelke by said George Sidney Tyler, special master commissioner, as ordered by the decree of said court, and that no portion thereof has been paid to these defendants or accounted for to them; and these defendants further say that since which time, to wit, on the 23d day of November, 1887, Charles A. Kebler departed this life, and that Frederick G. Roelker and Ferdinand Jelke, Jr., are the surviving partners of said firm. Wherefore these defendants pray that said Ferdinand Jelke, Jr., may be made party defendant hereto and that it may be adjudged that these defendants are creditors of said firm of Kebler, Roelker & Jelke, and that the property in the petition and cross-petition of Frederick G. Roelker sought to be sold may be sold, and that out of the proceeds thereof said sum $11,361.66,

with interest from the 16th day of June, 1887, may be paid to these defendants, and that these defendants may recover judgment against Frederick G. Roelker and Ferdinand Jelke, Jr., as surviving partners of Kebler, Roelker & Jelke, for said sum of $11,361.66, with interest from the 16th day of June, 1887, and for their costs."

Subsequently, on May 17, 1888, Robb and Strong, trustees, obtained leave of court to withdraw their said answer and cross-petition, and filed a demurrer on the ground that they were not proper parties to the case, which demurrer was sustained by the court, and Robb and Strong were, on May 26, 1888, dismissed with their costs.

On May 12, 1888, Robb and Strong, trustees, at No. 43,368 of the Superior Court of Cincinnati, Hamilton County, Ohio, brought a suit against August Vos and William Stix. In the petition, after reciting the conveyance by themselves to Moritz Loth and the lease of the latter to them, they set forth the proceedings in the Gugenheim case, and alleged as follows:

"And the plaintiffs further say that on said day one Meyer Gugenheim, having recovered by the consideration of the Court of Common Pleas of Hamilton County, Ohio, a judgment against the said Moritz Loth, brought suit in the said Court of Common Pleas, numbered 74,375 in the said court, against the said Moritz Loth and these plaintiffs and divers other persons, praying, among other things, that these plaintiffs might be declared to hold said lands by way of mortgage as security for the said purchase price of said lands of $10,000, and that the said lands might be sold free from any claims of these plaintiffs and all other persons parties thereto, to satisfy the judgment of the said Meyer Gugenheim and the claims of the divers other persons therein made defendants.

"And these plaintiffs further say that in said cause no summons or other process was ever issued for these plaintiffs (who then were and ever since have been non-residents of Ohio) and no advertisement was ever made for these plaintiffs, and that they had no notice of said proceedings; and these plaintiffs further say that thereafter, to wit, on the 18th day of December, 1885, one Charles A. Kebler, then engaged in the prac-

tice of the law with one Frederick G. Roelker, under the firm name and style of Kebler & Roelker in the said city of Cincinnati, did, without authority from the plaintiffs and without their knowledge, enter the appearance of these plaintiffs in said case, and did file an answer therein on behalf of these plaintiffs, using for that purpose said firm name of Kebler & Roelker.

"And these plaintiffs further say that thereafter, to wit, prior to the 11th day of May, 1887, the said firm of Kebler & Roelker was dissolved, and the said Charles A. Kebler, the said Frederick G. Roelker, and one Ferdinand Jelke, Jr., entered into a partnership and engaged in the practice of the law in said city of Cincinnati, under the firm name and style of Kebler, Roelker & Jelke, as successors to the said firm of Kebler & Roelker; and these plaintiffs further say that thereafter all steps in said cause purporting to be on behalf of these plaintiffs were taken in the name of the said firm of Kebler, Roelker & Jelke.

"And these plaintiffs further say that all steps taken in said cause at any time purporting to be on behalf of these plaintiffs were taken without the knowledge of these plaintiffs and without any authority from these plaintiffs; and these plaintiffs say that all orders, decrees, and judgments entered in said cause purport to have been entered by and with the consent of these plaintiffs, but that the same were entered by the said Kebler, Roelker & Jelke, and without the knowledge, consent, or the authority of these plaintiffs, and that these plaintiffs had no knowledge of said cause or the institution thereof, or of any proceeding therein, until December 2, 1887, being long after the conveyance of said lands to the purchasers thereof, in pursuance of the pretended sale made in said case.

"And these plaintiffs further say that such proceedings were had in said cause No. 74,375, that the said premises were sold by one George Sydney Tyler, who was appointed special master commissioner by said Court of Common Pleas for the purpose of making said sale of property, and that said special master commissioner purported to make said sale free of the claims of these plaintiffs and of all other persons what-

ever parties to said cause, and that the said parcels of land were purchased, respectively, at said sale by the said August Vos, purchasing lots numbered 3, 4, and 5, hereinbefore described, of the subdivision of the tract of land on the west side of Vine Street, 100 feet front and extending back westwardly 132 feet, of the same width in front as in rear, and the said William Stix purchasing the other lots hereinbefore described, to wit, all those parts of lots 2, 4, and 5, of block 12 of Findlay and Ludlow subdivision, hereinbefore described.

"And these plaintiffs further say that in said cause numbered 74,375 a decree was made on the 19th day of May, 1887, whereby it was ordered, adjudged, and decreed that the said George Sydney Tyler, special master commissioner in said case, pay to these plaintiffs, or to Kebler, Roelker & Jelke, purporting to be their attorneys in said cause, out of the proceeds of said sale, the sum of $11,361.66.

"And these plaintiffs further say, that thereafter, on the 16th day of June, 1887, the said George Sydney Tyler, special master commissioner, as ordered by the decree of said court, but without the knowledge and consent of these plaintiffs and without their authority, did pay to the said Kebler, Roelker & Jelke, and the said Kebler, Roelker & Jelke received, the said sum of $11,361.66, and that no portion of the said sum has been received by these plaintiffs or been accounted for to them.

"And these plaintiffs say that they were never parties to said cause in law or in fact, and that the said sale as to them is null and void.

"And these plaintiffs further say that the said transactions between them and said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000, in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Moritz Loth the lease hereinbefore described, containing the privilege of purchase for the said sum of $10,000; and they say that in consequence thereof they have a first and best lien upon the said premises in the said sum of $10,000, with interest thereon, and that there is and remains due and unpaid

thereon the sum of $10,000, with interest thereon from January 1, 1885, at six per cent per annum.

"Wherefore the plaintiffs pray that the said claim may be established as a first and best lien on the said premises, and that unless the defendants shall pay to them the said sum of $10,000, with interest as aforesaid, at a short day to be fixed by the court, that the said premises may be sold for the satisfaction of their said claim, and for such other and further relief as they may show themselves to be entitled to in equity and good conscience."

In the Superior Court case, summons was issued May 12, 1888, and served on August Vos, May 18, 1888.

On June 7, 1888, Vos filed his answer and cross-petition in said case, denying that the alleged acts of Kebler for the said Robb and Strong, trustees, in the Gugenheim case were without their authority, knowledge, or consent, admitting the sale to him under the proceedings in that case, and that the transactions between them and said Loth were in fact a loan by them to him of $10,000 at six per cent interest secured in the form of said deed and lease, but denying that they have any lien on said premises therefor or that any part thereof remains unpaid. By way of cross-petition, the said Vos set up the proceedings in the said Gugenheim case, and averred their regularity, and that said proceedings, orders, decrees, sale, and deed vested in him a valid title in fee simple to the said real estate purchased by him thereunder, free from all claims of said appellants and other parties to said cause, his payment therefor of $9100, and his possession thereof ever since the conveyance to him, May 24, 1887. He prayed "that the said claim and interest of the said Robb and Strong, trustees, in and to said real estate may be adjudged to be null and void, and that his title aforesaid may be quieted against the same, and for all other proper relief."

On June 8, 1888, upon motion of said Robb and Strong, trustees, their said petition was dismissed, and as to the said cross-petition of Vos, the cause was continued for further proceedings. On July 7, 1888, the said Robb and Strong, trustees, filed their petition in said cause 43,368, Superior Court

of Cincinnati, for a removal of the same on the cross-petition of said Vos to the Circuit Court of the United States, in and for the Southern District of Ohio, Western Division, and the order of removal was made.

In said petition they say that they are citizens and residents of the State of New York; that August Vos is a citizen and resident of the State of Kentucky, and William Stix is a citizen and resident of the State of Missouri. They further say that the said suit "is one of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the value of $2000, and is one in which there is a controversy on cross-petition between citizens of different States." They then state the facts, in substance, averred in their said petition filed May 12, and in said cross-petition of August Vos, the dismissal of their said petition, June 8, and their remaining in the case only as defendants to said cross-petition of Vos.

On October 2, 1888, the transcript of the record in said case was filed in the said Circuit Court, and numbered therein 4182.

On October 4, 1888, the said Vos filed his motion in said Circuit Court for the remanding of said cause No. 4182 to the Superior Court of Cincinnati, for want of jurisdiction in said Circuit Court.

On November 17, 1888, the Circuit Court overruled said motion. To which overruling the said Vos then entered his exception.

On November 26, 1889, on motion of the said complainants, said cause No. 4182 was consolidated by order of court with cause No. 4148, all further proceedings to be had under the latter number.

In No. 4148, complainants' bill stated the citizenship and residence of the parties as in their petition in the Superior Court case. They were all non-citizens and non-residents of Ohio. It alleged that said Robb and Strong, trustees, owned certain valuable real estate in the city of Cincinnati, Ohio, which was in the possession of tenants under a lease for the life of two persons for whom said trustees acted. A judgment creditor of the lessee sought by judicial proceedings in the

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Court of Common Pleas of Hamilton County, Ohio, to subject his interest in these and other lands to payment of his claim. The petition was in the nature of a creditor's bill, and made parties defendant a number of persons, including said trustees, holding deeds from the lessee, and charged that these deeds were intended as mortgages, and prayed that they be so decreed, and the property sold to satisfy said judgment.

The trustees were non-residents, and Kebler, of the law firm of Kebler & Roelker, and purporting to act for that firm, entered their appearance in the case and consented to a sale of the fee, it was alleged, without their authority or knowledge. The property was sold at judicial sale, and the proceeds received by Kebler and not paid over or accounted for by him to said trustees. The defendants, Vos and Stix, were purchasers. The bill sought to avoid the title so acquired by them, on the ground that the sale was absolutely void by reason of the fraud of Kebler.

On August 2, 1888, the defendant, Vos, filed a demurrer to said bill.

On August 28, 1888, the court held the bill "good on its face substantially," and overruled the demurrer, and allowed Vos until the first Monday of October, 1888, to plead or answer to the bill.

On September 14, 1888, Vos filed a plea to said bill, setting forth the judicial proceedings referred to in said bill, and contained in Exhibits "A," "B," "C," and "D," made part thereof, under which he purchased and acquired title, that he was "a *bona fide* purchaser of said premises for a good and valuable consideration, and without notice or knowledge that the acts and proceedings of said Charles A. Kebler and of the firm of Kebler & Roelker on behalf of said complainants, alleged in said bill, were unauthorized by said complainants and without their knowledge, or that said complainants did not consent to said sale, or of the alleged fraud on the part of said Kebler;" and that he had no such notice until after May 12, 1888, when said complainants filed their said petition in the Superior Court of Cincinnati.

On September 27, 1888, the court overruled said plea, to

which said Vos entered his exception, and was allowed thirty days to answer, which time was, on November 26, 1888, extended to December 10, 1888.

On December 8, 1888, said Vos filed his answer to said bill.

In this answer Vos admitted specifically all the allegations of said bill, except the following, which he denied, to wit: He denied that the said Kebler and Kebler & Roelker had no authority to accept service of summons for said complainants in said Gugenheim case. He denied that said complainants had notice or knowledge of their answer and cross-petition in said case filed by said Kebler, or of their answer to the cross-petition of William Stix filed therein by said Kebler, or that said Kebler was not authorized to file the same. He denied that said Robb and Strong, trustees, did not consent that said premises should be sold free from their claim and title thereto, or that said claim and title should be transferred to or reserved in the proceeds of sale to be made under said decree, or that said Kebler and Kebler & Roelker had no authority to make or give such consent for them. He denied that said complainants had no knowledge of the order of distribution of the proceeds of said sale made in said cause, or of the payment of said sum of $11,361.66 to said Kebler, or that said Kebler was not authorized to receive said sum, or that the order of court directing such payment was null and void. He denied that said Kebler was wholly insolvent at all times mentioned in said bill. He denied that prior to or at the time of his purchase of said premises he knew complainants were absent from the State of Ohio, or non-residents of said State during the time of said proceedings. He denied that the proceedings and acts taken and done in said cause, purporting to be on behalf of said complainants, were without authority, notice, or knowledge, or that they were done solely by fraud of said Kebler, or that they were ignorant of said suit and the proceedings therein and of the receipt of said money by said Kebler until after his death. He denied that the said decree in said cause was null and void as to said complainants, or that the said

Court of Common Pleas was without jurisdiction to order the said premises sold free from their claim and title, or that said sale and conveyance to him by said Tyler were null and void. He denied that no rent had been paid under said lease since February 5, 1886, or that there was due and unpaid rent since that date at the rate of $600 per annum, or that said complainants had any lien on said premises therefor.

Of the truth of the charge in said bill, that the said Kebler embezzled and appropriated said sum of $11,361.66 to his own use, and that said complainants received no part of the same, or of the charge therein that said Loth was insolvent, the defendant averred that he had no knowledge, and did not admit the same.

Admitting that he had failed and refused to perform any of the covenants and conditions of said lease as charged in said bill, he averred that he was under no obligation to perform the same, but that, by virtue of said sale and conveyance to him of the premises so purchased by him and the consideration of $9100, which he paid therefor, he acquired a perfect title to said premises in fee simple, including all the right, title, and interest of both said lessors and said lessee, and free from the claims of all the parties to said suit.

Further answering, said Vos averred that at the time said deed was made by said Loth to said Robb and Strong, trustees, and said lease by them back to him, the transaction was understood and intended to be in fact a mortgage to secure an investment then made of $10,000 by said trustees for the purpose of furnishing an income to the said Ellen W. and Mary Robb; that at the same time it was understood and agreed between said trustees and said Kebler, and said Kebler & Roelker, that the said Kebler should have entire charge of said investment and collection of said rent or interest and pay same directly to said Ellen W. and Mary Robb, with full authority to act for said trustees in carrying out said trust in all matters required for the protection and collection of said interest and principal, and in pursuance thereof, that he did, with the knowledge and consent of said trustees, collect interest on said $10,000, paid as rent from February 5, 1885, down to

November 1, 1887, and paid the same over to said Ellen W. and Mary Robb, and that he had also paid over to the said Ellen W. Robb and Mary Robb a portion of said sum of $11,361.66, but how much thereof exactly he could not state.

And, further answering, said Vos averred that any alleged want of authority on the part of said Kebler, or Kebler & Roelker, to do any and all of the acts by him or said firm done and in said bill mentioned, was supplied, and all such acts purporting to be done on behalf of said complainants, were ratified by them as follows: Said complainants, on March 2, 1888, in the Court of Common Pleas of Hamilton County, Ohio, in the case of William J. Coppock, Administrator, *v.* John Kebler et al., No. 79,812, on the docket of said court, voluntarily entered their appearance and filed their answer and cross-petition; and again, on April 10, 1888, in the same court, in the case of William J. Coppock, Administrator, *v.* John Kebler et al., No. 79,902, on the docket of said court, said complainants having, on cross-petition of Frederick G. Roelker, been made parties defendant in said cases, voluntarily entered their appearance and filed their answer and cross-petition in each of said cases, being in the same language, and in each case averring that said Charles A. Kebler, for his firm of Kebler & Roelker, had entered the appearance of said Robb and Strong, trustees, in said action in the bill mentioned, brought by said Gugenheim, and had filed an answer therein on their behalf, and that on May 11, 1887, said firm of Kebler & Roelker had been dissolved, and had been succeeded by the firm of Kebler, Roelker & Jelke, composed of said Kebler and Roelker and Ferdinand Jelke, Jr., and that thereafter all steps taken in said cause on behalf of said Robb and Strong, trustees, were taken by said new firm; and that in the case aforesaid, brought by said Gugenheim, the premises in the said bill herein described had, pursuant to decree made therein, been sold by George Sidney Tyler, special master commissioner appointed by the court for that purpose, free from the claims of said Robb and Strong, trustees, and all

other persons whomsoever; averring further, that the decree had been made in said cause on May 19, 1887, whereby it was ordered, adjudged, and decreed that said special master commissioner should pay to said Robb and Strong, trustees, or their counsel, Kebler, Roelker & Jelke, out of the proceeds of said sale, the sum of $11,361.65; and further averring, that said sum had been by said special master commissioner, on June 16, 1887, duly paid to said firm, but no portion thereof had by said firm been paid or accounted for to said Robb and Strong, trustees; and further averring, that, on November 23, 1887, said Charles A. Kebler had deceased, and that said Roelker & Jelke were the surviving partners of said firm of Kebler, Roelker & Jelke, and praying that said Jelke might be made party defendant to said causes; and that it might be adjudged that said Robb and Strong, trustees, were creditors of said firm of Kebler, Roelker & Jelke; and that the property in the petition and cross-petition of said Roelker sought to be sold might be sold, and that out of the proceeds thereof said sum of $11,361.65, with interest from June 16, 1887, might be paid to said Robb and Strong, trustees; and that said Robb and Strong, trustees, might recover judgment against said Roelker & Jelke, as surviving partners of said Kebler, Roelker & Jelke, for said sum and interest.

And, further answering, said Vos averred that said answers and cross-petitions were sworn to by the said James Hampden Robb, and were signed and filed by the duly authorized attorneys of the said Robb and Strong, trustees, that the same remained on file in said cases until May 16, 1888, when, said cases having in the meantime been consolidated April 21, 1888, (Record, p. 164,) said Robb and Strong, trustees, filed a demurrer to said cross-petition of Frederick G. Roelker, on the ground that they had been improperly joined as defendants thereto; and thereafter, until May 28, 1888, when said demurrer was sustained, and said Robb and Strong, trustees, were dismissed from said cases. A copy of said answers and cross-petitions was filed with the answer of said defendant, William Stix, to said bill, to which copy the said Vos makes

reference and incorporates said copy in this his answer as part thereof.

Said Vos further averred that at the time of swearing to said answers and cross-petitions and filing them, said Robb and Strong, trustees, had full knowledge of all things and acts done in their behalf by said Kebler, and Kebler & Roelker, and Kebler, Roelker & Jelke, and they deliberately adopted them as done on their behalf and ratified them, and supplied all lack of previous authority upon the part of said Kebler, and Kebler & Roelker, and Kebler, Roelker & Jelke, if any such there previously had been, which he, said Vos, denied. And thereupon said Vos prayed to be hence dismissed.

On the same day, December 8, 1888, the said August Vos filed in said Circuit Court and in said cause No. 4148 his cross-bill against the said James Hampden Robb and Charles E. Strong, trustees, William Stix and Moritz Loth, stating fully the facts alleged in said bill of Robb and Strong, trustees, which were admitted in his answer to said bill; also the facts set forth in his said answer; also averring that on May 24, 1887, he entered into possession of the premises so purchased and conveyed to him, and had had possession thereof ever since, and had expended a large amount of money thereon in repairs and permanent improvements, which he was ready to show to the court; also referring to the petition hereinbefore mentioned, filed in a cause brought by said Robb and Strong, trustees, May 12, 1888, in the Superior Court of Cincinnati, No. 43,368, removed to said Circuit Court and then on the docket thereof, No. 4182, in which they averred that the said transactions between them and said Loth — the deed and lease — were in truth and in fact a loan by them to said Loth of $10,000, for which sum and interest thereon they had a first and best lien upon said premises. Reference was made to the certified copy of said petition contained in the transcript of the record in said case 43,368, Superior Court of Cincinnati, on file in said Circuit Court in said case No. 4182, and the same incorporated therein.

Vos prayed that, in the event it be found by the court that the said acts done by said Kebler, or Kebler & Roelker, or

Kebler, Roelker & Jelke, were unauthorized by and not ratified by and not binding on said Robb and Strong, trustees, and the said judgments, orders, and decrees of said Court of Common Pleas void as to them, and that he acquired no title by his purchase and deed of the said real estate, it should be decreed that the deed and lease aforesaid constituted only a mortgage to secure to said Robb and Strong, trustees, the payment of said $10,000 and interest, and that an account be taken to ascertain what proportion of said sum and interest ought justly to be borne by him as chargeable against the land covered by said mortgage purchased by him, taking into account the payments which it might be found said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, had made on account of said interest and principal, or out of said sum of $11,361.65, to said Ellen W. Robb and Mary Robb, which proportionate sum that might be so found he thereby offered and agreed to pay as said Circuit Court should direct.

On December 21, 1888, said Robb and Strong, trustees, filed their general replication to the answer of said Vos in No. 4148.

On February 16, 1889, said Robb and Strong, trustees, filed their answer to the said cross-bill of August Vos, in which they denied that said Vos was an innocent purchaser for valuable consideration, without notice of the want of authority from the said Kebler, or Kebler & Roelker, or of the want of consent of said Robb and Strong, as trustees, to the decree of sale in the said Gugenheim case; and they denied that any of the acts of said Kebler, or Kebler & Roelker, or Kebler, Roelker & Jelke, had been ratified by any act of said Robb and Strong, as trustees. As to whether the said transaction, whereby the said Loth conveyed to them said property for $10,000, and they leased the same back to him, was a loan, and whether said conveyance should be regarded as a mortgage, and to be foreclosed as such, they left the same to the determination of the court upon the proof to be made by said August Vos of the allegations of his said cross-bill.

They also denied any authority on the part of said Kebler, or Kebler & Roelker, to collect said rent, or to act for them

in the collection of said interest or principal; and they denied that said Kebler collected any of the interest of said $10,000, and paid the same to Ellen W. Robb and Mary Robb, and if he did so, that he was authorized to collect the said principal.

On February 23, 1889, said Vos filed a general replication to said answer of Robb and Strong, trustees, to his cross-bill.

The defendant, William Stix, did not file any demurrer or special plea to said bill, but otherwise filed pleadings substantially the same as those filed by August Vos.

On the final hearing, November 26, 1889, upon the pleadings and evidence, the court found the equity of the case with the defendants, and that the complainants had ratified said Kebler's want of authority, and therefore decreed the dismissal of the bill; and also that the title of Vos should be quieted against the complainants, as prayed for in his cross-petition.

Mr. Edward Colston, (with whom were *Mr. Judson Harmon* and *Mr. George Hoadly, Jr.*, on the brief,) for appellants, on the question of election and ratification said:

It is claimed that Robb and Strong, trustees, by filing an answer and cross-petition in the Coppock case, ratified Kebler's want of authority, and thereby made the title of Vos and Stix to the land in question good.

Ratification being thus asserted and denied, the question is, whether the mere fact that Robb and Strong, trustees, filed an answer and cross-petition in the Coppock case furnishes, *under the circumstances*, conclusive evidence that they did thereby elect to abandon their title, as trustees, to this land, and to adopt in lieu thereof the chance of recovering some, or it may be all, or it may be none, of the money from Kebler's assets or from Kebler's partners *by means of the Coppock case.* The court below decided in the affirmative and accordingly dismissed the bill on that ground.

We claim that there is in this record no evidence of an intelligent and intentional ratification of the acts of Kebler and of deliberate choice *actually made* to look solely to what

might be got out of the Coppock case. It is not pretended that there was any express ratification, and, therefore, if any ratification there was, it must be implied. This presents a question of fact, not of law. Ratification and election rest upon intention. The answer and cross-petition of Robb and Strong, which is claimed to operate as a ratification, was not a *suit begun* by them, but only a pleading filed in an action in which they had been summoned as defendants, *for a limited purpose*, by the cross-petition of Frederick G. Roelker. Roelker did not claim it was necessary to bring in Robb and Strong, trustees, in order to determine the question whether they had any claim upon "the subject-matter in this case." The precise language of Roelker's cross-petition is that Robb and Strong, trustees, "are necessary parties to the determination of the right of *plaintiff* (Coppock) and of this *defendant* (Roelker) to the subject-matter of the litigation in this cause."

Roelker did not aver that Robb and Strong, trustees, had any claim to participate in his indemnity fund or that they had asserted a right to avail themselves thereof. He recognized no rights of Robb and Strong in that fund nor to any relief in the case. Their presence was averred to be necessary only to determine rights between Coppock and him. Roelker acted on the idea that it was necessary to have Robb and Strong before the court to enable *him* to establish *his* lien upon the Kebler assets to an extent that would protect him against the Robb and Strong claim should they make it, and not in order to afford *them* an opportunity to assert any right of *theirs*. But in reality their presence was not necessary even for this purpose; and the court so decided, and they were dismissed. It is true that Robb and Strong, in their answer, overlooking the purpose for which they had been invoked into the case, did set up a claim to a personal judgment not only against Roelker, but against Jelke, the other partner, whom the answer of Robb and Strong prayed should be made a party. But Jelke was not made a party. It was, however, clearly not a case for a personal judgment against Roelker and Jelke, or either. Such cause of action would have been foreign to the case as affecting some and not all

the parties to the cause, and would have been contrary to the provisions of § 5020 Revised Statutes of Ohio, which requires that each cause of action shall affect all the parties to a case. It was proper, then, for these reasons, if for no other, that Robb and Strong should withdraw their answer and cross-petition, it being subject at any time before trial to be stricken from the files for non-conformity to that section or to a demurrer for the same reason. The result is the same as if no such answer had ever been filed by them.

But if any effect is to be given to the filing of this answer and cross-petition, no greater effect can be rightly claimed for it than would attach to it as the presentation of a claim to participate in a fund, the value of which the claimant knows nothing of; for anything more would have exceeded the limits of that case. The presentation of such a claim would not amount to an election even where it is filed *voluntarily*. So are all the authorities, particularly *Morris* v. *Robinson*, 3 B. & C. 196; *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; *Wells, Fargo & Co.* v. *Robinson*, 13 California, 133. But the appearance of Robb and Strong in the Coppock case was not voluntary. Robb and Strong, although non-residents, were subject to constructive service by publication, and being thus compellable to appear, their appearance without waiting to be served by publication would have no different effect than if they had been served in that manner.

Our claim that there was no election on the part of Robb and Strong to ratify the acts of Kebler in consenting to the sale of the property as professed attorney for Robb and Strong, trustees, is placed upon the following grounds:

I. Robb and Strong, trustees, had no authority or power to ratify a transaction, the effect of which would be to divest them of their title as trustees to this property. They could not have conveyed this property in the first instance so as to divest their *cestuis que trustent* of their title; and *a fortiori* could not do so by ratification after the property had been sold and the proceeds thereof squandered. Stix and Vos derived notice of this want of power on the part of Robb and Strong from the conveyances and from the pleadings in the case.

Robb and Strong had no power to have accepted in lieu of the land the *chance* of making the money out of the insolvent Kebler, or out of his solvent partners who denied responsibility for his acts.

A ratification can only be made when the party ratifying possesses the power to perform the act ratified. *Marsh* v. *Fulton County*, 10 Wall. 676, 684. See also *Shaw* v. *Spencer*, 100 Mass. 382, *S. C.* 97 Am. Dec. 107; *Smith* v. *Ayer*, 101 U. S. 320; *The Distilled Spirits*, 11 Wall. 356.

II. There could be no ratification as against the partners of Kebler without their consent; they did not consent to a ratification the result of which would have made them liable for stolen money. The claim in the answer and cross-petition of Robb and Strong was not against the estate of Kebler, but only against his partners; or at most against Kebler, in conjunction with them.

III. Ratification being a question of intention, the filing of the answer and cross-petition of Robb and Strong did not, under the circumstances, constitute an election to give up the land and accept in lieu thereof a *supposed* right of recovery, for which they had in that case no remedy *enforceable in that proceeding.*

To constitute an election by implication, the acts relied upon must be plain and unequivocal acts, done under a full knowledge of all the circumstances and rights of the parties. *Reaves* v. *Garrett*, 34 Alabama, 558, 562; *Anderson's Appeal*, 36 Penn. St. 476.

In considering the question of ratification or election as arising from the act of filing this answer and cross-petition, we cannot accord to it the same significance as attaches to proceedings at common law where the pleading indicated to a certainty, whether it was founded upon tort or contract, there being in Ohio no forms of action. We find no case in the books where it has been decided that the mere commencement of a suit which was afterwards withdrawn without issue of process, has been held to amount to a ratification. In all the cases where the pendency of a suit not prosecuted to judgment has been held to constitute a ratification, there has

been either an attachment, a trial by jury or a replevin, or some other step taken whereby the plaintiff had acquired some advantage. There are in the opinions in some cases, expressions such as that any decisive act would constitute a ratification or election, as the case may be; but, in those very cases, there had either been a trial of the case or an attachment, or the case was still pending when the second action was brought. *Morris* v. *Robinson*, 3 B. & C. 196; *Morgan* v. *Couchman*, 14 C. B. 100; *Curtis* v. *Williamson*, L. R. 10 Q. B. 57; *Priestly* v. *Fernie*, 3 H. & C. 977; *Calder* v. *Dobell*, L. R. 6 C. B. 486; *Peters* v. *Ballistier*, 3 Pick. 495; *Valpy* v. *Sanders*, 5 C. B. 886; *Butler* v. *Hildreth*, 5 Met. 49; *Anchor Milling Co.* v. *Walsh*, 20 Mo. App. 107; *Bunch* v. *Grave*, 111 Indiana, 351; *Nason* v. *Cockroft*, 3 Duer, 366; *Becker* v. *Walworth*, 45 Ohio St. 169; *Dean* v. *Yates*, 22 Ohio St. 388; *Frank* v. *Jenkins*, 22 Ohio St. 597; *Huffman* v. *Hughlett*, 11 Lea, 549; *Wells, Fargo & Co.* v. *Robinson*, 13 California, 133; *In re Collie*, 8 Ch. D. 807.

Mr. Gustavus A. Wald and *Mr. A. B. Huston*, (with whom was *Mr. W. Austin Goodman* on the brief,) for Vos, appellee.

Mr. Gustavus A. Wald and *Mr. Charles B. Wilby* filed a brief for Stix, appellee.

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

As the proceedings in the Gugenheim case were regular upon their face, and extrinsic evidence was required to show their invalidity, we think a court of equity was the proper tribunal to afford effectual relief. *Slater* v. *Maxwell*, 6 Wall. 268; *Cocks* v. *Izard*, 7 Wall. 559; *Oelrichs* v. *Spain*, 15 Wall. 211, 228; Freeman on Judgments, §§ 499 and 500.

Nor do we think that the contention, that for the Circuit Court of the United States to grant such relief would be to interfere with the jurisdiction of the state court, is well founded. *Pennoyer* v. *Neff*, 95 U. S. 714; *Johnson* v. *Waters*, 111 U. S. 640; *Arrowsmith* v. *Gleason*, 129 U. S. 86.

Whether the presumption, in favor of innocent third parties, that Kebler had authority to enter an appearance for Robb and Strong, trustees, and to receive the proceeds of the sale, was sufficiently overcome by the evidence in this case, we need not consider, because we agree with the conclusion of the court below that the acts of Kebler, whether done with or without authority, were subsequently adopted and ratified by the complainants.

That the course of Robb and Strong, in voluntarily appearing in the case of Coppock *v.* Kebler, and filing an answer and cross-petition therein, whereby they sought to appropriate to themselves the benefit of the mortgage given by Kebler, in June, 1887, to F. G. Roelker, would have been an adoption and ratification of the acts of Kebler done in their behalf, and would have estopped them, as against innocent third parties whose proceedings were or may have been influenced by such course, is clear, upon reason and authority, if Robb and Strong were acting in their own behalf. This course was deliberately chosen, after the lapse of several months from the death of Kebler, and with a full knowledge of all the facts. It does not appear that they acted under any mistake, nor that, when they afterwards dismissed their cross-petition and resorted to the present suit, they had acquired any additional information. The subsequent withdrawal of their answer and cross-petition did not avail to put the parties in *statu quo.* Such withdrawal could not restore to the purchasers at the Gugenheim sale their lost opportunity to pursue Kebler's estate. Nor is it necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to Vos and Stix from an attempt, if seasonably made, to secure indemnity from Kebler's estate. The right to seek such indemnity was a valuable one, and it is enough that it appears that Robb and Strong, by acquiescing in Kebler's acts and resorting to legal proceedings against his administrator and partner, prevented Vos and Stix from promptly and perhaps successfully pursuing their remedies against the criminal's estate.

Similar reasoning was applied by this court in the case of *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 114.

It was there held that a depositor, whose checks had been fraudulently raised by his clerk, lost his remedy against the bank by his delay and negligence in making known the facts to the bank and thus giving it an opportunity to seek restitution from the wrongdoer, and the following language was used:

"Still further, if the depositor was guilty of negligence in not discovering and giving notice of the fraud of his clerk, then the bank was thereby prejudiced, because it was prevented from taking steps, by the arrest of the criminal, or by an attachment of his property, or other form of proceeding to compel restitution. It is not necessary that it should be made to appear, by evidence, that benefit would certainly have accrued to the bank from an attempt to secure payment from the criminal. Whether the depositor is to be held as having ratified what his clerk did, or to have adopted the checks paid by the bank and charged to him, cannot be made, in this action, to depend on a calculation whether the criminal had at the time the forgeries were committed, or subsequently, property sufficient to meet the demands of the bank. An inquiry as to the damages in money actually sustained by the bank by reason of the neglect of the depositor to give notice of the forgeries might be proper if this were an action by it to recover damages for a violation of his duty. But it is a suit by the depositor, to falsify a stated account, to the injury of the bank, whose defence is that the depositor has, by his conduct, ratified or adopted the payment of the altered checks, and thereby induced it to forbear taking steps for its protection against the person committing the forgeries. As the right to seek and compel restoration and payment from the person committing the forgeries was, in itself, a valuable one, it is sufficient if it appears that the bank, by reason of the negligence of the depositor, was prevented from promptly, and, it may be, effectively, exercising it."

We do not deem it necessary to review the numerous cases, involving questions of election of remedy and ratification, cited on behalf of the respective parties, but shall content ourselves with referring to two or three which satisfactorily illustrate the principles upon which we proceed.

Thompson v. *Howard*, 31 Michigan, 309, 312, was a case where a father who had brought an action of assumpsit for a minor son's wages, and, after the jury disagreed, had discontinued the suit, and brought an action for the unlawful enticing away and harboring the son. The Supreme Court said:

"A man may not take contradictory positions; and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. . . . [The plaintiff's] proceeding necessarily implied that the defendant had the young man's services during the time *with plaintiff's assent*, and this was absolutely repugnant to the foundation of this suit, which is, that the young man was drawn away and into defendant's service *against the plaintiff's assent*."

In *Conrow* v. *Little*, 115 N. Y. 387, 393, 394, the court said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud, voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. We think that time was when they commenced an action for the sum due under the contract, and in the course of its prosecution applied for and obtained an attachment against the property of Branscom as their debtor. They then knew of the fraud practised by him, and disclosed that knowledge in the affidavit on which the attachment was granted, and became entitled to that remedy because it was made to appear that a cause of action existed in their favor by reason of 'a breach of contract to pay for goods and money loaned obtained by fraud.' The attachment was levied and the action pending when the present action, which repudiates the contract and has no support except on the theory of its disaffirmance, was commenced. The two remedies are inconsistent. By one, the whole estate of the debtor is pursued in a summary manner, and payment

of a debt sought to be enforced by execution; by the other, specific articles are demanded as the property of the plaintiff. One is to recover damages in respect of the breach of the contract, the other can be maintained only by showing that there was no contract. After choosing between these modes of proceeding, the plaintiffs no longer had an option. By bringing the first action, after knowledge of the fraud practised by Branscom, the plaintiffs waived the right to disaffirm the contract, and the defendants may justly hold them to their election. The principle applied in *Foundry Company* v. *Hersee*, 103 N. Y. 26, and *Hays* v. *Midas*, 104 N. Y. 602, require this construction, for the present contains the element lacking in those cases, viz., knowledge of the fraud practised by the vendee; and by reason of it the plaintiffs were put to their election.

"It is not at all material to the question that the plaintiffs discontinued the first suit before bringing the present to trial, for it is the fact that the plaintiffs elected this remedy, and acted affirmatively upon that election, that determines the present issue. Taking any steps to enforce the contract was a conclusive election not to rescind it on account of any thing known at the time. After that the option no longer existed, and is of no consequence whether or not the plaintiffs made their choice effective."

In *Butler* v. *Hildreth*, 5 Met. (Mass.) 49, it was held that "an assignee of an insolvent debtor," under the insolvent law of 1838, "may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he cannot, by discontinuing such action, and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them."

At page 51 the court said: "It would, we think, be going too far to say that merely demand of the price would be deemed a waiver of his right to avoid the sale and claim the

goods; because, in many cases, if the price could be obtained, it would be equally beneficial to the creditors, and he would have no farther occasion to pursue the harsher remedy of impeaching the sale. But we think that, if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act, too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own; and if done with a knowledge of all the facts which ought to influence him in his election, it is conclusive."

In *Connihan* v. *Thompson*, 111 Mass. 270, 272, the court said: "The defence of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act.

We cannot accept the contention that Robb and Strong never had any legal standing in the Coppock case, and that the filing of their answer and cross-petition was merely a fortuitous circumstance, which did no injury to Vos and Stix. It is true that when the answer and cross-petition were, by leave of court, withdrawn, the record did not, of itself, disclose any good reason for making them parties, and their

demurrer was properly sustained. But if they had stood upon their case, as set up in their answer and cross-petition, it would seem that they would have been entitled to relief.

These views justify the decree of the court below, unless the fact that Robb and Strong were trustees calls for a different conclusion.

It is claimed that the interest held by Robb and Strong, in the lands embraced in the deed and lease between them and Loth, was in the nature of an estate in realty, and that, as trustees, they could not themselves, nor by authority given to Kebler, have consented to the sale of such lands in the Gugenheim case. If the nature of their tenure was indeed such that it could not be affected by the sale in the Gugenheim case without their consent, and if, as trustees, they were disabled from consenting, it would seem to follow that the sale in that case was inefficacious, and that the remedy at law would be the sufficient and only one.

But our examination of the deed and lease, read in the light of the testimony of the parties, satisfies us that, as between Robb and Strong and Loth, the transaction was that of a loan of money secured by the covenants of the lease.

Moritz Loth testified, in the present case, that he regarded the transaction as a loan; and Robb and Strong, in the petition filed by them against Vos and Stix, alleged that "the said transactions between them and the said Moritz Loth were in truth and in fact a loan by them to the said Moritz Loth of the sum of $10,000, in consideration whereof the said Moritz Loth conveyed to them the premises hereinbefore described, and they executed to the said Loth the lease hereinbefore described containing the privilege of purchase for the said sum of $10,000," and they accordingly prayed that "their claim shall be declared to be a first and best lien on the premises, and that unless the defendants should pay them the said $10,000, with interest, the said land might be sold for the satisfaction of their claim."

It also appears that, in the Gugenheim case, the petition averred that Robb and Strong, trustees, held the land only as security.

Counsel for Parties.

Accordingly it would seem plain that the rights of Robb and Strong, trustees, were correctly asserted by Kebler in the answer and cross-petition filed by him in the Gugenheim case, and that, assuming that he was authorized to appear, the decree in that case, directing the lands to be sold, and awarding to Robb and Strong, trustees, the said sum of $10,000 and interest out of the proceeds, was fully warranted. It follows that, by the payment into court of the amount of the principal and interest of the money found to be due to Robb and Strong, trustees, and by the conveyance to them by the master of the lands in question, in pursuance of the decree, the purchasers became vested with a fee simple title to said lands.

The decree of the court below is accordingly

Affirmed.

Mr. Justice Jackson and Mr. Justice White, not having heard the argument, took no part in the decision.

TALBERT *v.* UNITED STATES.

UNITED STATES *v.* TALBERT.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 24, 25. Argued and submitted October 11, 12, 1894. — Decided October 15, 1894.

A finding of fact by the Court of Claims, where there is nothing in the other findings or elsewhere in the record which authorizes this court to go behind that finding and conclude that there was error in respect thereof, will not be reviewed here.

The two causes were argued together. The case is stated in the opinion.

Mr. S. S. Henkle for Talbert in both cases.

Mr. Assistant Attorney General Conrad for the United States.

The court declined to hear him in No. 24, and in No. 25 he submitted on his brief.

THE CHIEF JUSTICE: This was a suit brought in the Court of Claims under an act of Congress entitled "An act for the relief of William Talbert," approved June 30, 1886, and reading as follows: "That the claim of William Talbert, of Montgomery County, Maryland, for the use by the government of his patented improvement for marine railways be, and the same is hereby, referred to the Court of Claims, with authority to take jurisdiction thereof, and to award judgment thereon, as the merits of the case may demand, according to its value to the government during the existence of such patent." 24 Stat. 822, c. 591.

The court filed findings of fact and a conclusion of law; rendered an opinion, reported in 25 C. Cl. 141; and gave judgment in claimant's favor for $6564.30, from which both parties appealed, but argument is waived by the government on its cross-appeal. Among the findings of fact was the following: "VIII. The value to the government of plaintiff's patented improvement for marine railways during the existence of his patent was $6564.30, being 2 per cent upon the amount earned by the railway cradle as improved during said period." On this appeal only questions of law can be reviewed, and none such are presented for our consideration. The contention is that the sum awarded was far less than it should have been. But the eighth finding was one of fact, and there is nothing in the other findings or elsewhere in the record which authorizes us to go behind that finding and conclude that there was error in respect thereof.

Judgment affirmed.

WRIGHT *v.* YUENGLING.

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

No. 1. Argued October 9, 1894. — Decided October 22, 1894.

Whether there was any novelty in the first claim in letters patent No. 144,818, issued November 18, 1873, to William Wright for an improvement in frames for horizontal engines, *quære.*

Inasmuch as the semi-circular connecting piece in that patented machine is described by the inventor as an essential feature of his invention and is made an element of claims 1 and 2, it must be regarded as such essential feature, and a device which dispenses with it does not infringe the patent.

When an invention is not a pioneer invention, the inventor is held to a rigid construction of his claims.

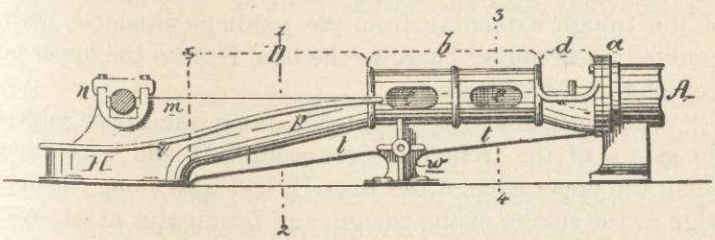
The second claim in the said patent is void for want of patentable novelty.

The combination of the cylindrical guide with the trough in that machine is not a patentable invention.

THIS was a bill in equity for an injunction and the recovery of damages for infringement of letters patent No. 144,818, issued November 18, 1873, to the plaintiff Wright, for an improvement in frames for horizontal engines.

In his specification the patentee stated the object of his invention to be the "attainment of both lightness and strength in the construction of frames for horizontal engines, and at the same time to dispense with much of the fitting and other costly work demanded by the ordinary frames of engines of this class."

The following drawing exhibits the material parts of the invention:



The patentee further stated that "the extreme rear end of the frame, and forming part of the same, is the head *a* of the steam-cylinder A, and the portion of the frame which, in ordinary engines, is devoted to the usual flat slides, consists of a hollow cylinder, *b*, arranged concentrically with the steam-cylinder, and serving as a guide for the cross-head, the guiding cylinder being simply bored out to receive a cross-head, adapted to it in a manner which need not here be explained, as it forms no part of my present invention. There are lateral openings *ee* in this cylindrical guiding portion of the frame, in order that access may be had to the cross-head. . . . A semi-circular connecting-piece, *d*, merges at one end in the guiding cylinder *b*, and at the other end in the cylinder-head *a*, thus uniting the two, the open top of the said connecting-piece permitting ready access to be had to the stuffing-box of the cylinder-head.

"This combination, in a horizontal engine-frame, of the guiding-cylinder *b*, cylinder-head *a*, and connection *d*, constitutes an especial feature of my invention. The cylinder *b* not only forms the main body of this portion of the frame, but serves at the same time as a cross-head guide, which can be readily prepared for service by the same bar which is used for boring out the cylinder.

"From the front of the guiding-cylinder *b* to the point *x*, where it meets the base H, the frame is made in the form of an inclined concavo-convex trough, D, deep enough to permit the free movement of the connecting-rod, and this trough, . . . on the line 1 2, has one side, *m*, the upper edge of which is continued in a plane coinciding with the centre of the cylinder *b*, from the latter to the enlargement *n*, for receiving the bearing of the crank-shaft, the opposite side *p* of the trough extending from the guiding-cylinder *b*, with a gradually descending curve to the base H, into the upper portion of which it merges.

"A strengthening-rib, *q*, extends along the upper edge of the side *p* of the trough-like connection D, and is continued along the upper edge of the base H, and also along the upper edge of the side *m* of the trough, and terminates at an exten-

sion of the cylinder-head *a*; and in order to add vertical strength to the frame a central web, *t*, extends from the base H to the cylinder-head *a*, this web merging into the foot *w*, which serves as one of the supports of the frame.

"In horizontal engines there is necessarily an excessive lateral strain on the frame between the cross-head guides and the crank-shaft. This strain is effectually resisted by the comparatively light trough-like portion of the frame between the crank-shaft and guiding-cylinder."

His claims were as follows:

"1. A horizontal steam-engine frame in which a cylinder, *b*, for guiding the cross-head, is combined with the cylinder-head *a* and semi-circular connecting-piece *d*, substantially in the manner described.

"2. The combination, in a horizontal engine-frame, of the guiding-cylinder *b*, base H, and trough-like connection D.

"3. A horizontal engine-frame composed of the cylinder-head *a*, guiding-cylinder *b*, connecting-piece *d*, trough D, base H, and web *t*, all combined substantially in the manner described."

The answer set up the defences of non-infringement and want of patentable novelty by reason of certain prior patents.

Upon a hearing in the Circuit Court upon pleadings and proofs the bill was dismissed upon these grounds and plaintiff appealed.

Mr. Andrew M. Todd for appellant.

Mr. B. F. Lee for appellee.

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

The object of the invention in question was to add both lightness and strength to the construction of frames for horizontal single crank engines. To attain this the patentee, instead of employing the ordinary flat parallel slides for the piston and cross-head, makes use of a hollow cylinder, arranged

concentrically with the steam cylinder, and serving as a guide for the cross-head, together with a trough connecting this cylinder with the base H, and deep enough to permit the free movement of the connecting rod. This construction is further strengthened by a rib extending along the upper edge of one side, *p*, of the trough D, continued along the upper edge of the base H, and also along the upper edge of the other side, *m*, of the trough, and terminating at an extension of the cylinder head *a*; and also, to add vertical strength to the frame, a rib or web, *t*, was extended from the base H to the cylinder head *a*, merging in a foot, *w*, which serves as one of the supports of the frame. The cylinder head *a*, the guiding cylinder *b*, with its connecting piece, the trough D, the base H, and the web *t*, are cast in a single piece and firmly bolted to the head of the steam cylinder A.

(1) The first claim is for a combination of the cylinder *b*, the cylinder head *a*, and the semi-circular connecting piece *d*, while the third claim includes the same elements and, in addition thereto, the trough D, the base H, and the web *t*.

In view of the fact to which we shall hereafter call attention, that a cylinder had been used long before for guiding the cross-head of a piston, it is at least open to doubt whether there was any novelty in the first claim. Such novelty, if there be any at all, consists in leaving certain lateral openings, *ee*, in the guiding cylinder, and in taking half the top off of such cylinder as it approaches the steam cylinder, in order to give convenient access to the cross-head. But, in the view we take of the alleged infringing device, it is unnecessary to express a decided opinion upon this point.

The connecting piece *d*, which is described in the specification as a semi-circular connecting piece merging at one end in the guiding cylinder and at the other end in the cylinder head, thus uniting the two, is not only made an element of both these claims, but is said to constitute, in connection with the guiding cylinder and cylinder head, a special feature of the invention. This so-called connecting piece is distinguished from the guiding cylinder in that it is only semi-circular, and thus admitting of access to the stuffing-box with

perfect freedom throughout a complete half circle. This access is had, not through a mere hole or opening, such as are *ee*, but through such an opening as can be obtained by cutting away the upper half of the frame at this point.

The device used by the defendant contains a similar cylinder for guiding the cross-head, and a trough connecting it with the base; but this cylinder, instead of having its entire interior surface bored out, so that it may guide the cross-head in the same way that the piston is guided in the steam cylinder, (as in the Wright patent,) merely contains an upper and a lower guide, formed of two slides or fitting strips, the surfaces of which are bored out, but no other portion of the cylinder. We do not regard this, however, as a material departure from the Wright patent, as it constitutes a mere difference in detail of construction, not affecting in any way the operation of the cross-head of the cylinder, or changing materially the efficiency of such cylinder. Nor do we think it material that in defendant's structure there is no cylinder head forming part of, cast with, and constituting a portion of the engine-frame, since the frame of the defendant's device terminates in a flange adapted to be bolted to a cylinder head, and thus in fact constituting a part of it.

But the absence of the semi-circular connecting piece *d* is a circumstance worthy of more serious consideration. In the defendant's engine there is no such semi-circular connecting piece as is described in the Wright patent, but the guiding cylinder extends backward to a connection with the head of the steam cylinder, the side of such guiding cylinder, through which the cross-head operates, containing an opening oval in shape and narrower at each end than in the centre. The equivalent for the connecting piece, if found at all, must be in this continuation of the guiding cylinder backward to the steam cylinder. But this portion of the cylinder is neither scooped out in a semi-circular form, nor does it admit of ready access to the cross-head shown at this point in the Wright patent. Instead of access to the cross-head being easier at this point than any other, it is in reality more difficult, as the oval opening is narrower there than in the centre.

Now, while this semi-circular connecting piece may be an immaterial feature of the Wright invention, and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant's device, yet the patentee, having described it in the specification and declared it to be an essential feature of his invention, and having made it an element of these two claims, is not now at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplish the same purpose in, perhaps, an equally effective manner. *Vance* v. *Campbell*, 1 Black, 427; *Water-Meter Co.* v. *Desper*, 101 U. S. 332; *Gage* v. *Herring*, 107 U. S. 640, 648; *Gould* v. *Rees*, 15 Wall. 187; *Brown* v. *Davis*, 116 U. S. 237, 249.

If the guiding cylinder of this patent had been a pioneer invention, it is possible the patentee might have been entitled to a construction of this claim broad enough to include the defendant's device, notwithstanding the absence of the semi-circular connecting piece; but as we have already said, the novelty of the invention is at least open to doubt, and we think the patentee should be held to a rigid construction of these claims. The opening in the guiding cylinder, which is supposed to be the equivalent of the connecting piece *d*, instead of increasing so as to form a semi-circular opening, as in the patent, decreases, so as to prevent, if anything, ready access to the stuffing-box, and, under the circumstances, does not constitute a mechanical equivalent for it. Indeed, the guiding cylinder of the defendant's engine bears a stronger resemblance to those shown in the prior patents hereinafter cited than to that of the Wright patent, and hence if the prior patents anticipate the Wright cylinder, the defendant's does not infringe it.

(2) The second claim of the patent is for "the combination, in a horizontal engine-frame of the guiding cylinder *b*, base H, and trough-like connection D." The guiding cylinder, which is used in lieu of the ordinary parallel slides, was, however, by no means a novelty in the construction of engine-frames. It is found in different stages of perfection in several prior

patents, viz.: in a patent issued to Samuel Wright as early as 1837, for locomotive engines, and was there used, as the patentee states, "to subserve the twofold purpose of a (steam) pump and guide;" in the patent to Gelston Sanford of February 15, 1859, in which the invention related to elongating the cylinder, "by which means it becomes a part of the frame, used for the support of the crank shaft, and so constructed that when bored out forms a guide and rest for the cross-head;" in the patent to William Wright of August 8, 1865, in which the movement of the piston is transmitted to the main crank by means of a connecting rod, jointed to the cross-head, to which the piston is attached, and which is guided in ways or guides, fast to the frame; and in which a semi-circular connecting piece is also shown; in that to John B. Root of August 14, 1866, in which the piston also works in two cylindrical guides attached to the cylinder heads; in that to Maxwell & Cope of February 13, 1872; in that to Edward H. Cutler of November 26, 1872; and in that to George H. Babcock of December 10, 1872.

It is true that none of these patents exhibit distinctly the trough-like connection D of the Wright patent, but that also is found in the patent to Chilion M. Farrar of March 19, 1872, in which it is fully shown in the drawings, though not described in the specification, and is used in connection with the ordinary flat guides or parallel slides.

Wright's only invention, then, was in the combination of the cylindrical guide with the trough shown in the Farrar patent. Did this accomplish a new and valuable result it is quite possible that a patent therefor might have been sustained, but we do not find this to be the case. The cylindrical guide performs the same functions as in the prior patents; the trough, in which the connecting rod works in the Farrar patent, is practically the same as in the Wright patent, and the combination is a mere aggregation of their respective functions. If the combination of the trough and cylindrical guide of the Wright patent gives greater lightness and strength to the frame than the combination of the trough and the flat guides of the Farrar patent, it is a mere difference in degree,

a carrying forward of an old idea, a result, perhaps, somewhat more perfect than had theretofore been attained, but not rising to the dignity of invention. We have repeatedly held patents of this description to be invalid. *Stimpson* v. *Woodman*, 10 Wall. 117; *Smith* v. *Nichols*, 21 Wall. 112; *Guidet* v. *Brooklyn*, 105 U. S. 550; *Hall* v. *Macneale*, 107 U. S. 90.

The decree of the court below dismissing the bill is, therefore,

Affirmed.

WRIGHT *v.* BEGGS. Appeal from the Circuit Court of the United States for the Southern District of New York. No. 2, argued with No. 1. Decided October 22, 1894. MR. JUSTICE BROWN delivered the opinion of the court. This was a suit against the defendant Beggs as maker of the engine used by Yuengling, and is disposed of by the opinion in the last case holding the Wright patent to be invalid. The decree of the court below dismissing the bill is, therefore,

Affirmed.

Mr. Andrew M. Todd for appellant.

Mr. B. F. Lee for appellee.

LEWIS *v.* PIMA COUNTY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 550. Submitted October 17, 1894. — Decided October 29, 1894.

The act of the legislature of Arizona of February 21, 1883, authorizing Pima County in that Territory to issue its bonds in aid of the construction of a railway, is a violation of the restrictions imposed upon territorial legislatures by Rev. Stat. § 1889, as amended by the act of June 8, 1878, c. 168, and the bonds issued under the authority assumed to be conferred by that statute created no obligation against the county which a court of law can enforce.

THIS was an action originally begun in the District Court of the First Judicial District of Arizona upon 2250 coupons

attached to 150 bonds, issued by the defendant county July 1, 1883, and payable to the Arizona Narrow Gauge Railroad Company or bearer. The railroad in question was organized under a general act of the territorial legislature for the incorporation of railroads, passed in 1879, which gave them power to make all contracts, acquire real and personal property, to sue and be sued, to borrow money necessary for the construction of the road, to issue bonds and notes therefor, and to receive donations or voluntary grants of real and personal property to that end. The bonds in question were issued by the board of supervisors of the defendant county under an act of the legislature of Arizona of February 21, 1883, entitled "An act to promote the construction of a certain railroad," and were part of a series of 200 bonds issued in pursuance of said act, and exchanged for a like number of bonds of the railroad company of like amounts, bearing like interest, and running like times as the bonds in suit.

Defendant demurred to the complaint both generally and specially, and upon argument the demurrer was sustained and judgment entered in favor of defendant.

Plaintiff appealed to the Supreme Court of the Territory, by which the judgment of the District Court was affirmed. He thereupon sued out this writ of error.

Mr. W. H. Barnes and *Mr. W. H. Rossington* for appellant.

Mr. Charles Weston Wright for appellee.

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

This case involves the validity of certain bonds issued by the county of Pima under an act of the legislative assembly of Arizona, approved February 21, 1883, authorizing and requiring the board of supervisors to issue $200,000 of bonds of such county, and to exchange the same in lots of $50,000 each for an equal number of the bonds of the Arizona and Narrow Gauge Railroad Company, secured by a mortgage

upon its road. Assuming that the bonds were issued in conformity with this act, the act itself is claimed to be in conflict with certain acts of Congress upon the subject of the organization of Territories.

By Rev. Stat. § 1889, of a chapter containing a provision common to all the Territories, "the legislative assemblies of the several Territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon-roads, irrigating-ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific association."

In 1878 this section was amended by an explanatory act, (Act of June 8, 1878, c. 168, 20 Stat. 101,) to the effect that the restrictions contained in section 1889 "shall not be construed as prohibiting the legislative assemblies . . . from creating towns, cities, or other municipal corporations, and providing for the government of the same, and conferring upon them the corporate powers and privileges, necessary to their local administration, by either general or special acts." Following this there is a paragraph validating acts theretofore passed creating municipal corporations, and providing further that "nothing herein shall have the effect to create any private right, except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city, or other municipal corporation, or *to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs.*"

In the face of these restrictions upon its power, the legislature of Arizona, on February 21, 1883, passed the act in question, making it the duty of the board of supervisors to issue $200,000 of county bonds, and to deliver the same to the railroad company in exchange for corresponding bonds

of such company. Now, unless a debt thus incurred in aid of the construction of a railroad can be said to be an obligation "necessary to the administration of the internal affairs" of Pima County, it must necessarily follow, irrespective of every other consideration, that the legislature exceeded its powers in authorizing and requiring the county to issue its bonds in exchange for those of the railroad company in question, and that the bonds are void.

The question is too clear for extended argument. By the "internal affairs" of a municipal corporation, in the administration of which the legislature could alone authorize it to incur a debt, was undoubtedly intended such business as municipalities of like character are usually required to engage in to fulfil their proper functions, and to effectuate the objects of their charters. In the case of counties these are ordinarily to provide a court-house for the administration of justice; a jail for the confinement of prisoners; a poor-house for the sustenance of paupers (where by local law they are made chargeable upon the county); offices for the various officials of the county; and, under certain circumstances, highways and bridges for the accommodation of the public. It could never have been contemplated, however, that this power would be used to incur obligations in favor of a railroad operated by a private corporation for private gain, though also subserving a public purpose. The record before us does not show whether this railroad was designed to extend beyond the limits of the county; but if the county had power to issue its bonds in aid of railroads at all, there is nothing to indicate that such power was restricted to such roads as were wholly within the county, and if this act were a valid exercise of the authority of the legislature, the credit of the county might be indefinitely pledged for the construction of railways extending far beyond the county limits, and, indeed, for carrying out any such schemes of public improvement as the legislature could be persuaded to authorize. Clearly such debts would not be incurred in the administration of the internal affairs of the county.

The argument of counsel on both sides was largely directed

to the question whether the territorial act of 1883, under which these bonds were issued, conferred an "especial privilege" upon the railroad company, within the meaning of Revised Statutes, section 1889, inhibiting "private charters and especial privileges," and also to the further question whether bonds issued under a mandatory or compulsory statute are valid. But in the view we have taken of the case it is unnecessary to express an opinion upon these points.

We are compelled to hold that the bonds in question create no obligation against the county which a court of law can enforce.

The judgment of the court below is, therefore,

Affirmed.

GREELEY *v.* LOWE.

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

No. 517. Submitted April 30, 1894. — Decided October 29, 1894.

A suit in equity for the partition of land, wherein the plaintiff avers that he is seized as tenant in common of an estate in fee simple, and is in actual possession of the land described, and, after setting forth the interests of the other tenants in common, and alleging that no remedy at law exists to enable him to obtain his share of said lands in kind, or of the proceeds if sold, and that he is wholly without remedy except in chancery, prays for the partition of the land, and the segregation of his own share from that of the others, and incidentally that certain deeds may be construed and, if invalid, may be cancelled, and that he may recover his advances for taxes and expenses, is clearly a bill to enforce a claim and settle the title to real estate; and as such is a suit covered by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, of which the Circuit Court of the district where the land lies may properly assume jurisdiction.

The questions that, the title of some of the parties to the land being in dispute, such titles must be settled before partition could be made; that the interests of several of the defendants were adverse to each other; and that as some of these defendants were citizens of the same State, it would raise controversies beyond the jurisdiction of the Circuit Court to decide, not having been certified to this court, are not passed upon.

Statement of the Case.

Where the laws of a State give a remedy in equity, that remedy will be enforced in Federal courts in the State, if it does not infringe upon the constitutional right of the parties to a trial by jury.

The objection that A. was alleged in the bill to be a resident and citizen of the District of Columbia was met by an amended allegation that A. was "a citizen of South Carolina, now residing in Washington city, District of Columbia;" and while this allegation was traversed, it must, for the purpose of this hearing, be taken as true.

THIS was a bill in equity for the partition of real estate originally filed by George P. Greeley and wife, who were alleged to be citizens of New Hampshire, against 130 defendants, most of whom were citizens of Florida. Of the remaining defendants some were citizens of Georgia, others of Illinois, South Carolina, Alabama, Texas, North Carolina, New York, New Jersey, Mississippi, and one Eliza B. Anderson, of the city of Washington and District of Columbia.

The bill averred the plaintiff, George P. Greeley, to be seized as tenant in common, in fee simple, and in actual possession of 10,016 acres of land in the Northern District of Florida, of the value of $10,000, exclusive of interest and costs, etc.; that one John T. Lowe and Susan, his wife, were originally seized of the said premises by grant from the Spanish government in 1816, as a mill right, Lowe being then married, and his wife Susan being seized by ganancial right of an undivided half of said premises under the laws of Spain, which declared that real estate acquired by either the husband or wife during coverture by purchase, gift, or gain, becomes and remains community property, and that they were seized thereof as tenants in common; that Lowe died in 1824, and the grant was subsequently confirmed by the Supreme Court of the United States in 1842, *United States* v. *Low*, 16 Pet. 162; that the ganancial right and title of said Susan Lowe has never been alienated, relinquished, or annulled, and has been duly protected and guaranteed by the treaty of 1819 between the United States and Spain; that Lowe attempted to convey to one Clark the southern half of this grant, but his wife, then living, did not join, and the half of the south half only was conveyed; that Clark conveyed to Duncan L. Clinch, who died testate, leaving his

executor power to sell said lands; that Susan Lowe survived her husband, but both died intestate, and their estates had long been settled. That the north half of said grant and half of the south half descended to their children, nine in number.

The genealogy and shares of the heirs and their grantees are stated at great length in the bill, all the claims of the various members being set up and defined, and the invalidity of certain deeds attached as exhibits being averred and pointed out. The bill contained a general averment that no other person except such as were made parties had any interest in or title to the premises; that by reason of the lapse of time, the disturbed condition of the country, etc., it has been almost impossible to trace the lineage of the several families, and to find the actual parties in interest.

The bill prayed that the different deeds attached as exhibits might be construed, and the interest, if any conveyed, ascertained or the deeds cancelled; that all persons having any claims or liens upon the lands might be brought in and required to prove their claims, or have the same held null and void; that partition of the lands be made, if possible and equitable, and if not, that they might be sold and the proceeds distributed; that plaintiff recover his advances for taxes and expenses, including costs and counsel fees; that a master be appointed to state the shares, advances, and fees; and that commissioners be appointed to make partition or sale, etc.

Isaac A. Stewart, one of the defendants resident in Florida, filed a plea to the jurisdiction, setting up, among other things, that the suit was not brought in the district of the residence of either the plaintiffs or defendants; that the controversy was not between citizens of different States; that certain defendants had interests adverse to other defendants; that Eliza B. Anderson, one of the defendants, was a resident and citizen of the District of Columbia; that her claim was adverse to his (Stewart's); that Greeley's wife was improperly joined, was not the cotenant, and could not maintain a suit; that the wives of several of the defendants were improperly joined,

in that they possessed no legal interest in the property; and that others who were necessary parties were not joined as defendants. Thereupon plaintiff moved for leave to amend his bill by inserting after the name of Eliza Anderson the words "citizen of South Carolina, now resident in Washington, D. C.," and also to add other defendants. The court granted the motion to amend, and the cause came on to be heard on the plea to the jurisdiction. The court made a final decree, holding that, while it was true that the complainants were citizens of New Hampshire and resident there, and some of the defendants were citizens of Florida, in the district in which the land lies, yet because there were other defendants, citizens of New York and also of other States than the State in which the complainants reside and have citizenship, and also citizens of other Federal districts than that where the land is situate, and where certain defendants reside, it was decreed that "this court has not jurisdiction over all the defendants to this action, because they are not all residents and citizens of the district in which the land sought to be partitioned lies, and are not all found in said district at the time of the service of the process."

On May 6, 1892, plaintiffs filed a petition for rehearing, and on June 13 amended their bill by striking out the name of Eliza B. Anderson as defendant. While no formal decree subsequent to the rehearing appears to have been entered, by an endorsement made upon the bill of June 15, it would appear that the bill was finally dismissed upon that date. From this decree an appeal was taken to this court, and the question of jurisdiction as above stated was certified to this court for decision, pursuant to section 5 of the Court of Appeals act.

Mr. George A. King and *Mr. James R. Challen* for appellants.

Mr. I. A. Stewart, *Mr. E. K. Foster*, *Mr. A. G. Hamlin*, and *Mr. E. Bly* for appellees.

The bill in this case seeks to obtain the construction of a great number of deeds, mortgages, and contracts set forth in

it; the ascertainment of the respective interests of parties claiming under them; and the cancellation of such as appear to convey no interest. Its real object is stated near its close as follows: "That no remedy at law exists to enable the complainant to obtain his share of said lands in kind, or of proceeds if sold, and he is wholly without remedy except in chancery, for that, unless all the shareholders of said lands and all the lienholders thereon are discovered and marshalled, and the valid sustained, and the invalid excluded, and the legal titles quieted as against the illegal, the said lands will forever remain a forlorn wilderness." It is thus sought in one action to determine who are the owners of the land, and then to partition the same, which cannot be done. *Chapin* v. *Sears*, 18 Fed. Rep. 814. This is sought, regardless of adverse claims, interests, and conflicts.

The bill further seeks to recover all money expended by the plaintiff in this litigation, directly or indirectly, or in holding an alleged adverse possession, for taxes paid, for counsel fees, etc. This is sought to be taken out of the proceeds of the sale of the land, upon final decree in partition, regardless of the fact that some of the adverse owners may succeed in establishing their titles to all or portions of the property.

It is further shown that a sale of the property will be necessary. Reasons are alleged why the land cannot be partitioned after the title is litigated, but must be sold by commissioners under the decree of the court.

In order that such sale may be decreed, it is necessary that all parties interested in the property be joined in the proceedings. To decree such a sale while the title is in any manner in dispute, would be decreeing clouds upon the title, rather than clearing them up. The object of the bill thus being for a sale of the land, rather than for partition, such a bill must be distinguished in principle from one in which one or more parties seek the mere partition and setting off of their particular interests, in such manner that none of the parties interested can be injured or in the least affected. In the one case the object of the bill is simply to stake off the interest of the complainants; in the other it is to affect every foot of land so

that a purchaser at the sale decreed shall obtain a perfect title to the whole. In the former case the controversy might be separate, and all adverse claimants or parties interested might not be indispensable parties; but in the case at bar every party claiming any interest is a material and necessary party. The litigation cannot go on without affecting each and all. If dismissed as to one, it must be as to all, and, under such circumstances, relief cannot be granted to any. *Barney* v. *Baltimore City*, 6 Wall. 280.

In view of the citizenship of the parties, it follows that the court did not err in dismissing the bill for want of jurisdiction. The Federal Constitution allows to United States courts certain maximum jurisdiction, to be granted by Congress from time to time. Jurisdiction of the bill at bar can only be maintained under that clause of the Constitution which authorizes jurisdiction in suits between citizens of different States. The primary prerequisite in this case is that there shall be a controversy between citizens of different States. Congress has delegated to United States Circuit Courts jurisdiction between "citizens of different States," using the very language of the Constitution, with the limitation that in cases in which jurisdiction is dependent upon difference in citizenship, suit shall be brought only in the district of the residence of plaintiff or defendant. Act of August 13, 1888, c. 866, sec. 1; 25 Stat. 433. The entire scope of jurisdiction of these courts is laid down in section 1 of that act, and is not found elsewhere. *Smith* v. *Lyon*, 133 U. S. 315; *Jewett* v. *Bradford Savings Bank*, 45 Fed. Rep. 801.

A controversy between citizens of different States, when there are several plaintiffs or defendants, has been uniformly held for more than ninety years to be one in which each plaintiff is competent to sue, and each defendant liable to be sued at the place where suit is brought. There is no difference in this respect between cases at law and equity. *Smith* v. *Lyon*, 133 U. S. 315; *Anderson* v. *Watt*, 138 U. S. 694; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Karns* v. *Atlantic & Ohio Railroad*, 10 Fed. Rep. 309. Every party on one side must be a citizen of a different State from every party on the other. *Blake* v. *McKim*, 103 U. S. 336.

In determining who are the parties, the court is not bound by the title of the cause, or the form of the pleadings. It can examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides, according to the facts, without regard to their technical places in the litigation. *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Blake* v. *McKim*, 103 U. S. 336; *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631. This power extends to partition suits in chancery, *Beebee* v. *Louisville &c. Railroad*, 39 Fed. Rep. 481; *Covert* v. *Waldron*, 33 Fed. Rep. 311; *Rich* v. *Bray*, 37 Fed. Rep. 273; and is applicable to original suits as well as to those removed from state courts. *Karns* v. *Atlantic & Ohio Railroad*, 10 Fed. Rep. 309; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631.

Since the passage of the act of 1888, the Circuit Courts of the United States have no original jurisdiction in law or equity, in suits between citizens of one State, and citizens of the same and of another State. *Karns* v. *Railroad Co.*, 10 Fed. Rep. 309; *Smith* v. *Lyon*, 133 U. S. 315; *Covert* v. *Waldron*, 33 Fed. Rep. 311. And as they will not allow their jurisdiction to be imposed upon by improperly invoking it, or allow parties by subterfuge or collusion to successfully thrust jurisdiction upon such courts, they will investigate such matters of their own motion, as it has been the constant effort of Congress and of United States courts to prevent litigation between citizens of the same State in United States courts. *Anderson* v. *Watt*, 138 U. S. 694; *Rich* v. *Bray*, 37 Fed. Rep. 273; *Börs* v. *Preston*, 111 U. S. 252; *Bland* v. *Freeman*, 29 Fed. Rep. 669.

The bill was therefore properly dismissed because, jurisdiction depending only upon difference in citizenship, the suit was not brought in the district of the residence of plaintiff or defendant. On this point the act of August 13, 1888, already referred to, reads as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in

any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." This must be considered as a limitation upon that other clause of the same section granting generally to Circuit Courts jurisdiction in controversies between citizens of different States. The very language shows this, "and when jurisdiction depends," etc. Congress was empowered by sec. 2, art. 3, of the Federal Constitution to grant jurisdiction without this limitation, in controversies between citizens of different States, but this has never been done. It has been the constant effort of Congress and the courts to limit jurisdiction. It is narrower under the act of 1887 than theretofore. *McCormick Harvesting Machine Co.* v. *Walthers*, 134 U. S. 41; *Anderson* v. *Watt*, 138 U. S. 694; *Smith* v. *Lyon*, 133 U. S. 315; *Bensinger Cash Reg. Co.* v. *Nat'l Cash Reg. Co.*, 42 Fed. Rep. 81.

That the last-named decision, in its construction of sec. 1, did not intend to limit it to cases at common law, or to any particular class of chancery cases, is evident from the cases cited therein. Most of them are chancery cases, and some are cases to enforce liens upon real or personal property within the district. As to the latter see *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631; 30 L. Ed. 1020; *New Orleans* v. *Winter*, 1 Wheat. 91.

But the appellant contends that jurisdiction is given by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, known as the Publication Act. That statute does not enlarge the jurisdiction of United States courts, but only provides a method of bringing parties before the court in a certain class of cases wherein there is jurisdiction otherwise. *Brigham* v. *Luddington*, 12 Blatchford, 237; *Pacific Railroad* v. *Missouri Pacific Railway*, 3 Fed. Rep. 772; *Jewett* v. *Bradford Savings Bank*, 45 Fed. Rep. 801; *Van Antwerp* v. *Hulburd*, 7 Blatchford, 426; *Detweiler* v. *Holderbaum*, 42 Fed. Rep. 337; *Remer* v. *Mackay*, 35 Fed. Rep. 86.

United States courts have no jurisdiction except such as the

statutes clearly confer. No presumption of jurisdiction exists. *Sewing Machine Cases*, 18 Wall. 553; *Anderson* v. *Watt*, 138 U. S. 694; *Börs* v. *Preston*, 111 U. S. 252; *Menard* v. *Goggan*, 121 U. S. 253; *Robertson* v. *Cease*, 97 U. S. 646; *Brown* v. *Keene*, 8 Pet. 112.

The entire jurisdiction given to the courts is sought to be concentrated in § 1 of the act of 1888. This is the general jurisdictional clause, and none other is intended. The wording of the act is significant. Jurisdiction is granted in § 1, with the limitation that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought in the district of the residence of either plaintiff or defendant." Then comes § 8 and says that the act shall be so construed as to keep in force the publication act. This does not mean that the publication act shall be paramount, and that citizenship and district within which a party is entitled to be sued shall be disregarded.

If the section which keeps the publication act in force was intended to change any of the provisions of § 1 it would have been mentioned therein as a limitation, just as is the limitation to the clause providing for controversies between citizens of different States, viz., the provision as to where parties shall be sued.

If the publication clause is a jurisdictional clause, it is broad enough to go beyond anything permitted by the Constitution, as it is without limit as to difference of citizenship, or as to districts. Any one could sue any other person anywhere in the whole world in a Circuit Court, regardless of citizenship or any other constitutional limitations, in a certain class of cases therein named. It is plain to be seen that such a construction would array the publication clause in conflict with all the limitations contained in § 1, and we would have an act inconsistent with itself and impossible to be construed. *Brigham* v. *Luddington*, 12 Blatchford, 237; *Bensinger Cash Register Co.* v. *National Cash Register Co.*, 42 Fed. Rep. 81.

If, however, this clause is construed to give a right to proceed by publication only in cases in which the court otherwise

has jurisdiction, as we contend it should be, there is no conflict. In the words of *Brigham* v. *Luddington*, 12 Blatchford, 237, "Nothing in the act of 1872" (the original publication act) "warrants the suggestion that Congress intended anything more than to furnish a means of obtaining jurisdiction of the person of a defendant not found within the district in actions whereof the court, under the Constitution and existing statutes, would have jurisdiction if all the defendants were personally served with process within the district or voluntarily appeared."

The act of 1888 has been construed in many cases in which the publication act is not particularly mentioned, but if the construction of the general jurisdiction of courts therein be sound, this construction cannot be changed by the publication act. *Anderson* v. *Watt*, 138 U. S. 694; *Smith* v. *Lyon*, 133 U. S. 315.

The case of *Anderson* v. *Watt* is the last expression of the Supreme Court upon the question at issue. The publication act is not mentioned, but it will be noticed that the suit is one to enforce an equitable lien upon real estate in the district, and the court unanimously holds that, since the act of 1875, if the defendants reside in the State of which the complainants are citizens, or if each of the indispensable adverse parties is not competent to be sued therein, the Circuit Court cannot retain cognizance of the suit. The difficulty was a jurisdictional one — the controversy was not one between citizens of different States. If it were possible to bring the parties in by publication, the Supreme Court would surely have said so.

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

This bill appears to have been dismissed by the court below upon the ground that inhabitants of other districts than the Northern District of Florida were made defendants. The question really is whether, under the act of August 13, 1888, c. 866, 25 Stat. 433, requiring, in actions between citizens of

different States, suits to be brought only in the district of the residence of either the plaintiff or the defendant, it is admissible to bring a suit for partition in a district in which only a part of such defendants reside. As suits are usually begun in the district in which the defendants, or one of the defendants, reside, the question practically involves the whole power of the Circuit Court of one district to take jurisdiction of such suits, brought against defendants some of whom are residents of other districts.

(1) The paragraph of section 1 of the act of 1888, relied upon by the defendants, reads as follows: "And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In the case of *Smith* v. *Lyon*, 133 U. S. 315, 317, this court held that the Circuit Court has no jurisdiction on the ground of diverse citizenship, if there are two plaintiffs to the action, who are citizens of and residents in different States, and defendant is a citizen of and a resident in a third State, and the action is brought in a State in which one of the plaintiffs resides. As was said by the court, the argument in support of the jurisdiction was, "that it is sufficient if the suit is brought in a State where one of the defendants or one of the plaintiffs is a citizen. This would be true if there were but one plaintiff or one defendant. But the statute makes no provision, in terms, for the case of two defendants or two plaintiffs who are citizens of different States. In the present case, there being two plaintiffs, citizens of different States, there does not seem to be, in the language of the statute, any provision that both plaintiffs may unite in one suit in a State in which either of them is a citizen." The court referring to several prior cases in this court, in which it was held that the word "citizen," as used in the Judiciary Act of 1789, is used *collectively*, and means all citizens upon one side of a suit, and if there are several co-plaintiffs the intention of the act is that each plain-

tiff must be competent to sue, and if there are several codefendants, each defendant must be liable to be sued or the jurisdiction cannot be entertained, held that the same construction must be given to the word "inhabitant" as used in the above paragraph in the act of 1888, and that, if suit were begun in a district whereof the plaintiff was an inhabitant, jurisdiction would only attach if there were no other plaintiffs, citizens, and inhabitants of other districts. If this doctrine be also applicable to defendants in local actions, it necessarily follows that suit will not lie in any district of which a defendant is a citizen or inhabitant, if there are inhabitants of other districts also made defendants. As above stated, this practically inhibits *all* suits against defendants resident in different districts.

A brief review of the history of corresponding provisions in prior acts will show that it has never been supposed that the Federal courts did not have jurisdiction of local actions in which citizens of different districts were defendants, and, in fact, provision was expressly made by law for such contingency. In the eleventh section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 79, is a provision, subsequently incorporated in section 739 of the Revised Statutes, that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Under this section any number of non-residents could be joined as defendants if only they were served within the jurisdiction of the court. *Ober* v. *Gallagher*, 93 U. S. 199.

But to obviate any objection that might be raised by reason of the non-joinder or inability to serve absent defendants, it was provided by the act of February 28, 1839, c. 36, 5 Stat. 321, subsequently carried into the Revised Statutes, as section 737, that "when there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district within which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit

between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit." Construing this act, it was held in *Shields* v. *Barrow*, 17 How. 130, 141, that it did not enable a Circuit Court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such a decree. Says Mr. Justice Curtis (p. 141): "It remains true, notwithstanding the act of Congress and the 47th rule, that a Circuit Court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights." This ruling was applied in *Barney* v. *Baltimore City*, 6 Wall. 280, to a bill for partition filed by Barney, a citizen of Delaware, in the Circuit Court of Maryland, against the city of Baltimore and several individuals, citizens of Maryland, and certain other citizens of the District of Columbia. These latter had made a conveyance to one Proud, a citizen of Maryland, for the special purpose of conferring jurisdiction on the Federal court, such conveyance being made without consideration, and with an agreement that the grantee would reconvey on request. It was held that the court of chancery could not render a decree without having before it the citizens of the District of Columbia, and that their conveyance to Proud, being merely collusive, conferred no jurisdiction upon the court.

The law remained in this condition until 1872, when Congress, apparently to remove the difficulty suggested by these cases, passed an act, Act of June 1, 1872, c. 255, 17 Stat. 196, § 13, subsequently incorporated into the Revised Statutes as section 738, providing that "when any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, is not an inhabitant of nor found within the said dis-

trict, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill, at a certain day therein to be designated," etc. And then follows the provision in section 739, that "except in the cases provided in the next three sections, . . . and the cases provided by *the preceding section* (§ 738) no civil suit shall be brought in any other district than that of which the defendant is an inhabitant," etc. The "next three sections" are § 740, in which special provision is made for States containing more than one district, requiring the defendant, if a single one, to be sued in the district where he resides, but if there are defendants in different districts, suit may be brought in either, and a duplicate writ issued against residents of the other districts; § 741, wherein provision is made for suits of a local nature where the defendant resides in a different district in the same State from that in which the suit is brought, permitting process to be served in the district where he resides; and § 742, providing that in any suit of a local nature at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, suit may be brought in the Circuit or District Court of either district, etc. These sections — 740, 741, and 742 — are the "next three sections" mentioned in § 739 as exceptions to the general rule that no civil suit shall be brought against an inhabitant in any other district than his own.

But, by the act of March 3, 1875, c. 137, § 1, 18 Stat. 470, a slight change was made in the previous phraseology to the effect that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings, *except as hereinafter provided.*" This exception is contained in § 8 of the same act, which deals with the class of cases mentioned in Revised Statutes, § 738, and provides for publication "in any suit . . . to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon

the title to real or personal property within the district where such suit is brought;" with a further proviso that "said adjudication shall, as regards such absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district." As no exception was made in that act of the cases provided for by §§ 740, 741, and 742, it is at least open to some doubt as to whether suits will lie against non-resident defendants under those sections. So, too, in the act of August 13, 1888, § 5, there was an express reservation of any jurisdiction or right mentioned in § 8 of the act of Congress of which this act was an amendment, (that is, the act of March 3, 1875,) which, as above stated, is the section permitting suits to enforce any legal or equitable lien upon, or claim to real estate to be brought in the district where the property lies, and defendants, non-residents of such district, to be brought in by publication or personal service made in their own districts. It is entirely true that § 8 of the act of 1875, authorizing publication, does not enlarge the jurisdiction of the Circuit Court. It does not purport to do so. Jurisdiction was conferred by the first section of the act of 1888 of "all suits of a civil nature" exceeding two thousand dollars in amount, "in which there shall be a controversy between citizens of different States," and this implies that no defendant shall be a citizen of the same State with the plaintiff, but otherwise there is no limitation upon such jurisdiction. Section 8 of the act of 1875, saved by § 5 of the act of 1888, does, however, confer a privilege upon the plaintiff of joining in local actions defendants who are non-residents of the district in which the action is brought, and calling them in by publication, thus creating an exception to the clause of § 1, that no civil suit shall be brought in any other district than that of which defendant is an inhabitant. Hence, it appears that the case of *Smith* v. *Lyon* really has no bearing, as that case involved only the rights of parties to personal actions residing in different districts to sue and be sued, and was entirely unaffected by the act of 1888, § 5, which deals with *defendants only in local actions*, and expressly reserves juris-

diction, if the suit be one to enforce a lien or claim upon real estate or personal property. The precise question here involved has never been passed upon by this court, but in the only cases in the Circuit Courts to which our attention has been called, the jurisdiction was upheld. *American F. L. M. Co.* v. *Benson*, 33 Fed. Rep. 456; *Carpenter* v. *Talbot*, 33 Fed. Rep. 537; *Ames* v. *Holderbaum*, 42 Fed. Rep. 341; *McBee* v. *Marietta &c. Railway*, 48 Fed. Rep. 243; and *Wheelwright* v. *St. Louis, New Orleans &c. Transportation Co.*, 50 Fed. Rep. 709.

In line with these cases, and almost directly in point here, is the decision of this court in *Goodman* v. *Niblack*, 102 U. S. 556, in which it was held that where a bill was filed to enforce a claim or lien upon a specific fund within reach of the court, and such of the defendants as were neither inhabitants of, nor found within the district did not voluntarily appear, the Circuit Court had the power to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication in the mode prescribed by Rev. Stat. § 738. This is a distinct adjudication that defendants, who are neither inhabitants of, nor found within the district, may be cited by publication to appear, and if this be so, it is difficult to see how the omission of the words "found within the district" in the act of 1888 makes any difference whatever with regard to the right to call absent defendants in by publication. The act of 1875 gave the right to sue defendants wherever they were *found*. The act of 1888 requires that they shall be inhabitants of the district. But in both cases, an exception is created in local actions, wherein any defendant interested in the *res* may be cited to appear and answer, provided he be not a citizen of the same State with the plaintiff. So, too, in *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352, a suit instituted by a creditor to set aside a conveyance of the real estate and a mortgage upon the personal property of his debtor made to secure certain preferred creditors, was held to be a suit brought to remove an incumbrance or lien or cloud upon the property within the meaning of § 8 of the act of 1875, and that the Circuit Court

was authorized to summon an absent defendant, and to exercise jurisdiction over his rights in the property in suit within the jurisdiction of the court.

Indeed, any other construction of this act would practically nullify § 8 of the act of 1875, permitting the publication of absent defendants, since the entire object of the section is to call in defendants who cannot be served within the district, by reason of their absence or non-residence.

It follows, then, that if this be a suit covered by § 8 of the act of 1875, the Circuit Court of the district wherein the land in dispute lies may properly assume jurisdiction. We think that it is such a suit. The bill in question is one for the partition of land, wherein plaintiff avers that he is seized as tenant in common of an estate in fee simple, and is in actual possession of the land described, and after setting forth the interests of the other tenants in common, and alleging that no remedy at law exists to enable him to obtain his share of said lands in kind, or of the proceeds if sold, and that he is wholly without remedy except in chancery, prays for the partition of the land, and the segregation of his own share from that of the others, and incidentally that certain deeds may be construed and, if invalid, may be cancelled, and that he may recover his advances for taxes and expenses. This is clearly a bill to enforce a claim and settle the title to real estate.

(2) Further objection was made to the jurisdiction of the court upon the ground that it appeared from the face of the bill that the title of some of the parties to the land was in dispute; that such titles must be settled before partition could be made; that the interests of several of the defendants were adverse to each other; and that as some of these defendants were citizens of the same State, it would raise controversies beyond the jurisdiction of the Circuit Court to decide. These objections, however, are not within the question certified to us for decision, which is that it had been "adjudged and decreed that this court has not jurisdiction over all of the defendants to this action because they are not all citizens and residents of the district in which the land sought to be partitioned lies, and are not all found in said district at the time of service of

process, although they are all residents and citizens of other States than that in which complainants have residence and citizenship." The objections go not to the jurisdiction of the Federal court as such, but to the maintenance of such a bill in any court of equity in the State of Florida. They are questions proper to be considered on demurrer to the bill, and as bearing upon such questions, the local practice of the State in that regard may become an important consideration. This court has held in a multitude of cases that where the laws of a particular State gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy would be enforced in the Federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury. *Clark* v. *Smith*, 13 Pet. 195; *Holland* v. *Challen*, 110 U. S. 15; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Chapman* v. *Brewer*, 114 U. S. 158, 171; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *United States* v. *Landram*, 118 U. S. 81; *More* v. *Steinbach*, 127 U. S. 70.

This suggestion is the more important in view of a statute of Florida which authorizes a court of equity in partition cases "to ascertain and adjudicate the rights and interests of the parties," which has apparently been held to authorize the court, in its discretion, to settle the question of title as incidental to the main controversy, or *retain the bill* and refer it to a court of law. *Street* v. *Benner*, 20 Florida, 700; *Keil* v. *West*, 21 Florida, 508.

These questions, however, are not presented by the record in this case, and are mentioned only as giving color to plaintiff's claim that the existence of controversies between different defendants is not fatal to the jurisdiction of the Federal court upon the allegations of this bill.

(3) The objection that Eliza B. Anderson was alleged in the bill to be a resident and citizen of the District of Columbia was met by an amended allegation that Anderson was "a citizen of South Carolina now residing in Washington city, District of Columbia;" and while this allegation was traversed, it must, for the purpose of this hearing, be taken as true.

Statement of the Case.

As this case was appealed under section 5 of the act of March 3, 1891, upon a question of jurisdiction, no other question can be properly considered, and the decree of the court below must, therefore, be

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

Mr. Chief Justice Fuller dissented.

UNITED STATES *v.* COE.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 591. Submitted October 9, 1894. — Decided October 29, 1894.

The provisions in the act of March 3, 1891, c. 539, 26 Stat. 854, "to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," authorizing this court to amend the proceedings of the court below, and to cause additional testimony to be taken, are not mandatory, but only empower the court to direct further proofs, and to amend the record, if in its judgment the case demands its interposition to that effect.

The judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the Supreme Court of the United States.

An appeal lies to this court from a judgment of the Court of Private Land Claims over property in the Territories.

Motion to dismiss for want of jurisdiction. The case was as follows:

On March 3, 1891, an act of Congress was approved, entitled "An act to establish a Court of Private Land Claims, and to provide for the settlement of private land claims in certain States and Territories." 26 Stat. 854, c. 539.

By the first section it was provided: "That there shall be, and hereby is, established a court to be called the Court of Private Land Claims, to consist of a Chief Justice and four Associate Justices, who shall be, when appointed, citizens and residents of some of the States of the United States, to be

appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term expiring on the thirty-first day of December, anno Domini eighteen hundred and ninety-five ; any three of whom shall constitute a quorum. Said court shall have and exercise jurisdiction in the hearing and decision of private land claims according to the provisions of this act."

Under section six it was made lawful "for any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court in the State or Territory where said land is situated and where the said court holds its sessions, but cases arising in the States and Territories in which the court does not hold regular sessions may be instituted at such place as may be designated by the rules of the court."

Section seven provided: "That all proceedings subsequent to the filing of said petition shall be conducted as near as may be according to the practice of the courts of equity of the United States, except that the answer of the attorney of the United States shall not be required to be verified by his oath, and except that, as far as practicable, testimony shall be taken in court or before one of the justices thereof. The said court shall have full power and authority to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title

and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo, on the second day of February, in the year of our Lord, eighteen hundred and forty-eight, or the treaty concluded between the same powers at the city of Mexico, on the thirtieth day of December, in the year of our Lord, eighteen hundred and fifty-three, and the laws and ordinances of the Government from which it is alleged to have been derived, and all other questions properly arising between the claimants or other parties in the case and the United States, which decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected ; and in confirming any such claim, in whole or in part, the court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed."

Under the eighth section, " any person or corporation claiming lands in any of the States or Territories mentioned in this act under a title derived from the Spanish or Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein " was given the right to apply to the court in the manner in the act provided for other cases, for a confirmation of such title.

Section nine provided as follows : " That the party against whom the court shall in any case decide — the United States, in case of the confirmation of a claim in whole or in part, and the claimant, in case of the rejection of a claim, in whole or in part — shall have the right of appeal to the Supreme Court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy, as is now provided by law for the taking of appeals from decisions of the Circuit Courts of the United States. On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record

of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the Supreme Court thereon shall be final and conclusive. Should no appeal be taken as aforesaid the decree of the court below shall be final and conclusive."

By paragraph five of section thirteen it was provided: "No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other, all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

Section nineteen read thus: "That the powers and functions of the court established by this act shall cease and determine on the thirty-first day of December, eighteen hundred and ninety-five, and all papers, files, and records in the possession of said court belonging to any other public office of the United States shall be returned to such office, and all other papers, files, and records in the possession of or appertaining to said court shall be returned to and filed in the Department of the Interior."

The Court of Private Land Claims was accordingly duly organized and upon the pleadings and evidence in this case proceeded to a decree confirming a Mexican grant in favor of the appellee to land in the Territory of Arizona. An appeal having been duly prayed and allowed and the record having been filed in this court, a motion to dismiss the appeal for want of jurisdiction was submitted.

Mr. E. M. Sanford, *Mr. A. M. Stevenson*, and *Mr. S. L. Carpenter* for the motion.

I. Congress has no power to confer upon the Supreme Court jurisdiction to entertain an appeal from a decision of the Court of Private Land Claims, the latter tribunal not being vested with judicial power in virtue of any provision of the Constitution.

Former decisions of this court have clearly settled that there are but two classes of courts that may be created by Congress, in virtue of the powers granted it by the Constitution of the United States. They are defined as constitutional courts, or those created by virtue of section 1 of article 3 of the Constitution, and "legislative courts," or those created or authorized by Congress in virtue of the power granted by sub-division 2 of section 3, article 4, of the Constitution, "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

As the act of March 3, 1891, 26 Stat. 854, establishing the Court of Private Land Claims, provides that the judges thereof shall hold their offices for a term expiring on the 31st day of December, 1895, it is clear that such tribunal is not a constitutional court. *American Insurance Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546; *Brenner* v. *Porter*, 9 How. 235, 242; *McAllister* v. *United States*, 141 U. S. 174.

That the Court of Private Land Claims does not fall within the class denominated "legislative courts" would seem to be equally clear, inasmuch as Congress derives its power to create such courts or to confer judicial power upon courts created by other legislative bodies solely from that provision of the Constitution hereinbefore referred to, empowering Congress to make rules and regulations respecting the territory belonging to the United States. *Cases cited supra; Clinton* v. *Englebrecht*, 13 Wall. 434, 447.

The purpose of the act creating the Court of Private Land Claims is, as stated in its title, "to provide for the settlement of private land claims in certain States and Territories." No jurisdiction is conferred upon the court by the act to administer the judicial power of the United States in respect of any of their territory or property. The matters committed to it by Congress for adjudication are such as might well have been determined by Congress itself without recourse to judicial agency, in carrying out, in good faith, the provisions of the treaties made with Mexico, by virtue of which the government acquired sovereignty over the territory in which these lands are situated.

Argument for the Motion to Dismiss.

As the Court of Private Land Claims is not a court in the sense of having been vested with the judicial power of the United States, it would seem to follow that Congress may not impose upon this court the exercise of appellate jurisdiction over its decisions. *Gordon* v. *United States*, 117 U. S. 697; *United States* v. *Ritchie*, 17 How. 525; *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *In re Sanborn*, 148 U. S. 222; *Grisar* v. *McDowell*, 6 Wall. 363; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447.

II. But should the court be of the opinion that the Court of Private Land Claims is a tribunal administering the judicial power of the United States, and thus a part of its judicial system from which an appeal may be prosecuted to the Supreme Court, then we contend that in prescribing the mode of procedure in this court upon such appeal Congress has transcended its powers and thus rendered nugatory the clause in the act granting the right of appeal.

By section 9 of the act creating the court it is provided as follows: "On any such appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below and may amend the record of the proceedings below as truth and justice may require; and on such retrial and rehearing every question shall be open and the decision of the Supreme Court thereon shall be final and conclusive." It is clear from an examination of sub-divisions 1 and 2 of section 2, article 3, of the Constitution of the United States, that as to such decree as may be rendered in controversies of this kind the jurisdiction of the Supreme Court of the United States is appellate only. Any act of Congress requiring the Supreme Court to take original jurisdiction of such a matter would be unconstitutional and void.

But the section of the act creating the Court of Private Land Claims, above referred to, requires the Supreme Court practically to try the cause the same as if it had originated in that court. It shall *retry* the cause, and on such retrial "*every question shall be open.*" The requirement that it shall retry the cause upon the issues of fact and of law probably would

not be obnoxious to its appellate jurisdiction if such retrial were limited to the record as it was made in the lower court; but when there is added to this the requirement that the court shall cause additional testimony to be taken, (for a proper showing having been made, this provision is undoubtedly mandatory,) and that it shall rehear and redetermine every question that may arise in the case the same as if it had not been litigated in the court below, a burden is imposed upon the Supreme Court of the United States not contemplated by the Constitution. The Congress of the United States cannot indirectly place a burden upon this court that cannot be directly imposed under the Constitution. *Wiscart* v. *D'Auchy*, 3 Dall. 321; *United States* v. *Ritchie*, 17 How. 525; *Grisar* v. *McDowell*, 6 Wall. 363.

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create that cause." *Marbury* v. *Madison*, 1 Cranch, 137, 175.

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

The motion to dismiss rests upon two grounds: 1. That the Congress had no power to confer upon this court jurisdiction to entertain an appeal from the decree of the Court of Private Land Claims because the latter is not vested with judicial power in virtue of any provision of the Constitution. 2. That if this be not so, nevertheless the act creating that court, in prescribing the course of procedure upon appeal, imposed upon this court the exercise of original jurisdiction contrary to the provisions of the Constitution, and that therefore no appeal would lie.

The second of these grounds does not appear to us to afford any support to appellee's contention. This is not one of the cases within the original jurisdiction of this court, and if it be one of those in respect of which the court has appellate jurisdiction, that jurisdiction exists "both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

If the paragraph in the ninth section of the act providing that this court shall retry causes coming up on appeal, "as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open," were obnoxious to the objection that in whole or in part it was not such a regulation as the Congress had power to enact, then the section would to that extent be invalid, but this would not take away the right of appeal itself, nor could the question of such invalidity arise except when particular action was asked under the clause.

We understand the suggestion as made to relate to the authority to allow further proofs or the record to be amended. Causes in the Court of Private Land Claims are in effect equity causes and brought to this court by appeal, and, as observed by Chief Justice Ellsworth, in *Wiscart* v. *D'Auchy*, 3 Dall. 321, "an appeal is a process of civil law origin and removes a cause entirely; subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common law and it removes nothing for examination but the law."

The remedy by appeal in its original sense was confined to causes in equity, ecclesiastical, and admiralty jurisdiction. Undoubtedly appellate courts proceeding according to the course of the civil law may allow parties to introduce new allegations and further proofs, and such has been the settled practice of the ecclesiastical courts in England and of the admiralty courts in this country. Nevertheless, orders allowing this to be done are not granted as matter of course, but made with extreme caution, and only on satisfactory grounds. As to appeals to this court from the decrees of Circuit Courts in equity causes, it was provided by the second section of the act of Congress of March 3, 1803, c. 40, 2 Stat. 244, carried forward into section 698 of the Revised Statutes, which was the first enactment giving the remedy by appeal, "that no new evidence shall be received in the said court, on the hearing of such appeal, except in admiralty and prize causes." *Holmes* v. *Trout*, 7 Pet. 171; *Mitchel* v. *United States*, 9 Pet.

711; *Boone* v. *Chiles*, 10 Pet. 177; *Blease* v. *Garlington*, 92 U. S. 1. And in respect of the allowance of amendments, when the ends of justice require it, the course has been to remand the cause with directions. *Wiggins Ferry Co.* v. *Ohio & Mississippi Railway*, 142 U. S. 396, and cases cited.

Under what circumstances and to what extent the power to amend the record of the proceedings below under this act, or to cause additional testimony to be taken, was intended to be exercised, we are not now called on to consider. The statute is not mandatory, but empowers the court to direct further proofs and to amend the record if in its judgment the case demands its interposition to that effect, and, as the question is one of power merely, and not properly arising for determination on this motion, we need not prolong these observations.

The principal ground relied on by appellee is that the Court of Private Land Claims is not a tribunal vested with judicial power in virtue of any provision of the Constitution, and, therefore, the Congress had no power to confer upon this court jurisdiction to entertain appeals from its decisions.

By article 8 of the treaty of Guadalupe-Hidalgo and article 5 of the Gadsden treaty, the property of Mexicans within the territory ceded by Mexico to the United States was to be "inviolably respected," and they and their heirs and grantees were to enjoy with respect to it "guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. 922, 929, 930; 10 Stat. 1031, 1035. While claimants under grants made by Mexico or the Spanish authorities prior to the cession had no right to a judicial determination of their claims, Congress, nevertheless, might provide therefor if it chose to do so. *Astiazaran* v. *Santa Rita Land and Mining Co.*, 148 U. S. 80. And it was for this purpose that the act of March 3, 1891, was passed, establishing the Court of Private Land Claims for the settlement of claims against the United States to lands "derived by the United States from the Republic of Mexico, and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming."

The argument is that the court thus created, composed of judges holding office for a time limited, is not one of the courts mentioned in article 3 of the Constitution, whereby the judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish, the judges of which hold their offices during good behavior, receiving at stated times for their services a compensation that cannot be diminished during their continuance in office, and are removable only by impeachment; and that the appellate power of this court cannot be extended to the revision of the judgments and decrees of such a court. Granting that the Court of Private Land Claims does not come within the third article, the conclusion assumes either that the power of Congress to create courts can only be exercised in virtue of that article, or, that judicial tribunals otherwise established cannot be placed under the supervisory power of this court.

It must be regarded as settled that section 1 of article 3 does not exhaust the power of Congress to establish courts. The leading case upon the subject is *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546, in which it was held in respect of territorial courts, Chief Justice Marshall delivering the opinion, that while those courts are not courts in which the judicial power conferred by article 3 can be deposited, yet that they are legislative courts created in virtue of the general right of sovereignty which exists in the government over the Territories, or of the clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The authorities are referred to and commented on by Mr. Justice Harlan in *McAllister* v. *United States*, 141 U. S. 174.

The case before us relates to the determination of a claim against the United States to lands situated in the Territory of Arizona, and, as it was clearly within the authority of Congress to establish a court for such determination, unaffected by the definitions of article 3, the question is not presented whether it was within the power of Congress to create a judicial tribunal of this character for the determina-

tion of title to property situated in the States, where the courts of the United States, proper, are parts of the Federal system, "invested with the judicial power of the United States expressly conferred by the Constitution, and to be exercised in correlation with the presence and jurisdiction of the several state courts and governments." *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655.

And as wherever the United States exercise the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories, *Shively* v. *Bowlby*, 152 U. S. 1, 48, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government. There has never been any question in regard to this as applied to territorial courts, and no reason can be perceived for applying a different rule to the adjudications of the Court of Private Land Claims over property in the Territories.

The motion to dismiss is

Denied.

SIPPERLEY *v.* SMITH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 688. Submitted October 15, 1894. — Decided October 29, 1894.

The rule reiterated that where a judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance or the equivalent.

MOTION to dismiss or affirm. The court stated the case as follows:

A. F. Sipperley and H. S. Lee, composing a partnership under the firm name of A. F. Sipperley & Co., doing business in the city of Salt Lake, Utah, made an assignment of their partner-

ship property to one Ross in trust to convert the same into money and pay creditors in the order named, first, M. J. Gray and the Union Bank of Greeley, Colorado, in full; second, Mrs. A. F. Sipperley, Mrs. E. J. Walling, and H. A. Lee, certain individual indebtedness, in full; third, their remaining creditors. John O. Smith, George Whiting, Charles F. Connor, and George S. Smith, composing the firm of Smith, Connor & Co., brought suit against A. F. Sipperley and H. S. Lee, in the District Court for the Third Judicial District of Utah Territory, and levied an attachment on the assigned property upon the ground that Sipperley & Co. had disposed thereof with intent to defraud their creditors. Thereupon the preferred creditors, M. J. Gray, the Union Bank of Greeley, Colorado, Mrs. Sipperley, Mrs. Walling, and H. A. Lee, filed an intervening complaint in said suit, praying for a receiver, and that the assignment be declared valid and the indebtedness due them be ordered to be paid out of the proceeds of the property and for general relief; which intervening complaint was answered by the original plaintiffs, who prayed therein that the assignment be adjudged fraudulent and void. The cause was tried by the District Court of the Third Judicial District, a jury having been duly waived; the trial judge filed findings of fact and conclusions of law, and rendered judgment, adjudging the assignment fraudulent and void; dismissing the complaint of intervention; and directing the receiver (the assignee having in the meantime been appointed receiver) to pay plaintiffs in certain other suits consolidated with this and then these plaintiffs.

The title of the cause in the District Court under which the findings of fact and conclusions of law appeared in the record, and also the judgment, was as follows: "John O. Smith *et al.*, Plaintiffs, *vs.* A. F. Sipperley *et al.*, Defendants, and M. J. Gray, Mrs. A. F. Sipperley, Mrs. E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, Intervenors." The record did not contain the prayer for and allowance of appeal to the Supreme Court of Utah, but showed as at the June term, 1893, of that court, the following order: "John O. Smith *et al. vs.* A. F. Sipperley *et al.*, Def'ts, and M. J. Gray

et al., Intervenors & Appellants. This cause coming on regularly to be heard, was argued by Hon. John W. Judd in behalf of appellants, by Charles C. Dey, Esq., in reply, was submitted, and taken under advisement." The judgment of the District Court was thereafter affirmed. The opinion of the Supreme Court is given and is entitled, "John O. Smith *et al.*, Respondents, *vs.* A. F. Sipperley *et al.*, Appellants." Subsequently this order was entered: "John O. Smith *et al. vs.* A. F. Sipperley, Def'ts, and M. J. Gray *et al.*, Intervenors & Appellants. In this cause counsel for appellants prays the allowance of an appeal from the judgment of this court, rendered therein, to the Supreme Court of the United States, and asks that the amount of a bond to be given thereon be now fixed, and it was ordered that such appeal, as prayed for, be and is hereby allowed, and the amount of a bond to be given thereon is fixed in the sum of five thousand dollars, and the amount of a bond for costs is fixed in the sum of five hundred (500) dollars."

The record disclosed a bond dated December 22, 1893, entitled "John O. Smith *et al.*, Respondents, *vs.* A. F. Sipperley *et al.*, Defendants, and M. J. Gray *et al.*, Intervenors, Appellants," signed by Mrs. Sipperley, Mrs. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, as principals, running to John O. Smith, George Whiting, Charles P. Connor, and George S. Smith, composing the firm of Smith, Whiting, Connor & Co., in the penal sum of $5500, and reciting that, "Whereas the above-named Mistress A. F. Sipperley, Mistress E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, have prosecuted an appeal to the Supreme Court of the United States," etc. This bond was approved by the Chief Justice of Utah, and filed on the day of its date. Citation was issued, dated January 4, 1894, and directed to John O. Smith, George Whiting, Charles P. Connor, George S. Smith, and their attorneys, reciting that Mrs. Sipperley, Mrs. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, had appealed, etc., service of which citation was admitted January 12, 1894. An assignment of errors in this court was also filed in that court January 12, entitled

Syllabus.

"John O. Smith *et al. vs.* A. F. Sipperley *et al.*, and Mrs. A. F. Sipperley, Mrs. E. J. Walling, H. A. Lee, and the Union Bank of Greeley, Colorado, Intervenors & Appellants." No application for summons and severance as to M. J. Gray or any equivalent therefor appeared in the record, nor any order permitting severance; nor was any application made in this court for the issue of citation to A. F. Sipperley and H. S. Lee, or leave to perfect the appeal as to them; nor did they or Gray appear herein.

Appellees moved to dismiss or affirm.

Mr. C. H. Armes for the motion.

Mr. J. W. Judd opposing.

THE CHIEF JUSTICE: The motion to dismiss is sustained upon the authority of *Masterson* v. *Herndon*, 10 Wall. 416; *Hardee* v. *Wilson*, 146 U. S. 179; *Inglehart* v. *Stansbury*, 151 U. S. 68; *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590.

Appeal dismissed.

NEW YORK *v.* ENO.

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

No. 602. Argued and submitted October 17, 1894. — Decided October 29, 1894.

Whether an offence described in an indictment in a state court is an offence against the laws of that State and punishable thereunder, or whether it is made by Federal statutes an offence against the United States, exclusively cognizable by their courts, and whether the same act may be an offence against both national and state governments, punishable in the tribunals of each, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance; and, (its obligation to render such decision as will give full effect to the supreme law of the land, and protect any right secured by it to the accused, being the same that rests upon the courts of the United States,) the latter, if applied to for a writ of *habeas corpus* in

such case, should decline to issue it unless it also appears that the case is one of urgency.

Ex parte Royall, 117 U. S. 241, followed, and distinguished from *In re Loney*, 134 U. S. 372.

The proper time, in such case, to invoke the jurisdiction of this court is after the claim of the accused of immunity from prosecution in the state court has been passed upon by the highest court of the State adversely to him.

THE case is stated in the opinion.

Mr. John D. Lindsay for appellants. *Mr. John R. Fellows* was with him on the brief.

Mr. George Bliss for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellee presented to the court below his petition for a writ of *habeas corpus*, alleging that he was restrained of his liberty by the warden of the city prison in New York city; that he had not been committed and was not detained by virtue of any judgment, decree, final order, or process; that the cause or pretence of such restraint was certain bench warrants issued upon indictments against him in the Court of General Sessions of the Peace of the city and county of New York; and that those indictments, copies of which are exhibited with the petition, charge him with the commission of certain offences over which that court "has not and never has had jurisdiction." The relief asked was that the petitioner be discharged from the custody of the state authorities.

The indictments referred to were five in number and were based upon the Penal Code of New York, which, among other things, declares any person guilty of forgery in the second degree and punishable by imprisonment for a term not exceeding ten years who, with intent to defraud, forges an entry made in any book of records or accounts kept by a corporation doing business within the State, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished,

discharged or in any manner affected; and any person guilty of forgery in the third degree and punishable by imprisonment for not more than five years, who, with intent to defraud or conceal any larceny or misappropriation of any money or property, alters, erases, obliterates, or destroys an account, book of accounts, record or writing, belonging to, or appertaining to the business of a corporation, association, public office or officer, partnership or individual; or makes a false entry in any such account or book of accounts; or wilfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him or under his direction. Penal Code, New York, §§ 511, 515, 524, 525.

In some of the indictments the offence is charged to have been committed by Eno in 1883; in the others, in the year 1884.

Each indictment alleges that the offence described was committed by the accused while he was president of the Second National Bank in the city of New York. It also appears from the indictments that the alleged forgeries consisted in the making of certain false entries in the books and accounts of that bank with intent to defraud and to conceal the misappropriation of its moneys.

By the Revised Statutes of the United States it is provided:

"Sec. 563. The District Courts shall have jurisdiction as follows: First. Of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title 'Crimes.'"

"Sec. 629. The Circuit Courts have original jurisdiction as follows: . . . Twentieth. Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offences cognizable therein."

"Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter men-

tioned shall be exclusive of the courts of the several States: First. Of all crimes and offences cognizable under the authority of the United States."

By section 5209, Title, National Banks, it is provided that "every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; . . . or who makes any false entry in any book, report or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

"§ 5328. Nothing in this Title [Crimes] shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

The Circuit Court held that the several offences for which the defendant was indicted were cognizable under the authority of the United States, and that the jurisdiction vested in the courts of the United States to punish them was exclusive of the courts of the State; and for that reason it was adjudged that the accused was restrained of his liberty in violation of the Constitution and laws of the United States. He was consequently discharged from custody. The court in its opinion said that "if any serious doubt were entertained as to the want of jurisdiction of the Court of General Sessions of the city of New York and the consequent want of authority to retain the petitioner in custody, such a disposition of the present proceeding would be made as would permit that question to be raised, in the event of a conviction upon the indictment, after a trial."

The circumstances under which a court of the United States is at liberty upon *habeas corpus* to discharge one held in custody under the process of a state court was considered in *Ex*

parte Royall, 117 U. S. 241, 251, 252. Royall was charged by indictments in one of the courts of Virginia with having violated certain statutes of that Commonwealth. Being held in custody by the state authorities for trial he presented petitions for *habeas corpus* in the Circuit Court of the United States for the Eastern District of Virginia and prayed to be discharged upon the ground that the statutes under which he had been indicted were repugnant to the Constitution of the United States and, consequently, that he was restrained of his liberty in violation of that instrument. Rev. Stat. §§ 751, 752, 753, 754, 755, 761, 764; Act of March 3, 1885, c. 353, 23 Stat. 437. The petitions were dismissed, and the cases were brought by appeal to this court.

This court held that Congress intended to invest the courts of the Union and the justices and judges thereof with power, upon writ of *habeas corpus*, to restore to liberty any person within their respective jurisdictions who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States; that the statute contemplated that cases might arise when the power thus conferred should be exercised during the progress of proceedings instituted against the petitioner in a state court, or by or under the authority of a State, on account of the very matter presented for determination by the writ of *habeas corpus*. But it was adjudged that the statute did not imperatively require the Circuit Court by writ of *habeas corpus* to wrest the petitioner from the custody of the state officers in advance of his trial in the state court; that while the Circuit Court of the United States has the power to do so, and could discharge the accused in advance of his trial, if he be restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such power immediately upon application being made for the writ.

"We cannot suppose," the court said, "that Congress intended to compel those courts by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits where the accused claims

that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under state authority. So, also, when they are in the custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the state court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed, to presume that the decision of the state court would be otherwise than is

required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States."

Again in the same case: "That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody under process from a state court of original jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him upon *habeas corpus* in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." See also *Taylor* v. *Carryl*, 20 How. 583, 595, and *Covell* v. *Heyman*, 111 U. S. 176, 182. Of course, the discretion here referred to is a legal discretion to be controlled in its exercise by such principles as are applicable to the particular case in hand.

In addition to the petitions presented to the Circuit Court of the United States, Royall made an original application to this court for a writ of *habeas corpus* based upon the same facts as those set forth in the other petitions. The application was denied upon the grounds stated in the previous cases. *Ex parte Royall*, 117 U. S. 254.

At the same term of this court, *Ex parte Fonda*, 117 U. S. 516, 518, was determined. That was an original application to this court for a writ of *habeas corpus* by one who was a clerk in a national bank, and who alleged in his petition that

he had been convicted in one of the courts of Michigan under a statute of that State, and sentenced to imprisonment for having embezzled the funds of that banking association. The principal ground upon which he asked for a writ of *habeas corpus* and for his discharge from custody was that the offence for which he was tried was covered by the statutes of the United States, and was therefore exclusively cognizable by the Federal courts. This court denied the application upon the authority of *Ex parte Royall*, observing that no reason had been suggested why the Supreme Court of the State might not review the judgment of the inferior state court upon the question as to the application of the statute under which the conviction was had to embezzlement by the servants and clerks of national banks, nor why it should not be permitted to do so without interference by the courts of the United States; that the question appeared to be one which, if properly presented by the record, might be reviewed in this court after a decision by the Supreme Court of State adverse to the petitioner. The judgment of conviction in that case was subsequently reviewed in the Supreme Court of Michigan, and that court held that jurisdiction of the offence charged against Fonda was exclusive in the Federal court. *People* v. *Fonda*, 62 Michigan, 401.

The rule laid down in the cases in this court, above cited, has been recognized in *In re Duncan*, 139 U. S. 449, 454; *In re Wood*, 140 U. S. 278, 289; *Cook* v. *Hart*, 146 U. S. 183, 194; and *In re Frederick*, 149 U. S. 70, 75.

It may be well to refer to the case of *In re Loney*, 134 U. S. 372, 375. It will be observed that this court in *Ex parte Royall* recognized certain cases as constituting exceptions to the general rule — among which are cases of urgency, involving the authority and operations of the general government. Loney's case was of that class. It appeared from the record that he was duly summoned to give his deposition in a contested election case pending in the House of Representatives of the Congress of the United States — a summons he was obliged to obey, unless prevented by sickness or unavoidable accident, under the penalty of forfeiting a named sum to the

party at whose instance he was summoned, and of becoming subject to fine and imprisonment, Rev. Stat. § 116; that he appeared before a notary public in obedience to such summons and proceeded to give his deposition; and that while in the office of an attorney for the purpose of completing his testimony, he was arrested under a warrant issued by a justice of the peace and based upon the affidavit of one of the parties to the contested election case charging him with wilful perjury committed in his deposition.

Having been arrested under that warrant, he sued out a writ of *habeas corpus* from the Circuit Court of the United States upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. That court, in advance of any trial in the state court for the offence charged against Loney, adjudged that the offence was punishable only under section 5392 of the Revised Statutes, and was exclusively cognizable by the courts of the United States. He was discharged, and the judgment was affirmed by this court.

It is clear from this statement that that case was one of urgency, involving in a substantial sense the authority and operations of the general government. The obvious effect of Loney's arrest, under the circumstances disclosed, was to embarrass one of the parties in the contested election case in obtaining evidence in his behalf, intimidate witnesses whom he might desire to introduce, and delay the preparation of the case for final determination by the House of Representatives. This court, therefore, said: "It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice."

Whether the offences described in the indictments against Eno are offences against the State of New York and punishable under its laws, or are made by existing statutes offences also against the United States and are exclusively cognizable by courts of the United States; and whether the same acts, upon the part of the accused, may be offences against both the National and State governments and punishable in the judicial tribunals of each government, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offence; these are questions which the state court of original jurisdiction is competent to decide in the first instance; and its obligation to render such decision as will give full effect to the supreme law of the land and protect any right secured by it to the accused is the same that rests upon the courts of the United States. When the claim of the accused of immunity from prosecution in a state court for the offences charged against him has been passed upon by the highest court of New York in which it can be determined, he may then, if the final judgment of that court be adverse to him, invoke the jurisdiction of this court for his protection in respect of any Federal right distinctly asserted by him, but which may be denied by such judgment.

Without considering the merits of the several questions discussed by counsel, we are of opinion that the Circuit Court erred in granting the prayer of the accused. He should not have been discharged from the custody of the state authorities, especially as he does not appear to have been under indictment in any court of the United States for the offences alleged to have been committed by him.

The judgment is reversed with directions to dismiss the writ of habeas corpus, and to remand the accused to the custody of the proper state authorities.

Mr. Justice Field, with whom concurred Mr. Justice Shiras, dissenting.

I am unable to agree with the majority of the court in the reversal of the judgment of the Circuit Court of the United

States directing the dismissal of proceedings against the defendant upon the indictments against him found in the state court of New York.

The 711th section of the Revised Statutes provides that the courts of the United States shall have jurisdiction exclusive of the courts of the several States of all crimes and offences cognizable under the authority of the United States; and section 5209 of the Revised Statutes, relating to national banks, provides that "every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; . . . or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive an officer of an association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk or agent in violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." The Circuit Court was thus cognizable, under the authority of the United States, of the several offences for which the defendant was indicted; and the jurisdiction vested in the court of the United States was exclusive of all jurisdiction of the offences in the state courts. It would, therefore, subserve no useful purpose to proceed with the cases in the state court and thus ascertain what that court might have done or would have done had it possessed jurisdiction. Until its jurisdiction was established, its determination, either one way or the other, would be only an idle proceeding. It could not, under any circumstances, take cognizance of the cases charged against the defendant, and hold him under them. He was, therefore, entitled to his discharge whenever the matter was properly brought to the attention of the Federal court.

PEPKE *v.* CRONAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 641. Argued October 22, 1894. — Decided October 29, 1894.

P., being adjudged guilty of contempt by a state court, and sentenced to fine and imprisonment therefor, applied to the District Court of the United States for a writ of *habeas corpus* upon the ground that the statute of the State under which the proceedings took place of which his conviction and punishment for contempt formed a part were in contravention of the Constitutions of the United States and of the State. The District Judge discharged the writ and remanded the petition. It was conceded that the validity of the proceedings in the state court could have been tested by the Supreme Court of the State on *certiorari* or *habeas corpus*, and no reason appeared why a writ of error could not have been applied for from this court to the state court. *Held*, that, without considering the merits of the question discussed, the judgment of the court below should be affirmed.

CERTAIN citizens of Minnesota were the owners of a lot and building in Walsh County, North Dakota, which they had leased and which were occupied under their lessee. Against the occupant and one of the owners a proceeding was instituted in the District Court of Walsh County, in the name of the State upon the relation of its attorney general, under an act of North Dakota in that behalf, entitled "An act to prescribe penalties for the unlawful manufacture, sale, and keeping for sale intoxicating liquors, and to regulate the sale, barter, and giving away of such liquors for medical, scientific, and mechanical purposes," (Laws N. Dakota, 1890, 309, c. 110,) praying for an injunction against the occupant for unlawfully disposing of intoxicating liquors upon the premises, and against the owner for permitting the use thereof for the unlawful keeping or selling of such liquors, which injunction was granted, and under the restraining order and a search warrant also issued the sheriff took possession of the building and contents. While the sheriff had possession, Emil J. Pepke entered the building under the license and permission of the owners, whereupon, upon report of the sheriff, a rule upon him

to show cause why he should not be punished for contempt was entered by the District Court, the rule was made absolute, and Pepke was sentenced to imprisonment in the county jail for ninety days and to pay a fine of $200, and was committed accordingly. Thereupon Pepke presented his petition for *habeas corpus* to the District Judge of the United States for the District of North Dakota, setting forth grounds upon which he charged that section 13 of chapter 110 of the Laws of North Dakota of 1890, under which section the proceedings against him had been had, and the entire act were in contravention of the Constitution of the United States and of the State, and the judgment against him therefore void. The writ of *habeas corpus* was issued, and upon hearing was discharged and the petitioner remanded, whereupon the cause was brought to this court by appeal.

Mr. Marshall A. Spooner, (with whom was *Mr. Armstrong Taylor* on the brief,) for appellant.

Mr. Willam A. Standish, Attorney General of the State of North Dakota, for appellee.

The Chief Justice: It was insisted upon the argument that the judgment in contempt was not appealable; *State* v. *Davis*, 2 North Dakota, 461; but it was conceded that the validity of the law and of the sentence could be tested by the Supreme Court of the State on *certiorari* or *habeas corpus*, and no reason was suggested why, if the judgment of the District Court was the final judgment of the highest court of the State in which a decision in the matter could be had, a writ of error from this court might not be applied for.

Without considering the merits of the questions discussed, the judgment must be affirmed upon the authority of *Ex parte Fonda*, 117 U. S. 516; *In re Wood*, 140 U. S. 278; *Cook* v. *Hart*, 146 U. S. 183; *New York* v. *Eno*, *ante*, 89, and cases cited.

Judgment affirmed.

CHAPPELL *v.* WATERWORTH.

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

No. 16. Argued October 11, 1894. — Decided November 5, 1894.

Under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case (not depending on the citizenship of the parties, nor otherwise specially provided for,) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

An action of ejectment, brought in a state court between two citizens of the same State, in which the declaration merely describes the land and alleges an ouster of the plaintiff by the defendant, cannot be removed into the Circuit Court of the United States upon the petition of the defendant, setting forth that the United States own and hold the land for a light-house, and have appointed him keeper thereof.

THIS was an action of ejectment, brought December 23, 1887, by Thomas C. Chappell against James M. Waterworth, both citizens of Maryland, in the Circuit Court for the fifth judicial circuit of the State of Maryland.

The declaration alleged that on January 1, 1878, the plaintiff was in possession of a parcel of land, partly above and partly below high-water mark, extending from Hawkins Point light-house on the west side of the Patapsco River in Anne Arundel County in the State of Maryland to the Brewerton channel in that river, and otherwise described by metes and bounds; and that the defendant wrongfully entered upon said parcel of land, and ejected the plaintiff therefrom, and ever since retained possession thereof, and did other wrongs to the plaintiff; and the plaintiff claimed to recover the land, and damages to the amount of $33,333.

In February, 1888, the case was removed into the Circuit Court of the United States for the District of Maryland, upon the petition of the defendant, alleging that the suit "arises under the Constitution of the United States in the following

Statement of the Case.

manner, that is to say: The title to the *locus in quo* described in the declaration in this suit, with the right of possession, is averred by this defendant to be now and to have been at the commencement of said suit in the United States of America. The said title of the United States, with the right of possession aforesaid, is derived as follows: The *locus in quo* aforesaid is now and ever has been submerged land situated in the Patapsco River, in the State of Maryland, the said river being one of the public waters and navigable rivers of the said United States; and it is now and has been ever since in the possession of the United States, used by the United States as a site for Hawkins Point light-house, the same being a light-house of the United States, used as an aid to the navigation of the said Patapsco River. The said defendant is in possession of said site, being the land described in the said declaration, by appointment of the proper executive authority of the United States for and on behalf of the United States, as the keeper of the said light-house. The said defendant, for his defence to this action, relies upon the paramount right and title of the United States, given and conferred by the Constitution of the United States, to the use of the said submerged land in the said river for the purposes of a site for said light-house, the same being necessary and used as an aid to the navigation of the Patapsco River, and which right and title of the United States to the said *locus in quo* for the uses and purposes aforesaid he will claim in his said defence is, by virtue of the said Constitution and its provisions, paramount to the right or title of the State of Maryland or the said plaintiff; and in support of his right of possession of said *locus in quo*, as the keeper aforesaid of said light-house for and on behalf of the United States, and in defence of the title of the United States to the same, he relies upon article 1, section 8, of the said Constitution of the United States, which is in the following words: 'To regulate commerce with foreign nations and among the several States and with the Indian tribes.'"

In June, 1888, the defendant filed a plea, disclaiming all title and right of possession, either in his own right or for and in behalf of the United States, to the fast land described in

the declaration; and making, as to the submerged land on which the light-house was built, allegations substantially like those in his petition for removal, as above quoted; and further alleging that on February 20, 1877, the State of Maryland, by deed executed in conformity to law, ceded to the United States jurisdiction on the site of the light-house.

A motion to remand the case to the state court was made by the plaintiff, and denied by the court.

The plaintiff then, for replication to the defendant's plea, alleged "that when possession was taken in 1868 of the portion of submerged land described in said plea, as and for the site of Hawkins Point light station, the said land was held and owned in fee simple by a certain John M. Johnston, under a good and sufficient patent to him therefor from the State of Maryland, dated July 2, 1861; and that such possession was taken, as in said plea alleged, without any grant of any kind from said Johnston, and without any compensation being paid or tendered to him for said land or for any use of or easement in the same; and that the plaintiff, at the time of the institution of this suit and for a long time prior thereto, held and still holds the legal title to said land in fee simple as successor in title of said John M. Johnston; and that no compensation has ever been paid or tendered to him for said land or for the use thereof, or for any easement therein, nor has any deed or grant of any kind ever been made by him to any person whatsoever of said land, or of any interest, right, or easement therein."

The defendant demurred to the replication, and the plaintiff joined issue on the demurrer. The court sustained the demurrer, and, the plaintiff electing to stand upon his replication, entered judgment for the defendant. 39 Fed. Rep. 77.

The plaintiff tendered and was allowed a bill of exceptions to the denial of his motion to remand, as well as to the action of the court in sustaining the demurrer to his replication, and in rendering judgment for the defendant; and thereupon sued out this writ of error.

Mr. W. Cabell Bruce and *Mr. Thomas C. Chappell* for plaintiff in error.

Argument for Defendants in Error.

Mr. Solicitor General, for defendants in error said, upon the question of jurisdiction:

If this is a suit "arising under the Constitution or laws of the United States," it might, by the express terms of § 1 of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, have been brought originally in the Circuit Court of the United States, and, if so, was removable by the defendant, under § 2 of that act, from the State court into the Federal court; for, as was held in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454, the Federal courts are given jurisdiction by removal under § 2 of all cases of which they are given original jurisdiction by § 1.

The question, therefore, is simply whether the suit is one "arising under the Constitution or laws of the United States." It is an action brought against a person who is, and at the commencement of the action was, an officer and agent of the United States, to recover from him the possession of property claimed to be owned by the United States which he holds not otherwise than as their agent and on their behalf.

That makes it, I submit, a suit which arises under the Constitution and laws of the United States. *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, was a case in which the court held that a suit for damages against receivers appointed by a Circuit Court of the United States might be brought in the Federal court, although no question of a Federal nature was involved, upon the ground that the receivers, in executing their duties, were acting under the judicial authority derived from the Constitution of the United States, and that the case was therefore one arising under the Constitution. The same is true of the case at bar.

It is not a case such as was mentioned by Mr. Justice Miller in *Railroad Co.* v. *Mississippi*, 102 U. S. 135, 144, and referred to by Mr. Justice Gray in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 462, where "the cause of action depended solely on the law of the State," and "the act of Congress only came in question incidentally as part, it might be

a very small part, of the defendant's plea in avoidance," nor a case such as was referred to by Mr. Justice Harlan in *Metcalf* v. *Watertown*, 128 U. S. 586, 589, and mentioned by Mr. Justice Gray in 152 U. S. 461, which the court may be called upon "to retain in order to see whether the defendant may not raise some question of a Federal nature, upon which the right of recovery will finally depend."

It is not a case against a defendant who may or may not, at his option, and as a personal privilege, set up some immunity under the Constitution or laws of the United States. It is a case in which the defendant, on the one hand, has no right, title or interest to defend, except what he holds as an officer and agent of the United States, and in which the plaintiff, on the other hand, has no right of recovery and seeks to enforce none except against the United States, who alone are in possession, (in the only way in which they can possess anything, to wit, by their agent,) and who alone deny the plaintiff's right. In other words, the plaintiff has no controversy, in fact, except with the United States. And, while the defendant, although an officer and agent of the United States, has no immunity from suit on that account, (*United States* v. *Lee*, 106 U. S. 196,) the lawfulness of his possession as such agent and the right and title of the United States to the property are the very subject-matter, and the only subject-matter, of the inquiry in this case.

The fact that the plaintiff does not disclose in his declaration that the defendant is an officer of the United States, and that the possession which is sought to be recovered is in fact the possession of the United States, held by the defendant as their officer and agent, does not make the case any less one "arising under the Constitution and laws of the United States;" for, as was said by Chief Justice Marshall in *Osborn* v. *Bank of United States*, 9 Wheat. 738, 824, "the questions which the case involved then [*i.e.* when the action was brought] must determine its character, whether those questions be made in the cause or not."

The case of *Tennessee* v. *Bank of Commerce*, 152 U. S. 454, which was wrongly removed from the State court into

the Federal court, was an action by the State of Tennessee to recover a tax levied under the laws of that State. The defendant was at liberty, at its option, to defend against the tax upon the ground that it was in contravention of the Constitution or laws of the United States. Whether the case would ever present any question under the Constitution or laws of the United States depended altogether upon the election of the defendant to set up an immunity thereunder as its personal privilege. But at bar the action is against an officer of the United States, who has no privilege or duty except to answer that the possession which he holds, and of which the plaintiff seeks to deprive him, is the possession of the United States.

It is, in fact, a suit to recover the possession of the United States, which cannot be held otherwise than through some agent or officer. It is an action against a defendant who exercises his authority and holds his possession under the Constitution and laws of the United States, and not otherwise, and upon the principle of *Texas & Pacific Railway Co.* v. *Cox*, 145 U. S. 593, is therefore a suit "arising under the Constitution and laws of the United States," which might have been brought originally in the Circuit Court of the United States, and which was therefore properly removed by the defendant into that court.

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

The question presented by the pleadings, considered in the opinion below, and argued at the bar, cannot be decided upon this record, because the case was removed into the Circuit Court of the United States without authority of law. The question of removal is governed by the decision of this court at the last term in *Tennessee* v. *Bank of Commerce*, 152 U. S. 454, by which, upon full consideration, it was adjudged that under the acts of March 3, 1887, c. 373, (24 Stat. 552,) and August 13, 1888, c. 866, (25 Stat. 433,) a case (not depending on the citizenship of the parties, nor otherwise specially pro-

vided for,) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

In the present case, the declaration is in the ordinary form of an action of ejectment between individuals, merely describing the land and alleging the ouster of the plaintiff by the defendant. It does not show that either party claims any right under the Constitution or laws of the United States, or that the government of the United States or any third party claims or asserts any title or right to the land in controversy. So far as the declaration shows, the only question in the case might be merely whether the plaintiff has any title, or whether the defendant has taken possession. There was therefore no ground for ousting the jurisdiction of the courts of the State, and removing the case into the courts of the United States for trial.

The case must be remanded to the court in which it was originally brought. If such a defence as was set up in the Circuit Court of the United States should be hereafter set up in the courts of the State, and overruled by the highest court of the State to which the case can be taken, the judgment of that court may be reviewed by this court on writ of error.

Judgment reversed, with costs, and case remanded to the Circuit Court of the United States with directions to remand it to the Circuit Court of the fifth judicial circuit of the State of Maryland.

UNITED STATES *v.* JAHN.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 541. Argued and submitted October 23, 1894. — Decided November 5, 1894.

A Circuit Court of the United States has jurisdiction to hear and determine, on appeal from the Board of General Appraisers, the questions of law and of fact involved in a decision of that Board sustaining the action of a collector of customs in exacting a charge for gauging molasses under the provisions of Rev. Stat. § 3023.

Giving to the act of March 3, 1891, 26 Stat. 826, c. 517, to establish Circuit Courts of Appeals, taken as a whole, a reasonable construction, it is *held:*

(1) That if the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court;

(2) That if the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it;

(3) That if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court;

(4) That if in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined;

(5) That the same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits.

The docket title of this case being wrong, it is corrected by this court.

August 15, 1890, G. A. Jahn & Co. imported into New York some casks of molasses, which on the 28th of that month they withdrew from warehouse and exported to Montreal for the benefit of the drawback. Upon such withdrawal and exportation, the collector of customs at New York exacted a charge of ten cents per cask for gauging the molasses under the provisions of section 3023 of the Revised Statutes. The importers protested against the charge for gauging, claiming that it had been abolished by the 22d section of the act entitled "An act to simplify the laws in relation to the collection of the revenue," approved June 10, 1890. 26 Stat. 131, 140, c. 407.

The matter was duly taken before the board of general appraisers, which sustained the action of the collector, and the importers appealed to the Circuit Court of the United States for the Southern District of New York. The Circuit Court reversed the decision of the board of general appraisers, and held that the gauging charge exacted by the collector had been abolished. Thereupon the United States appealed to the Circuit Court of Appeals, and assigned for error that the Circuit Court erred in reversing the decision of the board of general appraisers for the reason that the decision of the board was final and conclusive, and that the Circuit Court had no jurisdiction to make any decree or order in said proceeding. The jurisdiction of the Circuit Court was first challenged upon the appeal. The Circuit Court of Appeals certified to this court the question: "Whether the United States Circuit Court had jurisdiction to hear and determine the questions of law and of fact involved in said decision of the board of general appraisers."

Mr. Solicitor General for the United States, submitted on his brief.

Mr. Edwin B. Smith for Jahn & Co.

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

This case was docketed here under the title: "In the

matter of the application of Gustave A. Jahn & Co. upon certain merchandise entered by the 'Alps,' August 15, 1890," but the correct title is *United States* v. *Gustave A. Jahn et al.*, for the reasons given by Mr. Justice Gray in *United States* v. *Hopewell*, 5 U. S. App. 137.

Counsel for the importers denies that the Circuit Court of Appeals had authority to certify the question of the jurisdiction of the Circuit Court to this court because that question was not in issue in the Circuit Court or raised in any way; and, if it had been in issue, it could only be certified by the Circuit Court to this court; that as it was not put in issue and not certified, and an appeal was taken to the Circuit Court of Appeals, the action of the Circuit Court in proceeding to judgment was a final determination in favor of its own jurisdiction, which could not be revised by the Circuit Court of Appeals though under instruction from this court.

The act of March 3, 1891, 26 Stat. 826, c. 517, establishing the Circuit Courts of Appeals, provides in its fourth section that "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same;" in section five, that "appeals or writs of error may be taken from . . . the existing Circuit Courts direct to the Supreme Court . . . in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;" in section six, that the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the . . . existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the Circuit Courts of Appeals shall be final . . . in all cases . . . arising . . . under the revenue laws . . . excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the

United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision, and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." And excepting also that the Supreme Court, in the absence of request for instruction, might, by *certiorari* or otherwise, require any such case to be certified to it for review.

It thus appears that the revisory power of this court, and of the Circuit Courts of Appeals, under the act, is to be exercised only in accordance with its provisions, and that the Circuit Courts of Appeals exercise appellate jurisdiction under the sixth section in all cases other than those in which the jurisdiction of this court is exercised under the fifth, among which cases are included all revenue cases, that is, cases under laws imposing duties or imports or tonnage, or providing in terms for revenue, (*United States* v. *Hill*, 123 U. S. 681,) which can only come here on the merits on certificate or *certiorari;* yet if in such a case a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the Circuit Court, while if jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the Circuit Court of Appeals would undoubtedly have jurisdiction to review the case upon the merits. The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases, the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation

upon the jurisdiction of this court of the entire case and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under section five. *Horner* v. *United States*, 143 U. S. 570, 577. The act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. By taking a case directly to this court on the question of jurisdiction, the contention on the merits would be waived, but it does not follow that the jurisdictional question could not be considered, if the case were taken to the Circuit Court of Appeals. The act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction.

If in the case at bar the question of jurisdiction had been raised by the United States in the Circuit Court and the jurisdiction sustained, and the decision on the merits had then been rendered against the government, would the United States have been compelled to waive their contention on the merits and have the question of jurisdiction certified to this court, or would they have waived the question of jurisdiction by taking the case to the Circuit Court of Appeals? We do not think the act involves such a dilemma; but, on the contrary, are of opinion that the government would have had the right to carry the cause to the Court of Appeals, which could have then certified the question of jurisdiction to this court for determination. Of course, the power to certify assumes the power to decide; but if decided there, by *certiorari*, when necessary, the same review could be obtained here as on certificate for instruction. And although the question of jurisdiction was not put in issue in the Circuit Court, still, as the objection in the Circuit Court of Appeals went to jurisdiction over the subject-matter, no omission in that regard could

supply absolute want of power, and the Circuit Court of Appeals was bound to take notice of the question.

It is conceded that the United States assigned errors on the merits as well as the error under consideration, and as the question of jurisdiction lay at the threshold, and the intent of the act of March 3, 1891, was that that question should be determined by this court, the Circuit Court of Appeals properly suspended any consideration of the case upon the merits until that question could be determined upon certificate. This was in accordance with the early case of *McLish* v. *Roff*, 141 U. S. 661, in which it was held that the writ of error or appeal could be taken only after final judgment, except in the cases specified in section seven of the act, and Mr. Justice Lamar, delivering the opinion, said: "When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court." The same course was pursued in *New Orleans* v. *Benjamin*, 153 U. S. 411. The case was one in which the question of jurisdiction was raised in the Circuit Court, the jurisdiction maintained, and judgment rendered on the merits. The defendant did not ask that the question of jurisdiction be certified to this court by the Circuit Court, but carried the whole case to the Circuit Court of Appeals, and that court certified to us the questions involving the jurisdiction, which were accordingly answered.

Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of

Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it; (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court; (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits.

Glaspell's case illustrates this situation, though arising under somewhat different circumstances. Glaspell brought an action in the District Court of Stutsman County, in the then Territory of Dakota, against the Northern Pacific Railroad Company, and recovered a verdict of $12,545.43. After the State of North Dakota was admitted into the Union, including Stutsman County, the defendant petitioned for the removal of the case into the Circuit Court of the United States for the District of North Dakota, and it was removed accordingly. Glaspell moved to remand, which motion was denied. The Circuit Court then granted a new trial and the case was retried in that court, Glaspell insisting throughout upon his objection to the jurisdiction, and it resulted in a verdict for the plaintiff of $1120, upon which judgment was entered with costs. From that judgment Glaspell prosecuted a writ of error on the 16th day of June, 1891, from this court upon the question of jurisdiction. While his writ of error was pending, July 30, 1891, the defendant, upon alleging errors occurring upon the trial

on the merits, sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit and Glaspell filed in that court a motion to dismiss the writ of error on the ground that the court was without jurisdiction for the reason that the action was pending on the writ of error from this court, which was duly issued and served before the writ from the Circuit Court of Appeals was allowed. But the motion to dismiss was overruled, and the cause continued awaiting our decision upon the question of jurisdiction. *Northern Pacific Railroad* v. *Glaspell*, 4 U. S. App. 238.

This court subsequently held that the Circuit Court for the District of North Dakota had no jurisdiction, and reversed the judgment, and remanded the case with directions to remand it to the state court. *Glaspell* v. *Northern Pacific Railroad*, 144 U. S. 211.

In *Carey* v. *Houston & Texas Railway*, 150 U. S. 170, it appeared that two appeals had been prayed from the decree by the losing party, one to this court and one to the Circuit Court of Appeals for the Fifth Circuit, which appeals had been severally allowed and duly perfected, but, as we held, for reasons therein given, that we had no jurisdiction, the circumstance became unimportant.

In *Northern Pacific Railroad* v. *Amato*, 144 U. S. 465, a suit was brought in the Supreme Court of New York against a railroad corporation created by an act of Congress, to recover damages for personal injuries sustained by the plaintiff from the negligence of the defendant, and was removed by the defendant into the Circuit Court of the United States, where a trial was had, which resulted in a verdict and judgment for the plaintiff. The defendant took a writ of error from the Circuit Court of Appeals for the Second Circuit, which affirmed the judgment. On a writ of error taken by the defendant from this court to the Circuit Court of Appeals, a motion was made by the plaintiff to dismiss or affirm; and it was ruled, among other things, that as it did not appear by the record that on the trial in the Circuit Court the defendant made any objection to the jurisdiction of that court, and the petition for removal recognized the jurisdiction, the plaintiff could not be

heard to assert, as a ground for the motion to dismiss, that the defendant might have taken a writ of error from this court to the Circuit Court under section five of the said act of 1891, and had, by failing to do so, waived this right.

We are of opinion that the Circuit Court of Appeals was in the proper exercise of jurisdiction in certifying the question which it did, and that our jurisdiction to answer it is properly invoked.

The decision in *United States* v. *Klingenberg*, 153 U. S. 93, covers the case and requires

The question certified to be answered in the affirmative, and it is so ordered.

ALLIS *v.* UNITED STATES.

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

No. 661. Argued October 23, 1894. — Decided November 12, 1894.

When the record in a criminal case brought here by the defendant is meagre, containing only a small portion of the evidence, this court must assume, as the verdict was sustained by the court below, that the testimony was sufficient to establish defendant's guilt.

When a defendant is tried on an indictment charging false entries at different times running through several months, it is no error to admit evidence of such acts during the whole period, although he may be found guilty of only one such act.

Evidence having been given bearing upon one such alleged false entry, made at a period considerably later than the only one of which the defendant was found guilty, no advantage can be taken by the defendant here of the refusal of the court below to allow a cross question touching such evidence.

It is common practice and no error to recall a jury, after they have been in deliberation for a length of time, for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in their solution, and the time at which such recall shall be made must be left to the discretion of the trial court.

There is nothing in the record to show that the court in this case abused this discretion.

Rulings not specifically excepted to below are not reviewable here.

The rule repeated that in a Federal court the presiding judge may express to the jury his opinion as to the weight of evidence.

In making such a statement he is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question.

On May 13, 1893, the grand jury of the United States for the Western Division of the Eastern District of Arkansas presented an indictment against Horace G. Allis under section 5209 of the Revised Statutes. This section, so far as is material to this case, reads as follows:

"Every president . . . of any association . . . who makes any false entry in any book . . . of the association . . . with intent . . . to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association . . . shall be deemed guilty," etc.

The indictment consisted of twenty-five counts. The defendant pleaded not guilty, and the case came on for trial on November 27, 1893. This trial resulted in a verdict of guilty on the fourteenth count, upon which verdict the defendant was sentenced to imprisonment for the term of five years. The particular charge in that count was the making of an entry in February, 1892, on the books of First National Bank of Little Rock, of which defendant was the president, of the sum of fifty thousand (50,000) dollars to the credit of his individual account. To reverse the judgment and sentence against him, the defendant sued out a writ of error from this court.

Mr. John R. Dos Passos and *Mr. A. H. Garland*, (with whom was *Mr. Thomas B. Martin* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

The meagre record gives us little information as to the merits of this case, and presents but few questions for our con-

sideration. As the verdict was sustained by the trial judge, we must assume that the testimony, only a small portion of which is before us, was sufficient to establish the guilt of the defendant, and unless error is disclosed in the special matters presented to our consideration the judgment must be affirmed.

Upon the trial the court, over the objections of the defendant, permitted a witness, from an examination of the books of the bank, to testify to the condition of the defendant's private account from February to December 1892. It is insisted that this testimony was calculated to prejudice the jury against the defendant; that the items of the entire account were not in issue; that they were not within the scope of the indictment; and that, therefore, the defendant's attention had not been called to them and he could not be prepared to defend against them. There are two sufficient answers to these objections: 1st. While the defendant was found guilty only on one, he was being tried on twenty-five counts, which counts charged false entries at different times running from February to December, and therefore testimony was competent as to the condition of his account stretching through the entire time. 2d. The gravamen of this offence is the false entry with intent to injure, defraud, or deceive, and it was competent to show the state of the defendant's account, not merely at the very day the false entry was made, but also before and after that date, for the purpose of throwing light on the intent with which it was made.

Again, a bookkeeper having testified to the making of false entries under the direction of the defendant, was asked on cross-examination whether a report prepared by him in September, in the absence of the defendant from the State, did not contain the identical false entry subsequently found in the December report, the making of which last entry was the offence charged in one of the counts of the indictment. The court refused to permit an answer to this question. As the jury did not find the defendant guilty on that count, and as the question related to matters occurring more than six months after the false entry of which he was found guilty, and to an entirely different transaction, it is obvious that the defendant was not prejudiced by the ruling.

It is further insisted that the court erred in permitting the translation of a cipher telegram from the defendant to be received in evidence and read to the jury. It is sufficient to say, in respect to this matter, that no exceptions were taken to the rulings of the court, and, indeed, no objections were made to the admission of the testimony after all the preliminary proofs had been received.

The other errors complained of are in the charge to the jury. It appears from the bill of exceptions that after the jury had been deliberating for several hours on the case, the court called them into the court-room and inquired if they had reached a verdict. On being informed that they had not, the court asked if there was any portion of the charge the rereading of which would be of any assistance to them. To which question the foreman responded that a portion thereof was not fully understood by all of the jury, to wit, that in reference to the weight of the testimony of the witnesses. Thereupon the court reread that portion. It further stated that the jury were at liberty to conduct their deliberations as they chose, but that he would call their attention again to the part of the charge relating to the fourteenth, fifteenth, eighth and ninth counts of the indictment, and proceeded to reread that part. In the portion reread, after a reference to the alleged false credit of $50,000, was this language: "And if he caused these entries to be made, with what intent did he do so? If a customer or friend of yours who owed you $40,000 on account should come to you and tell you that he had deposited $50,000 to your credit in the German National Bank of Little Rock, and that he wanted a receipt for the $40,000 that he owed you and wanted a credit for the other $10,000, and you should give him the receipt and the credit, and should subsequently learn that he had never deposited one dollar in that bank for you, with what intent would you conclude he had made these statements? Would you think it was with an honest purpose or with some intent to injure or defraud you?"

The bill of exceptions also contains other parts of the charge as follows: "You are not bound to be governed by any state-

ment of the evidence made by the court, but if your recollection accords with that of the court you may accept it, and if it differs from it you may be governed by your own memory. It is your exclusive province and duty to determine the issues of fact here presented and the weight and credibility of the testimony of the witnesses, and by your determination of these questions the court will be bound. If in the course of what the court may say to you any expression of opinion should drop as to the disputed issues of fact or the credibility of the testimony of the witnesses, you are not bound by any such expression, but it is your privilege to adopt or disregard it as you may see fit."

"The court has reviewed the counts of this indictment and called your attention to some of the important evidence in the hope that this might be of some assistance to you in reaching a just verdict. There is much testimony bearing upon many of these counts that has not been called to your attention. You will consider that as carefully and as well as that which has been referred to, and will remember that whatever may have been said by the court, you are the exclusive judges of the questions of fact and of the credibility of the witnesses." Closing its remarks to the jury at the time of their recall, it said: "Of course, gentlemen of the jury, you must consider all the other parts of the charge heretofore read to you also. I have simply called your attention to these four counts, thinking possibly I might assist you in arriving at a just conclusion.

"The court and jury are here to come to a just and righteous result. No doubt you are as anxious to reach it as am I.

"So anxious is the court that, having spent now two weeks in the trial of this cause, I am willing to stay here another if by that means we may be able to reach a just and proper result in this trial. You may retire."

To the charge, of which the only portions preserved in the record are those just referred to, a single exception was taken in the following words: "The defendant excepts to the action of the court in recalling the jury and in arguing the testimony

and in stating part of the testimony on certain points without stating the entire testimony." It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury and sought to coerce a verdict. But the exception taken is not sufficient to bring all these matters before us. There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury, or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of this court provides: "The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court." Repeated decisions have emphasized the necessity of a strict adherence to this rule: "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception." *Harvey* v. *Tyler*, 2 Wall. 328, 339. "If it was intended to save an exception as to distinct propositions embodied in the instructions, the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed." *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 337. "An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party,

and, therefore, gave no opportunity to the trial court to correct any error committed by it." *Block* v. *Darling*, 140 U. S. 234, 238. See also *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S. 183, and cases cited in the opinion; *N. Y. & Colorado Mining Co.* v. *Frazer*, 130 U. S. 611; *Anthony* v. *Louisville & Nashville Railroad*, 132 U. S. 172. We see nothing in this case to withdraw it from the scope and control of this rule.

The specific matters excepted to are: 1st, the action of the court in recalling the jury; 2d, its arguing the testimony; and 3d, its stating part of the testimony on certain points without stating the entire testimony. It is a familiar practice to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration of the case, and of making proper efforts to assist them in the solution of those difficulties. It would be startling to have such action held to be error, and error sufficient to reverse a judgment. The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court, and there is nothing in the record to show that the court, in the case at the bar, abused this discretion or failed to wait a reasonable time for the consideration of the case by the jury under the charge as already given.

So far as "arguing the testimony" is concerned, the only part of the charge that can be considered as even tending in that direction was that part referring to the question of intent. We see nothing in this of which any just complaint can be made. The illustration given by the court was apt and fair, and if it bore hardly upon the defendant it was only because the transaction, of which he was charged, was one of like character and indicative of the same intent. The illustration was put in the form of a question, and no affirmation was made as to the intent that must be presumed therefrom. Even if it contained an expression of opinion, such expression is permissible in the Federal courts. *Simmons* v. *United States*, 142 U. S. 148; *Doyle* v. *Railway Co.*, 147 U. S. 413.

Syllabus.

So far as respects the complaint that the court stated part of the testimony on a certain point without stating all, we know of no rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question. There was no intimation that all the testimony bearing upon any particular point was stated. On the contrary, the plain declaration was that there was other testimony than that mentioned, and the jury were admonished to give that not mentioned as full and careful consideration as that mentioned.

So far as the record discloses, the charge of the court and its rulings on the trial were eminently fair and considerate of the rights of the defendant. In none of the matters referred to do we find any error, and therefore, the judgment is

Affirmed.

ERHARDT *v.* SCHROEDER.

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

No. 31. Argued January 24, 25, 1894. — Decided November 12, 1894.

It is a general rule that provisions in statutes imposing taxation, though not in terms mandatory, are to be regarded as such if necessary for the substantial protection of the taxpayer.

The customs laws, however, give to the complaining importer an ample remedy, only putting him to the inconvenience of seeking it in a legal tribunal.

In an action to recover duties alleged to have been illegally exacted, the burden is on the importer to overcome the presumption of a legal collection by proof that their exaction was unlawful.

Although the appraisement of goods by customs officers is not ordinarily open to judicial review, that rule does not apply when the value is determined by a classification made by the officer.

The provision in Schedule F, of the act of March 3, 1883, c. 121, 22 Stat. 488, 503, imposing a duty upon leaf tobacco, evidently requires that 85 per cent of half leaves are to be of the requisite size and necessary fineness of texture for wrappers, or, in other words, that each of 85 half

leaves out of 100 half leaves must contain a portion sufficiently fine in texture, of the requisite size to make at least one wrapper.

The further provision in that schedule, "of which more than 100 leaves are required to weigh a pound," refers to whole leaves, in their natural state.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Edwin B. Smith, (with whom was *Mr. William B. Hill* on the brief,) for defendants in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The defendants in error commenced this action in the Superior Court of the city of New York on May 6, 1889, against Joel B. Erhardt, collector of the port of New York, to recover the sum of $32,040.60, which amount they alleged had been unlawfully exacted from them by that officer as customs duties on leaf tobacco. The case was removed by *certiorari* into the Circuit Court of the United States for the Southern District of New York, in which court the complaint was filed, and the case proceeded to trial before the court and a jury.

As appears by the bill of exceptions, the defendants in error, partners as Schroeder & Bon, on November 5, 1888, imported from Amsterdam and entered at the port of New York, for warehouse, 429 bales of leaf tobacco, described in the invoice as Sumatra tobacco. The protest filed in this case related to 398 of those bales, but on the trial a recovery was abandoned of duties paid on such bales of the invoice as were withdrawn before May 6, 1889, for the reason that those duties had been paid to the predecessor in office of the defendant.

On that day, as the bill of exceptions further shows, the importers withdrew from warehouse five bales of the tobacco, upon one of which they paid duty at the rate of 75 cents a pound on 125 pounds of the tobacco in the bale, and 35 cents a pound upon 54 pounds thereof, and upon four of which bales they paid a duty of 75 cents a pound. On the following day

they withdrew five more bales, upon all of which they paid duty at the rate of 75 cents a pound.

The importers, contending that they should have been compelled to pay but 35 cents a pound on all of the ten bales, asserted that the amount constituting the difference between duties at that rate and at the rate of 75 cents a pound had been exacted from them unlawfully by Erhardt, and that amount, with interest, or $708.12, was sought on the trial to be recovered.

The evidence introduced by the importers showed that within ten days after the liquidation of their warehouse entry they had filed with the collector a protest against his decision, assessment, and liquidation of the duties; that within thirty days from the liquidation of the entry they had duly appealed to the Secretary of the Treasury, and that that officer having decided against them on appeal, they had within ninety days after his decision brought suit to recover the duties alleged to have been erroneously exacted.

It appeared from the invoice and the testimony of the examiner of tobacco at the appraisers' stores, called as a witness for the importers, that upon the entry of the tobacco the collector had designated five of the 429 bales for examination at the public stores; that subsequently, upon the request of the appraiser, twenty-five additional bales and no more had been sent to the public stores for examination; that of the plantation lots, about thirteen in number, of which the invoice was composed, four plantation lots, containing respectively ten, twenty-seven, twenty, and ten bales, were represented in the ten bales in controversy; two of these four lots being represented by four bales from each, and two of the four lots by one bale from each; that among the thirty bales sent to the public stores was one bale from each of the said four plantation lots; that one of the bales there examined was, and that the other three were not, among the ten bales in controversy; and that this one bale belonged to one of the plantation lots containing ten bales, and was the bale upon which the importer paid duty at the rate of 75 cents a pound upon 125 pounds thereof and 35 cents a pound upon 54 pounds thereof.

Other testimony was introduced to show the actual character of the tobacco.

On the trial, after all the testimony on both sides had been introduced, the collector moved the court to direct a verdict in his favor on the ground that the importers had not established facts sufficient to constitute a cause of action, which motion was denied. The collector excepted to this ruling, and asked to be allowed to go to the jury generally upon the issues of the case, and upon the court's refusal of this request the collector asked that the case might go to the jury upon the question whether there had been one package examined of the bales in controversy, claiming that although there was not one bale in ten of the entire invoice sent to the public stores, yet, as there were only ten bales in question, representing four plantation lots, and as four bales representing those ten bales had been actually examined at the public stores, there was a sufficient compliance with the statute. The court refused to submit this question to the jury, to which refusal the collector excepted. The importers then moved for the direction of a verdict in their favor, and the court granted the motion and directed a verdict for them for the sum of $708.12, to which action of the court the collector excepted. Judgment in favor of the importers, for the said amount, was duly entered on June 20, 1890, and subsequently the collector brought the case to this court by a writ of error.

The protest filed by the importers contained, among other things, an allegation that there had been no legal appraisal of the tobacco, for the reason that the provisions of section 2939 of the Revised Statutes had not been complied with. That section is as follows:

"The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examina-

tion of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined."

It seems, from the nature of a part of the evidence introduced on the trial, that the importers contended in the court below that the effect of the examination by the customs officers of less than one bale in ten of the invoice had the effect of invalidating the assessment of the higher tax upon the tobacco, provided for in paragraph 246 of the tariff act of 1883, and made it dutiable at the lower rate, as prescribed in paragraph 247 of that act.

The same ground of contention is presented in this court, the collector asserting that the provisions of Rev. Stat. § 2939 are in the nature of instructions to the officers of the customs, intended solely for the protection of the revenue, and, therefore, that no benefit from a violation of the statute could be taken by an importer. The importers insist, on the other hand, that inasmuch as the examination may have the effect of fixing a higher duty upon a given invoice of tobacco than that collectible upon leaf tobacco of the kind more extensively imported, the importer might be injured if the characteristics of the tobacco necessary to justify the exaction of the higher tax were determined by an examination different from that prescribed by § 2939, which enactment, therefore, they believe to be intended as well for the protection of the importer as the government, and hence mandatory. Collateral to the argument upon this point is the discussion by the parties as to whether the incident of the actual examination in this case of one of the ten bales in controversy, and the examination of one bale from each of four plantation lots represented by the ten bales, was equivalent to a substantial compliance with the statute.

Whether a statute is mandatory or directory is frequently a question of a great deal of importance to taxpayers, for the reason that errors in taxation are often susceptible of correction only by pointing to the non-observance of some law which, strictly followed by an officer, might have prevented the errors complained of. The acts of assessors, for instance,

in matters relating to general municipal and state taxation are, if legally performed, usually conclusive upon the taxpayer, unless some means of relief has been provided by the legislature, and often this relief is narrow. Very rarely, if ever, is there power in the judiciary to enter into all the questions affecting the legality of a charge for taxes, and therefore, in general, a statute, even though not in express terms mandatory, is treated as being so if its literal observance might afford substantial protection to the party complaining, and a failure of such observance by an officer is considered to render his act void. *French* v. *Edwards*, 13 Wall. 506, 511.

In the case of customs duties, however, a party dissatisfied with the classification of imports may apply to the courts to have examined and reviewed everything involving the legality of the demand which has been made upon him by a collector, and statutes containing directions to government officials, as to the manner in which they shall become informed of the dutiable character of merchandise, afford importers an altogether different kind of protection from that just mentioned. At most, a neglect of such provisions operates to no greater disadvantage to a party than to subject him to the necessity of bringing an action which he might not have felt impelled to bring if the tax had been ascertained in the manner prescribed. The unlawful demand of the duty does not conclude his rights, but, at the most, merely lays upon him, the inconvenience of going before a tribunal in which those rights will be declared.

An examination of one package in ten of the merchandise might have shown to the satisfaction of the collector that the importation was of the character the importer claimed it to be; the examination of one package in fourteen may have given the collector a different impression to the disadvantage of the importer. But the proceedings do not necessarily end with the collector's decision, and the importer's rights are not finally fixed until the character of the goods has been found by a court.

The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute

primarily directed to public officers for their guidance, and the substantial protection of the government, as mandatory, and to consider official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights or property. Cooley on Taxation, 215, 216.

In this view, it is apparent that the usual presumption of a legal collection is not changed by the circumstances of this case, and that the burden is upon the importer of overcoming this presumption by proof that the exaction of the duties was unlawful.

If the dutiable character of the goods in the present case were to be determined by *value*, the question of the effect of § 2939 might be of consequence to the importers, since in that event the value fixed by the appraisers, under section 2930 Rev. Stat., relating to appeals from appraisements, would be final, unless the appraisement were in some respect unlawful. The question of the value of the goods could not be raised in an action against the collector, and an attack upon the legality of the appraisement, for the purpose of having it declared illegal, and the goods therefore declared dutiable at the value stated in the invoice, would be the only means of redress by a court for an illegal exaction of duties based upon an erroneous valuation. The duty chargeable upon leaf tobacco was not fixed with reference to its *value*, but to certain prescribed characteristics of *size, fineness of texture, and weight.* It seems to have been the practice, under instructions issued by the Secretary of the Treasury, for the appraiser, in addition to ascertaining the value of goods, to ascertain the dutiable qualities of tobacco imported, and this act of the appraiser seems usually to be denominated an appraisement. At least, that word is so used by counsel on both sides of this case. Unless, however, this act of the appraiser is an *appraisement* in the sense of being an ascertainment of *value*, it would not be just to an importer to regard it as an appraisement in this kind of a case.

Section 3011 Rev. Stat. provided that any person who had made payment under protest, and in order to obtain possession

of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, might maintain an action in the nature of an action at law, which should be triable by jury to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. This statute is general in its terms, and is subject to but one qualification, namely, that in the action provided for no question can be raised as to the value of the merchandise, except to show that because of some illegality in the appraisement the value fixed by the appraiser should not be taken as the basis of the duties, but that the duties should therefore be fixed by the invoice.

In the case of *Hilton* v. *Merritt*, 110 U. S. 97, 106, Mr. Justice Woods said, in delivering the opinion of the court:

"Considering the acts of Congress as establishing a system, and giving force to all the sections, its plain and obvious meaning is that the *appraisement* of the customs officers shall be final, but all other questions relative to the rate and amount of duties may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted. Questions frequently arise whether an enumerated article belongs to one section or another. . . . In determining the rate and amount of duties the value of the merchandise is one factor, the question what schedule it properly falls under is another. . . . Questions relating to the classification of imports and consequently to the rate and amount of duty are open to review in an action at law."

A common instance of the recognition of the right of a party to review, in an action at law, a question of the classification of imports is to be found in cases where there is no dispute as to the character of the merchandise, but the contest is upon the name properly applicable to it, in the meaning of a statute. Many such cases are cited in *Cadwalader* v. *Zeh*, 151 U. S. 171, 176, which case is itself a similar instance. In such controversies the question to be answered is what the article is. The question is the same where there is no dispute over terms, but as to the qualities or characteristics necessary

to bring the article within the statutory description. In either case the matter to be decided is the portion of the act under which the article properly falls, and in all cases, eliminating only the question of the value of the merchandise, the classification may be reviewed in an action at law.

We are thus brought to the question of the actual character of the tobacco, with reference to the paragraph under which it was properly dutiable. This question is raised by the following allegation of the protest: "We protest against the estimate of quality of the different grades of said tobacco as made by the appraiser, and the assessment of 75 cents per pound as made by you as unlawful and as not in accordance with the provisions of Schedule F of the act of March 3, 1883, c. 121, 22 Stat. 488, 503, claiming said tobacco to be dutiable under said provision at only 35 cents per pound because eighty-five per cent of said tobacco is not of the requisite size and of the necessary fineness to be suitable for wrappers, and less than one hundred leaves are required to weigh a pound."

The provisions of Schedule F of the tariff act of 1883, under which the duties in this case were exacted, were as follows:

"[246.] Leaf tobacco of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound.

"[247.] All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound."

Diverse views were entertained by the parties concerning the meaning of paragraph [246], the most important of which had reference to the question whether the bale was to be treated as the unit to which the percentage test was to be applied, or whether the characteristics of the tobacco were to be ascertained by examining a number of representative hands, (which are small bundles of leaves fastened together,) and if certain of the examined hands should be found to be dutiable at one rate and the others at a different, the bale should be assumed to contain tobacco of two different grades, and the duties laid accordingly.

The proper answer to this question seems to depend upon the particular circumstances of a given case. It appears in the testimony on both sides of this case that leaf tobacco is divided into two classes, known as the wrapper class and the filler class. Whether or not a bale of tobacco is of uniform character seems to be easily ascertained. A dealer in leaf tobacco, one of the witnesses for the collector, said: "We never draw [from a bale] less than four hands, and it may run four hands, six hands, eight hands, or ten hands, according as we may find whether the bale has been packed honestly, as we term it, or whether it has been packed mixed. If the first four hands drawn should be entirely uniform, we probably would not draw any more, and in any event we would be hardly likely to draw more than ten hands."

If, then, a bale, or other separate and concrete quantity of leaf tobacco, contained only leaves of such uniformity of character as to be, in their collective form, of one class, the bale, or other separate collection, would be the unit contemplated in the percentage and weight tests of paragraph [246]. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class. The leaf tobacco meant by paragraph [246] is, apparently, a collection of leaves, or half-leaves, having the similarity caused by the circumstances of their having grown in soil of the same general character, in the same climate, and under the same general conditions of moisture or dryness, and by such selection or assortment as it may be customary to make on the plantation; yet having the differences which, despite the similarity of habitat and environment, are to be found in all natural products. Congress is, of course, presumed to be familiar with the fact that leaf tobacco is divided into classes, or is subjected, before being placed in bales, to some kind of an assortment, and a knowledge of the similarities and differences which are to be found in a collection of leaves of a class doubtless furnished the reason for the adoption of the percentage test.

All the tobacco in question in this case, as the evidence on both sides shows, was raised in the same country, and was all

of the class known to the trade as wrappers. Therefore, any bales, or, indeed, the whole invoice, if it might conveniently be treated as a whole for the purpose, was just such a unit as was intended by the statute. Any other view of this legislation would make it meaningless, for the very term, "per cent," implies an understanding that the tobacco to be taxed, even though of an uniform grade, may contain some leaves possessing and some not possessing the qualifications required for the higher tax. In such a case, if separate hands, taken from a bale containing only leaves of one class, were treated as units, the result might be an inaccurate conclusion. Doubtless in the hands classed as containing tobacco dutiable at the lower rate there would be leaves having all the requisites of the higher grade, while in the hands ascertained to be taxable at the higher rate would be leaves of the lower grade. This might have the effect of making a division of tobacco of one commercial class into two grades with respect to taxation — a division which we do not believe to have been contemplated by the statute. If the character of the tobacco is to be learned from an examination of a representative quantity therefrom, such as ten hands, the hands should be separated and the statutory tests applied to the general collection of all the representative leaves, irrespective of their casual association in the separate hands.

Examining the evidence in this case, we find that one of the importers gave testimony, based upon an examination of samples from the bales in controversy, tending to show that two of the plantation lots which were represented by five of those bales contained tobacco of which 85 per cent neither of the surface of the leaves nor of the quantity thereof, as estimated by the weight of the bale, was of the requisite size for wrappers; that the other two lots, represented by the other five bales in controversy, contained tobacco of which 85 per cent of the surface, but not 85 per cent of the weight, was suitable for wrappers. He further testified that 85 per cent of the tobacco was suitable for wrappers in respect to fineness of texture.

Considered with regard to fitness for wrappers each leaf of

tobacco is divided, by what is called the stem, into two distinct portions. It is matter of common knowledge, that, in making wrappers, the stem is not used, but is removed, with the result of dividing the leaf into separate pieces. From these pieces only are wrappers made, and their size and fineness of texture determine their suitability for wrappers, for if one piece is of insufficient size it cannot be aided in usefulness as a wrapper by the portion on the other side of the stem. If tobacco is imported with the stems removed, each piece or side, as it appears to be called by dealers and manufacturers, would of necessity be treated as independent, for there would be no means of knowing with certainty what parts were originally together in one leaf. In applying the test of size, therefore, the size of either side of the leaf is to be looked to, and the evident requirement of the statute is that eighty-five per cent of half-leaves, or eighty-five out of a hundred, are to be of the requisite size and necessary fineness of texture for wrappers. In other words, each of eighty-five half-leaves out of a hundred half-leaves must contain a portion, sufficiently fine in texture, of the requisite size to make at least one wrapper. Eighty-five per cent of the surface of the single leaf is not intended, for in that view any single leaf large enough for a wrapper would be, in respect to *size*, one hundred per cent or entirely of the requisite size for wrapper purposes, or, if one wrapper could not be made from it, the leaf would have, as to size, no percentage of suitability. Hence any leaf would be required to be treated simply as fit or unfit, one hundred per cent suitable in size or not suitable at all, and no general percentage test would be applicable.

The importers call attention to their testimony to the effect that in none of the four lots mentioned by them was there eighty-five per cent of the weight of the tobacco suitable for wrappers, and suggest that "as the commodity was bought, sold, and dutied by the pound, the weight must be the test to which the percentage rule applies." There is a practical objection to this view, however, which renders it not acceptable. It might often happen that a half-leaf which was suitable, according to the required test, would be joined, in

an unstemmed leaf, to one which was unsuitable, in which case the weight of the respective parts could not be ascertained. The most natural interpretation of the paragraph in question is to consider eighty-five per cent of half-leaves, or suitable half-leaves eighty-five in number out of half-leaves one hundred in number as the requirement, and to regard the proportion of the weight of the suitable half-leaves to the weight of all the leaves as immaterial.

A further requirement of the act is that the leaves of the collection must be of such average lightness that more than one hundred are required to weigh a pound; that is to say, if the collection should weigh 160 pounds it must contain more than 16,000 leaves; or if some smaller collection, taken as representative of the whole, such as ten hands, should weigh four pounds, this representative collection must contain more than 400 leaves. Here we are not to have in view, as in the other test, the separate parts of the leaves, for the language of the act expressly provides for the condition that "100 leaves are required to weigh a pound." The word *leaves* plainly means leaves in their natural state, or whole leaves.

Assuming that the importers, in testifying concerning the size and fineness of texture of tobacco, had in mind the proper test when speaking of the percentage of the surface suitable for wrappers, we must take their evidence to mean that only five of the ten bales in controversy contained tobacco of which less than eighty-five per cent fulfilled, as to the size and fineness of texture, the demands of paragraph 246. It would seem, therefore, that the court below was in error in directing a verdict for the importers, and that the judgment of that court ought to be reversed, and the case remanded with directions to set aside the verdict, and to order a new trial, in order that a jury may pass upon the real character of the tobacco contained in the ten bales withdrawn by the importers.

Judgment reversed.

Mr. Justice Brewer did not sit at the argument or take part in the decision.

NORTHERN PACIFIC RAILROAD COMPANY *v.* HOLMES.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 64. Argued November 9, 1894. — Decided November 12, 1894.

This court has no jurisdiction to review a judgment of the Supreme Court of the State of Washington, denying a petition for a rehearing which had been presented to the Supreme Court of the Territory of Washington touching a cause therein decided, and had been transferred to the Supreme Court of the State under the provisions of the act of February 22, 1889, c. 180, 25 Stat. 676, admitting that State to the Union.

MOTION to dismiss. The case is stated in the opinion.

Mr. W. R. Andrews for the motion.

Mr. A. H. Garland, and *Mr. James McNaught* opposing.

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

James Holmes recovered judgment in the District Court of the Fourth Judicial District of the Territory of Washington against the Northern Pacific Railroad Company; the railroad company prosecuted an appeal therefrom to the Supreme Court of the Territory, and the judgment was affirmed by that court on February 2, 1888. Thereupon, and on the same day, the Supreme Court of the Territory, on the application of plaintiff in error, entered an order granting it leave to file a petition for rehearing on or before July 17, 1888, giving sixty days after the determination of the petition within which to perfect proceedings upon appeal in the event that the petition should be denied, and staying all proceedings and withholding a remittitur pending the filing and determination of the petition and for sixty days thereafter.

The State of Washington was admitted into the Union November 11, 1889, and on March 8, 1890, an order was entered by the Supreme Court of the State, reciting the affirm-

ance of the judgment by the Supreme Court of the Territory and the order of that court of February 2, 1888, and further, that "the said petition having been filed within the time provided by the order of said court and having been pending undetermined at the time of the admission of the State of Washington and the organization of this, the Supreme Court of the State, and this court having directed the defendant in error to answer said petition, the said answer having been filed within the time provided by said order, and said petition and answer having been taken under advisement by this court, now, on this 8th day of March, A.D. 1890, the court being fully advised in the premises, denies said petition for rehearing; to which ruling and judgment, as well as the judgment of the Supreme Court of said Territory affirming the judgment of said District Court, plaintiff in error, by its counsel, excepts, and said exception is allowed." And it was ordered "that a writ of error to the Supreme Court of the United States to the judgment of the Supreme Court of the Territory of Washington, now a record of this court, and to the judgment, order, and ruling of this court upon the petition for rehearing, be and hereby is allowed." Supersedeas bond was given and approved, a writ of error issued, and citation signed and served.

It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31, 36; *Voorhees* v. *Noye Mf'g Co.*, 151 U. S. 135.

Under sections 22 and 23 of the act of Congress of February 22, 1889, c. 180, providing for the admission of the State of Washington into the Union, (25 Stat. 676, 682, 683, printed in the margin,[1]) this petition, which was pending in the

[1] "SEC. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the Supreme Court of either of the Territories mentioned in this act,

Supreme Court of the Territory at the time of the admission of the State, became a matter over which the state court had

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or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the Circuit or District Court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the Supreme Court of such State, as the nature of the case may require. . . . And each of the Circuit, District, and state Courts, herein named, shall, respectively, be the successor of the Supreme Court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the Supreme Court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgments shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

"SEC. 23. That in respect to all cases, proceedings, and matters now pending in the Supreme or District Courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said Territory; and in respect to all other cases, proceedings, and matters pending in the Supreme or District Courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said Supreme and District Territorial Courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such Circuit, District, and state Courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending, in any territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States Circuit, District or state court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the Circuit and District Courts of the

jurisdiction. The court took jurisdiction, and might, in its exercise, have granted a rehearing and reversed the judgment, but, upon consideration, both parties presenting their views, saw fit to refuse the rehearing, and thereby to confirm the action of the Supreme Court of the Territory in affirming the judgment. It was then that the judgment took final effect for the purposes of the writ of error, and plaintiff in error so regarded it. But plaintiff in error could not take the writ to the Supreme Court of the Territory, for when that court ceased to exist, a petition for rehearing was pending, which, after the admission, could not be disposed of by that court, and which plaintiff in error did not deem expedient to withdraw or abandon. And if the petition and the case could have been transferred to the Circuit Court of the United States because plaintiff in error was a corporation created by the United States, *Glaspell* v. *Northern Pacific Railroad*, 144 U. S. 211, that could only have been done upon request, and no request to that effect was preferred. On the contrary, plaintiff in error elected to continue the jurisdiction of the cause in the Supreme Court of the State, and as no Federal question was involved and the judgment could not take effect so far as a review of it on error was concerned until after the state court acted, and only through that action, the writ of error cannot be maintained. Moreover, the judgment of the Supreme Court of the Territory was rendered February 2, 1888, and the writ of error was not brought until more than two years thereafter, and, therefore, too late, unless the time of the pendency of the petition in that court were deducted, which is quite inadmissible in view of the fact that the petition remained pending notwithstanding the admission of the State had terminated the existence of the court in which it was originally filed. The result is that the writ of error must be

Dismissed.

United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts."

Statement of the Case.

NORTHERN PACIFIC RAILROAD COMPANY *v.* O'BRIEN. Error to the Supreme Court of the State of Washington. No. 65. Argued November 9, 1894. — Decided November 12, 1894. THE CHIEF JUSTICE: This case falls within that just decided, and, for the reasons there given, the writ of error must be

Dismissed.

Mr. Reese H. Voorhees for the motion to dismiss.

Mr. A. H. Garland, with whom were *Mr. James McNaught* and *Mr. H. J. May*, opposing.

OLIN *v.* TIMKEN.

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

No. 36. Argued October 12, 15, 1894. — Decided November 19, 1894.

The fifth claim in reissued letters patent No. 9542, granted January 25 1881, to Joseph Tilton and Rufus M. Stivers for a spring for vehicles, on the surrender of letters patent No. 157,430, dated December 1, 1874, is an expansion of the invention described in the original patent, and the reissue is thus invalidated.

Letters patent No. 197,689, granted November 27, 1877, to Henry Timken for improvement in carriage springs, are void for want of patentable novelty in the invention so patented.

Letters patent No. 239,850, granted April 5, 1881, to Cyrus W. Saladee for an improvement in spring-supports for vehicles, wagon-seats, etc., relate to a device which was anticipated by another invention made more than two years prior to the application for that patent, and reduced to practice prior to that application, and by other inventions named in the opinion of the court, and are void for want of patentable novelty.

THIS was a bill in equity, filed by Henry Timken in the Circuit Court of the United States for the Southern District of Ohio against Thomas D. Olin and Edwin D. Olin to restrain the infringement of three letters patent, namely, No. 197,689, granted to Henry Timken, November 27, 1877, for improvement in "carriage springs;" No. 239,850 to C. W. Saladee, April 5, 1881, for "road wagon;" reissue patent No. 9542,

granted January 25, 1881, being a reissue of patent No. 157,430, to Tilton and Stivers for improvement in "springs for vehicles," dated December 1, 1874. Complainant charged that these patents were capable of conjoint use with each other, and that defendants infringed them all. The answer set up want of patentability; anticipation; prior public use; non-infringement; that defendants had the right to manufacture the vehicle springs they made, under a patent, No. 246,571, granted to W. H. Stickle, August 30, 1881, reissued to the defendant Thomas D. Olin, August 21, 1883, as reissue No. 10,372, and which patent was owned by the defendants; also that the Tilton and Stivers' reissue was utterly void, because not issued for the same invention as the original patent, and for inventions not shown or described therein. The Circuit Court held the patents valid, and that the defendants infringed the single claims of the Timken and Saladee patents, and the third, fourth, and fifth claims of the Tilton and Stivers' patent, and entered a decree enjoining defendants and referring the cause to a master for an account, which resulted in a final decree for damages to the amount of $27,897.75, and defendants appealed. The opinion will be found in 37 Fed. Rep. 205.

Mr. George J. Murray for appellants.

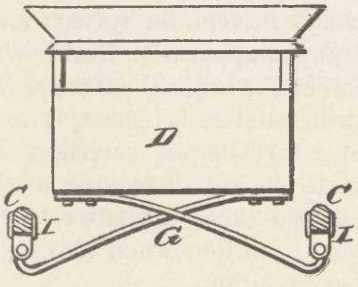
Mr. William M. Eccles for appellee.

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

Appellants manufactured no buggies or vehicles of any kind, but purchased and made springs which were fitted on wooden bars to be attached to the vehicles, and sold such spring bars in the market and to manufacturers of vehicles. The claims of the three patents, on which appellee's suit was based, were to combinations relating to side-bar buggies and wagons, the side-bar gear and buggy body being elements of each combination. These patents are as follows:

1. No. 197,689, declared to be for "improvement in carriage springs," was granted to Henry Timken, November 27, 1877, upon application filed October 27, 1877. The drawings consisted of three figures: (1) a side view of a wagon body with a spring attached; (2) a bottom view of a wagon showing the spring; and (3) "a sectional end view thereof."

The latter figure is as follows:



The specification states:

"My invention relates to buggy and wagon springs; and it consists in the attachment of springs to the bottom of the body at the sides, and crossing the bottom of the body, and connecting with the side bars on the opposite sides of the body, as will be hereinafter more fully set forth.

"The annexed drawing, to which reference is made, fully illustrates my invention.

"A represents the hind axle, and A′ the front axle, the latter having the usual head-block B. The hind axle A and head-block B are connected by side bars CC, in the usual manner. D represents the body of the vehicle.

"The body D is connected to the side bars CC by means of two springs, GG, composed of one or more plates near each end. These springs are fastened to the under side of the body D at opposite sides. The springs then cross each other, and their ends are pivoted or hinged in clips II, fastened to the opposite side bars, as shown.

"By this construction and arrangement of the springs I secure length of springs and elasticity of motion, and at the same time hanging the body low.

"What I claim as new, and desire to secure by letters patent, is —

"In combination with the side bars CC and body D, the springs GG, attached to the under side of the body at opposite sides, then crossing each other, and connected to the side bars on opposite sides, substantially as herein set forth."

2. No. 9542, reissue, dated January 25, 1881, upon application filed November 27, 1880, being a reissue of patent No. 157,430 to Tilton and Stivers, for springs for vehicles, dated December 4, 1874, upon application filed November 25, 1874.

The specification of the original patent read thus:

"The object of the present invention is to provide springs designed especially for buggies, carriages, and other light vehicles, which shall obviate all rocking motion of the body supported thereon, and cause the latter to be always maintained in a horizontal position when moving up or down, or when in a stationary position.

"The invention consists in the employment of two independent crossed-leaf metal springs, the ends of which are rigidly secured to the opposite ends of the cross-bar supporting the vehicle-body, each spring being formed or provided with a socket, and the two sockets meeting each other at the centre of the body-supporting bar, so as to enable an axis or pivot bolt to be passed through both sockets, for enabling the springs to turn thereon when the body is elevated or depressed. The invention further consists in securing a bearing and reënforcing plate of metal to the under side of the body-supporting bar, said plate being provided with pendent flanges at both ends, to serve as bearing-points for the ends of the springs, in order to prevent any lateral movement of the same, and to serve, in connection with fastening-bolts, to securely hold the springs in place.

* * * * *

"It is well known that elliptic or semi-elliptic springs, secured to the centre of the cross-bar supporting a carriage-body, will permit the same to rock from side to side, which is objectionable for various reasons.

"I propose to maintain a buggy, carriage, and other vehicle

body always in a horizontal position in respect to the springs and running-gear, and this is accomplished by employing a pair of springs, AA, which may properly be termed sections of semi-elliptic springs. The springs are arranged to cross each other at the centre of the cross-bar B, upon which the carriage-body is placed, and their elevated or upper ends are permanently secured at the opposite ends of said cross-bars by means of bolts and nuts *a*. Each spring is provided with a socket, *c*, at the crossing point, and through said sockets, which are thus brought in line with each other, an axis or pivot bolt, D, is passed. A nut, *b*, is applied to the screw-threaded projecting end of the bolt for securing the same in place. Each spring is generally formed of two or more leaves — a long lower leaf and a shorter upper leaf — this construction being resorted to in order to obtain greater strength, and to enable the socket C to be more readily formed."

* * * * *

The claims were as follows:

"1. The combination of two springs, each composed of one or more leaves, and hinged together at their crossing point, and provided with an eye at one end to connect with the side sills of the running-gear, and at the other end connected with the cross-bar for supporting the body of the vehicle, substantially as described.

"2. The two leaf-springs, each provided with a socket at their crossing point, in combination with a pivot or axis bolt, substantially as described.

"3. The combination of two springs side by side, and connected together, with the side sills and cross-bar, for supporting the body in a horizontal position between the side sills, substantially as described.

"4. The reënforcing and bearing plate I, having end flanges, in combination with the body-supporting bar and the connected cross-springs, substantially as described."

The specification was amended in the reissue by substituting "cross-piece attached to the body," for "cross-bar supporting the vehicle body," "the body-supporting bar," or "bar supporting the body;" and also by inserting after the word

"spring," in the line reading "each spring being formed or provided with a socket," the word "preferably," and after the words "spring is," in the line reading "each spring is provided with a socket, *c*, at the crossing point," the word "preferably."

The original claims were changed in the reissue by the substitution in the first claim of "cross-piece attached to the body," for "cross-bar for supporting the body;" and the word "cross-piece" for "cross-bar" in the third claim; and omitting the word "and" after "reënforcing," and the substitution of the "cross-piece attached to the body" for the "body-supporting bar," in the fourth claim; and a fifth claim was added as follows: "5. In combination with the body of a vehicle and the side sills or bars, the two springs crossing each other side by side and attached to a cross-piece, substantially as described."

3. No. 239,850, to C. W. Saladee for road wagon, dated April 5, 1881; application filed February 7, 1881. The claim is: "A spring-platform consisting of flexion springs arranged in pairs, the inner heavier ends of each pair being connected side by side to the central portion of the body or object supported, and the flexion portion of each spring curving downward from the centre and then upward to its connection with the frame, all substantially as set forth."

It will be perceived that the third claim of the reissued Tilton patent includes, as a necessary element, two springs side by side and connected together; the fourth claim includes the connected cross-springs and the reënforcing plate, having end flanges; while the fifth claim is substantially the same as the single claim of the Timken patent. Both have the two springs crossing each other, though in the Timken claim these springs must be connected at the heavier ends at the opposite side from which the light ones are connected with the side bar. It seems clear that the fifth claim was intended to cover sectional cross-springs without the articulated joint in the centre, and it does cover such springs, if the word "preferably," introduced for the first time in the reissue, is not an expansion of the invention described in the original patent; but we cannot concur with the learned Circuit Judge in his

conclusion that the insertion of that word did not unduly expand the original and so invalidate the reissue. The original patent made no reference to an alternative construction with the pivot bolt omitted, while the new matter made the connection of claims three and four, (which remained practically unchanged in terms,) if broadly construed, only a preferable mode. As the patent originally stood, the connection of the cross-springs was an essential element of the claim, but, if the reissue were valid, the bolt coupling the two springs together at their centre and forming an articulated joint would in effect be eliminated. The application for reissue was not filed until November 27, 1880, while the original patent was dated December 1, 1874, and the reissue was thus made by expansion to cover structures in public and common use between those two dates.

Huber v. *Nelson Manufacturing Co.*, 148 U. S. 270, is much in point. There one Boyle obtained a patent for a sanitary closet, including, as an essential element of the claim, a flushing chamber, and subsequently applied for a reissue for the purpose of eliminating that chamber, but this, it was held, could not be done.

The object of the original Tilton invention was declared to be to provide carriages or other vehicles with springs to prevent the rocking motion of the body supported thereon, and it was stated in the specification: "It is well known that elliptic or semi-elliptic springs secured to the centre of the cross-bar of the carriage body will permit the same to rock from side to side. It is objectionable for various reasons." It was proposed to remedy this by taking springs of the form shown, which might be properly termed sections of semi-elliptic springs, and arranging them to cross each other on the centre of the cross-bar upon which the body was placed, each spring being provided with a socket at the crossing point and a pivot bolt passing through both springs, secured by a nut, this coupling preventing them from moving independently of each other. In the first claim the words were used, "hinged together at their crossing point;" in the second claim, "two leaf-springs, each provided with a socket at their crossing point;" in the

third claim, "the combination of two springs side by side, and connected together, with the side sills and cross-bar, for supporting the body in a horizontal position;" while the fourth claim was for the reënforcing plate and connected cross-springs.

Appellee's contention that the connection of the crossed springs of the third and fourth claims is a connection by means of the reënforcing plate and its flanges, which, the specification says, were intended to serve as bearing points for the ends of the springs, described in the fourth claim as a separate element in combination with the body-supporting bar and the connected cross-springs, requires no comment.

The new fifth claim omits the crossing connection altogether and covers matter recognized as old in the original patent, and claims three and four, if broadly construed in connection with the new matter introduced in the specification, render the central connection non-essential, since it might be omitted, if preferred. There is no basis for the theory of inadvertence, accident, or mistake, and the reissue cannot be sustained.

As to the original patent, it should be observed that if the bolt passing through the sockets in that portion of the springs centrally under the body and coupling them together, as shown, were omitted, the result would be the Timken spring, and it involved no invention on the part of Timken to dispense with that connecting link, thus leaving the springs practically identical. It is true that the Tilton patent, both original and reissue, showed the light ends of the springs secured to the side bars by links or swinging shackles, while the shackles were rigid in the Timken, but both these shackles were well known, and complainant cannot contend that the difference is material.

In short, the Tilton patent relates to a crossing spring with a pivot bolt at the intersection. The Timken spring is the Tilton spring with the pivot bolt omitted, but in the defendants' spring the two sections do not cross each other, and cannot have a pivot bolt at the intersection.

Many different styles of cross-springs appear in the record, representing springs of all kinds and shapes; springs placed

longitudinally and transversely of the vehicle; springs with different fastenings binding them together at the crossing point; single sweep and double sweep springs; springs of wood and of steel; cross-springs of rigid metal; spring bars with semi-elliptic double sweep springs, etc. It is not disputed that the side-bar buggy or wagon, known as the Brewster side-bar vehicle, came into general use in 1873, and was made under a patent granted to Wood, May 27, 1873, No. 139,348, reissued August 18, 1874, No. 6018. The Wood invention consisted in altering a side-bar buggy having downward transverse springs over the axle in which the ends of the side bars rest on the ends of the springs, by putting in upwardly-curved springs transversely between the side bars and the body of the buggy, the claim being: "A frame, consisting of the longitudinal side-bars FF, downwardly-bowed end-springs EE, and upwardly-bowed metal springs GG, constructed, arranged, and applied as and for the purpose described." In the reissue the half springs in reverse were not a part of the combination, and the claim was: "The semi-elliptic springs GG, interposed between the side-bars FF, and the wagon body, all combined substantially as specified." The original and reissue were both held invalid by Judge Wallace in *Brewster* v. *Shuler*, 37 Fed. Rep. 785. Reference was there made to the semi-elliptic scroll ended springs which had previously been interposed between the side bars and the body of a buggy belonging to a well-known class used in carriages and sold by dealers as semi-elliptic springs, as appeared in the patent to George Groot of July 13, 1869, (one of the patents in evidence here,) for an improvement in carriage springs, which patent relates to the fastening of semi-elliptic springs transversely under the body of the carriage to side springs by means of saddle clips; and there being nothing in the Wood patent to indicate that a semi-elliptic spring of a special form was an element in the claim, it was held that the claim specified one of any well-known form adapted to be interposed between the side bars and the wagon body, and that therefore the patent was void for prior public use of semi-elliptic scroll ended springs, though the drawings showed springs without scroll ends.

The Steward patent of October 25, 1870, describes a semi-elliptic spring, whose ends are attached to the axle by means of two diagonal spring-braces which pass from the points of attachment to the semi-elliptic spring diagonally past each other to points near the journals of the axle, there to be secured by means of a sleeve and set screw or in some other suitable manner. The heavy ends are attached to the gear and the light ends to the semi-elliptic spring or spring-bar on which the vehicle rests, but obviously these springs could be interchangeably used for the springs shown in the Timken patent, and it would require no invention to attach them. There was no novelty in the means of accomplishing the result.

In Kenan's patent of September 13, 1870, No. 107,386, we find crossing springs coupled at the crossing point by solid balls or blocks of india-rubber. In Labaw's, No. 34,549, February 25, 1862, and Hubbard's, No. 12,890, May 15, 1855, the connection is effected by a pivot bolt. In Cooper's patent, No. 200,435, February 19, 1878, each spring is formed of two sections, lying side by side, the inner end or heel of each section being secured to the wagon body but a little beyond its centre, while the outer ends are secured to the side bars.

Catterson's English patent, No. 2642, May 15, 1854, shows cross-springs formed of two sections, lying side by side, pointing in opposite directions, provided at their ends with thin, flexible, curved portions, and there shackled.

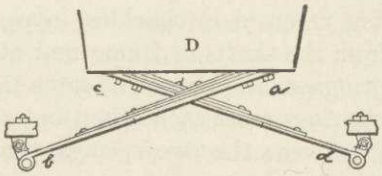
The earliest patent in the record is the Manton English patent, No. 4092, dated July 18, 1817. This patent shows a rigid gear mounted on cross-springs having their heavy ends "attached to the under side of the body at opposite sides, then crossing each other and connected to the side bar on opposite sides."

The specification states: "My improvement in the application of springs to wheel carriages consists in placing the springs which are to support the body of the carriage in a transverse or cross-position, so that the length of the springs will be in a direction from side to side of the carriage, as represented by the drawings hereunto annexed, and that each spring shall be

fixed to the body or suspended part of the carriage on one side thereof by one end of the said spring, which spring shall extend crossways beneath the body of the carriage and be attached to the frame of the carriage on the opposite side to that side on which the other end of the same spring is fastened to the body of the carriage. This is shown in Fig. 1, which is a view of part of a gig body and the axletree to show the application of the springs. A is the axletree; BB blocks fixed on the axletree to support the shafts, which with their cross-rail CC form a frame. Upon this frame the body DD is placed. *ab* is one of the springs and *cd* the other. Both springs are bolted or otherwise firmly fastened to the under side of the body D at their thick ends *a* and *c*; the other ends *b* and *d* of the springs are received in shackles, loops, or links, which are suspended from the shafts or frame and allow the ends *b* and *d* of the springs some play. The same figure also shows clearly how the springs cross each other, but a sufficient interval must be left between the two springs, that they will not touch or rub against each other where they cross. The figure is taken at the hind part of the gig and similar cross-springs may be applied at the fore part. The springs are suspended by the shackles, loops, or braces in order that the ends of the springs may expand and contract — that is, advance to and recede from each other — when the body rises and falls by jolts and irregular motions. . . . The thick ends *a* and *c* of the springs are fastened to a bar, GG, on the ends of which bar irons H are fastened, and they go beneath the body DD of the carriage, and are firmly fastened thereto, so as to fix the bar G firmly to the body. . . . In some cases the springs may be fixed immediately to the body of the carriage, . . . and then, if there is sufficient substance of wood in the body or boot or wherever the springs are to be fastened, there will be no necessity for the bar G; but be it observed that the particular manner of attaching and affixing the springs in their places may be left to the discretion of the workman, who must adapt the springs, in respect to their dimensions, weight, strength, and mode of attachment, to their places, according to the particular kind of carriage to which they are

to be applied, for I confine my improvement in the application of springs to wheel carriages to the placing of such springs in a transverse direction when one end of each spring is attached to the body of the carriage on one side, (for instance, the left-hand side,) and the other end of the same spring is attached by a shackle to the carriage or frame on the opposite side, (for instance, on the right-hand side,) the manner of which has been hereinbefore explained. In all cases the springs, being fixed fast at one end, must be suspended by a shackle at the other end to allow them play to expand or contract."

Figure 1, omitting the frame formed by the axletree, the shaft supports, and the cross-rail, is as follows:



The Manton specification covers a larger field than that of Timken, but the two devices are strikingly similar.

Passing to the question of prior use, the springs manufactured by Priest at Detroit, Michigan, show such anticipation of the alleged invention in the three patents in suit as seems to us quite decisive. The learned Circuit Judge, however, rejected the testimony of Priest as wholly unreliable; but in our view that testimony was so fully corroborated by other witnesses and documentary evidence, that we are constrained to arrive at a different conclusion, whatever might be said of it standing alone.

The first of the Priest springs is known as the Meisner spring. In 1872 or 1873, Priest manufactured a buggy for Dr. Meisner, which had a body coupled to the side bars by double sweep sectional cross-springs, rigidly secured to the buggy bottom at opposite sides by bolts passing through their thick ends, then curved downwardly from the body and up again in the direction of the side bars, to which they were coupled by swinging shackles or links.

Opinion of the Court.

The evidence of Priest and of one Rolfe, then a dealer in carriages, was to the effect that in 1874, Priest built a side-bar buggy on the order of Rolfe, who had contracted with C. W. Prescott to furnish a Brewster buggy for Lady Prescott; but during its construction Brewster's agent demanded a royalty, whereupon Priest used the Meisner spring, substituting the Brewster rigid shackle for the loose link.

Rolfe testified that the buggy was made in September or October, and was painted prior to December 1, 1874, and he produced the bill for the painting dated December 31 of that year; also his invoice book showing the buggy on hand January 1, 1875, as well as entries afterwards of a buggy sold Sir George Prescott, and of several other buggies with Priest springs; also bills of lading, dated March 25, 1875, from the Erie and North Shore Line, showing the consignment of the buggy to Lady Prescott, Strand Park, Herne Bay, Kent, England, one for the shipment from Detroit to New York, and another for the transportation from New York to London, April 10, by the steamer C. F. French; also letter of C. W. Prescott, dated June 10, 1875, from Isenhurst, Hawkhurst, Sussex, England, showing that the buggy had arrived, and ordering another for Sir George Prescott; and another letter of C. W. Prescott, without date, purporting to have been written from Lawrence, Kansas, with reference to the second buggy. The testimony of Priest was sustained, not only by that of Rolfe, but of Rand, who packed and superintended the shipment of the buggy to England. Rolfe's invoice book showed the buggy sold to Sir George Prescott, August 13, 1875, and also a Priest buggy to Dr. Drake on October 23, 1875. That the first Prescott buggy was made and shipped as contended, is satisfactorily made out, but the real question is as to the character of the springs upon it, and in respect of that Priest is corroborated by several witnesses.

Among the exhibits which Mr. Timken concedes in his evidence contain his invention, or are nearly the same as his springs, are the Matlock or Kierolf springs and the Kunkle Brothers' springs. The Kunkle springs were manufactured by one Ruple and sold to Kunkle Brothers in 1876 or the

spring of 1877, and the evidence tends to show that these springs were invented by Ruple in the latter part of 1875. He applied for a patent shortly after the allowance of the Timken patent and his application was rejected, but the specification and drawing of this application are given in the record, and show clearly the invention claimed in this suit. The Kierolf springs were made during the summer or spring of 1877. Matlock identifies similar springs as made in 1877. We think counsel for appellants justified in saying that these and other springs exhibited were made in view of the reissued Wood patent embodied in the Brewster wagon. What was known as double-sweep Concord springs were long enough to extend from the rear axle to the head block, and Brewster shortened these springs and extended them across from side bar to side bar. Subsequent inventors took these same Concord springs and instead of shortening them cut them in two in the middle and crossed them past each other, extending from the middle or one side of the buggy body to the cross-bar on the opposite side.

Timken made his application October 27, 1877, and the evidence on his behalf as to when he made his invention, which we have carefully examined, fails to show that it was earlier than the other devices to which we have referred.

Appellee's argument seems to be that the Timken patent should be so construed as to cover a double-sweep sectional spring, having the attaching ends connected to the bottom of the buggy or cross-sills at any point between the side and the centre, crossing the centre, bending downwardly for a distance and then upwardly to be attached to the side bar; having a thick end for attachment to the buggy bottom and a thin end for attachment to the side bar shackle, the curve being such as to allow the body to move up and down without expanding the side bar, but we do not understand this description to be within the terms of the patent, according to which the Timken invention consisted in the use of sectional springs arranged in pairs side by side and crossing each other to couple the body to the gear. Now that sectional springs can be used for coupling the body to the gear of the vehicle; that rigidity

of spring can be obtained by making the connections rigid; that the body could be hung either high or low by the proper sweep of the spring; that the form and sweep of the springs and various methods of using them as couplings between the gear and body, were well known, the patents, exhibits, and proofs make exceedingly clear; and we should say that nothing but mechanical skill was required to so adapt these well-known springs as to attain the desired objects expressed in complainants' patent. And while the patented article may have been popular and met with large sales, that fact is not important when the alleged invention is without patentable novelty. *Duer* v. *Lock Company*, 149 U. S. 216.

If, however, such a construction could be put on the Timken patent as would save it from being held invalid for anticipation or for want of invention, that construction would certainly exclude appellants' structure. The differences between them are well and accurately given by appellants' expert. Timken's sections have their heels attached at the sides of the wagon bed; cross the entire bottom to reach the opposite side bar; cross each other like the letter X, and have their heels fastened independently and far apart below the wagon bed, by bolts passing through perforations in the springs, the flexible portions of the sections comprising the entire distance between the shackle bar and the first attaching bolt. In appellants' structure the heels of the sections attach at about the centre of the wagon bed and do not cross the entire bottom to reach the opposite side bar; the sections do not cross each other; the heels are attached closely contiguous to each other, by a rigid clip, secured by bolts and clips, the flexion of the section being limited to a length extending from the shackle end of the section to a point some distance nearer the shackle end than the bolt perforation through the section.

As to the Saladee patent, in view of the state of the art as shown by the exhibits, all made more than two years prior to the application for this patent, which was February 7, 1881, and the fact that the proof shows that the defendants' springs are made in accordance with the Stickle patent, and that Stickle made his invention, and reduced it to practice, prior to

the application for the Saladee patent, we need spend no time upon it. Moreover, the Cooper patent No. 200,435, clearly anticipated Saladee's invention.

The decree is reversed and the cause remanded with a direction to dismiss the bill.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY *v.* KEOKUK AND HAMILTON BRIDGE COMPANY.

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

No. 633. Argued October 19, 22, 1894. — Decided November 19, 1894.

Where the railroad bridge of a bridge company and the railroads of several railroad companies form a continuous line of railway transportation, the liability of two of the railroad companies to pay to the bridge company a certain proportion of tolls upon the bridge, and of deficiencies therein, according to a contract with the bridge company, executed by another of the railroad companies for the benefit and at the request of these two, they undertaking to assume all the liabilities and to be entitled to all the benefits of the bridge contract, "as if the same had been specifically named in and made a part of the ninth article of" a lease of its railroad from it to them, by which article they agreed to assume and carry out certain contracts of transportation over railroads of other companies, is not affected by the termination of the lease by eviction or otherwise.

Pittsburgh &c. Railway Co. v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, followed.

THIS was a bill in equity, filed in the Circuit Court of the United States for the Northern District of Illinois by the Keokuk and Hamilton Bridge Company (hereinafter called the Bridge Company) against the Pittsburgh, Cincinnati and St. Louis Railway Company (hereinafter called the Pittsburgh Company) and the Pennsylvania Railroad Company, to recover deficiencies in tolls for the use of the plaintiff's bridge since March 1, 1883, under a contract, dated January 19, 1869, and

modified June 6, 1871, by the Bridge Company with the Columbus, Chicago and Indiana Central Railway Company (hereinafter called the Indiana Central Company) and three other railroad corporations, by which the Bridge Company agreed to build and maintain a railway bridge across the Mississippi River, and granted to these four railroad companies in perpetuity the right to use it for the passage of their trains; and they agreed to pay monthly certain tolls, and, if those should fall below a certain sum, each to pay one fourth of the deficiency.

This contract was executed by the Indiana Central Company upon the requests in writing of the presidents of the Pittsburgh Company and of the Pennsylvania Company, by which these two companies agreed to "assume all the liabilities and obligations and be entitled to all the benefits of said bridge contract, the same as if it had been specifically named and made a part of the ninth article of" a lease of the Indiana Central Company to and with the Pittsburgh Company and the Pennsylvania Company, dated January 22, 1869.

By that lease, the Indiana Central Company leased its railroad to the Pittsburgh Company for ninety-nine years; the Pittsburgh Company covenanted to pay a certain proportion of the earnings of that road to the Indiana Central Company, and, by the ninth article, to assume and carry out, receiving and enjoying the benefits thereof, certain existing contracts for transportation over railroads of other companies not mentioned above; and the Pennsylvania Company guaranteed the performance of the covenants of the Pittsburgh Company.

The bridge aforesaid, with the railroads of the Pennsylvania Company, the Pittsburgh Company, the Indiana Central Company, and other railroad companies named in the bridge contract, formed a continuous line of railroad transportation from Philadelphia to Des Moines.

The provisions of the bridge contract, and of the lease, and the circumstances attending and following their execution, are more fully set forth in the case between the same parties in 131 U. S. 371. But the above abstract is sufficient for the purposes of the present case.

In June, 1871, immediately after the modification of the bridge contract, the bridge was accepted by the Bridge Company and was opened for use, and thenceforward was used by the Pittsburgh and Pennsylvania Companies, in the exercise of the control asserted by them under the contract and lease aforesaid. The Bridge Company demanded payment directly from the Pittsburgh Company semi-annually of the sums payable by the Indiana Central Company for tolls and deficiencies under the modified bridge contract; and from June, 1871, to September, 1874, the Pittsburgh Company paid to the Bridge Company the amount both of such tolls and of such deficiencies. After that time, like payments were demanded by the Bridge Company of the Pittsburgh Company, and the tolls only paid.

On July 25, 1881, the Bridge Company filed a bill in equity against the Pittsburgh Company and the Pennsylvania Company to recover deficiencies in tolls for the use of the bridge from September 1, 1874.

To that bill the defendants answered that the Indiana Central Company, the Pittsburgh Company and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it, and that the contract was beyond the scope of their corporate powers.

The Pittsburgh Company also, by way of supplemental answer, set up that in 1875 the trustees named in a mortgage made by the Indiana Central Company of its railroad, rights and franchises before the execution of the bridge contract, brought a bill in equity to foreclose that mortgage, and were thereupon appointed receivers, and, pursuant to decrees of foreclosure, there were conveyed by the Indiana Central Company to the receivers, and by them on January 10, 1883, sold and conveyed to three individuals, as trustees, for a smaller sum than the debt secured by the mortgage, its road, rights and franchises, with the right to affirm or disaffirm the lease aforesaid, and the purchasers, on February 21, 1883, notified the Pittsburgh Company that they disaffirmed the lease; and further averred "that, in accordance with said decrees, possession of said railway property, rights and franchises has been

Statement of the Case.

surrendered to the said purchasers, and that it has been wholly ousted and evicted from all and singular the premises, rights and franchises leased to it as aforesaid, and it relies upon the cancellation of said lease and the ouster and eviction as aforesaid, as a full and perfect answer to the relief sought in the bill."

To those answers a general replication was filed; and the case was referred to a master, who reported that there was due from the Pittsburgh and Pennsylvania Companies to the Bridge Company, as one fourth part of the deficiency in the receipts of the Bridge Company from September 1, 1874, to March 1, 1883, the sum of $118,076.89; and that the road, rights and franchises of the Indiana Central Company had been sold and conveyed, as alleged in the supplemental answer of the Pittsburgh Company, to trustees, and by them on March 17, 1883, to the Chicago, St. Louis and Pittsburgh Railroad Company. The Circuit Court confirmed the master's report, and entered a decree for the Bridge Company for the sum found due; and, on appeals by the Pittsburgh Company and the Pennsylvania Company, that decree was affirmed by this court. 131 U. S. 371.

The present bill was filed September 12, 1889, and set forth the proceedings and decree in the former suit. In an amended answer to this bill, the Pittsburgh Company and the Pennsylvania Company set up that the interlocutory decrees in the suit for foreclosure, appointing the receivers and directing a conveyance to them, were subject to the qualification that until further order of the court the receivers should not disturb the possession of the Pittsburgh Company; and that no order was made that they should disturb its possession, until and unless by the decrees of sale; but that, on the contrary, the Pittsburgh Company remained in undisturbed possession, of the railroad property of the Indiana Central Company until March 17, 1883, when it was wholly dispossessed of the same and evicted therefrom, and from all rights under the lease, by the Chicago, St. Louis and Pittsburgh Railroad Company, to which the same had been conveyed by the purchasers under the decree of foreclosure, "by virtue of which eviction the said Pittsburgh Company and the Pennsylvania Company lost and ceased to have any right, title or interest to, or any claim or demand upon, said railway premises,

Counsel for Appellee.

property and franchises, in or under said lease or amended lease, and became relieved thereby from all obligations, duties and liabilities imposed by the ninth clause of said lease, and by the said requests, or either of them, and by the said original bridge contract or any amendment or modification thereof." To this answer the plaintiff filed a general replication.

The Circuit Court entered a decree for the plaintiff; and the defendants appealed to the Circuit Court of Appeals for the Seventh Circuit, which certified to this court, under the act of March 3, 1891, c. 517, § 6, that at the hearing "there arose upon the pleadings in the cause certain propositions of law, concerning which the instruction of the Supreme Court of the United States is desired. And because this court is in doubt whether, in view of the decision of the Supreme Court of the United States in the cause between the parties hereto, referred to in the pleadings, and reported in 131 U. S. Reports, 371, it is at liberty to consider or sustain the eviction, pleaded in this case, as a valid defence to the claim of the appellee, and whether the contracts with the Bridge Company could be avoided by any transaction with respect to the lease: It is therefore ordered that the pleadings in this case, to wit, the bill, the amended answer, and the replication, be certified to the Supreme Court of the United States for its opinion and instruction upon the following questions:

"1. Is this court at liberty, in view of the decision and decree in the former case between these parties, referred to in the pleadings, to consider or sustain the defence of eviction, pleaded in this case?

"2. Are the contracts between the Bridge Company and the appellants so independent of the lease, that they would not be affected, nor the defendant railway companies released from liability thereunder, by termination of the lease by eviction or otherwise?"

Mr. George Hoadly for appellants.

Mr. Lyman Trumbull, (with whom was *Mr. Perry Trumbull* on the brief,) and *Mr. Edwin Walker* for appellee.

Opinion of the Court.

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

In the former case between these parties, reported 131 U. S. 371, it was decided that the Pittsburgh and Pennsylvania Companies were the real, though not the formal, parties to the bridge contract executed by the Indiana Central Company at their request and for their benefit; that this contract was within the scope of their corporate powers, and made them directly liable to the Bridge Company for the proportion of tolls and deficiencies which by the terms of that contract were chargeable to the Indiana Central Company; that the bridge contract was a separate and distinct agreement from the lease (to which the Bridge Company was not a party) between the Indiana Central Company and the Pittsburgh and Pennsylvania Companies; and that the validity and effect of the bridge contract did not depend upon the validity or invalidity of the lease, or upon the question whether these two companies, by reason of eviction, were no longer liable upon the lease.

In that case, this court, after discussing the terms of the lease, of the bridge contract, and of the agreement contained in the request of the Pittsburgh and Pennsylvania Companies to the Indiana Central Company to execute that contract, said:

"The reference in that request and agreement to the ninth article of the lease was for the purpose of defining the extent of the liabilities and benefits assumed, and perhaps of indicating that the Pittsburgh Company alone was bound as principal, and the Pennsylvania Company as guarantor only; but it did not make the bridge contract a part of the lease."

"The sole ground of our decision is that the bridge contract is independent of the lease, and is valid and binding as between the parties to this suit, whether the lease is valid or invalid. This being so, the question argued at the bar, whether the appellants, by reason of eviction, are no longer liable on the lease, becomes immaterial." 131 U. S. 387, 390.

The reason and principle of that decision, so far as concerns

the present inquiry, were that, while the ninth article of the lease might be referred to for the purpose of defining the extent, or measure, and perhaps the nature or character, of the liabilities and benefits which the Pittsburgh and Pennsylvania Companies assumed by reason of the terms of the bridge contract, and of the agreement contained in their request for its execution; yet the bridge contract was not made part of the lease, nor was the whole lease made part of the bridge contract, or of the agreement expressed in the request; nor did the liability of the Pittsburgh and Pennsylvania Companies to the Bridge Company upon the bridge contract, for deficiencies in tolls upon the bridge, depend upon the question whether the lease of the road of the Indiana Central Company to the Pittsburgh Company was valid or invalid, or upon the question whether that lease remained in full force between the parties to it, or had been terminated by eviction of the lessee or otherwise.

The same reason and principle are no less applicable to the eviction as now pleaded than to the eviction as pleaded in the former suit.

Consequently, the second question certified by the Circuit Court of Appeals must be answered in the affirmative; and no further solution of the doubts expressed by that court in the first question, and in the preamble thereof, is necessary to the disposition of the case.

Ordered accordingly.

Mr. Chief Justice Fuller having been of counsel, did not sit in this case, or take any part in its decision.

SCHILLINGER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 4. Argued October 9, 10, 1894. — Decided November 19, 1894.

The United States cannot be sued in their courts without their consent.

In granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination, and courts may not go beyond the letter of such consent.

The Court of Claims has no jurisdiction of a claim against the government for a mere tort.

The owner of letters patent for an invention, who sets up in the Court of Claims that a contractor with the United States has made use of the patented invention in the execution of his contract without compensation to the claimant, and against his protest, whereby there was a wrongful appropriation of the patent by the United States for their sole use and benefit, and that a right has accrued to him to recover of the United States the damages thus done to him, to be measured by the saving or profit made by the United States, thereby sets up a claim sounding in tort, of which the Court of Claims has no jurisdiction.

When a contractor with the United States, in the execution of his contract, uses any patented tool, machine, or process, and the government accepts the work done under such contract, *quære*, whether it can be said to have appropriated and be in possession of any property of the patentee in such a sense that the patentee may waive tort and sue as on an implied promise.

On July 19, 1870, a patent was issued to John J. Schillinger for an improvement in concrete pavement. The claim of the patent was in these words:

"The arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose described."

A reissue was granted May 2, 1871. The claims in the reissue were thus stated:

"1. A concrete pavement laid in detached blocks or sections, substantially in the manner shown and described.

"2. The arrangement of tar paper or its equivalent between adjoining blocks of concrete, substantially as and for the purpose set forth."

Statement of the Case.

On February 27, 1875, Schillinger filed in the Patent Office a disclaimer; which, after stating the language of the specification disclaimed, added: "Your petitioner hereby disclaims the forming of blocks from plastic material without interposing anything between their joints while in the process of formation."

Thereafter the Architect of the Capitol invited proposals for a concrete pavement in the Capitol grounds, and on September 2, 1875, entered into a contract with G. W. Cook for the laying of such pavement. It does not appear that in the proposals, specifications, or contract there was in terms any reference to or description of the Schillinger patent.

Frederick Law Olmsted was the person who prepared the plans and specifications, and in the contract it was provided as follows:

"The pavement to be laid with free joints, in the best manner, the courses running diagonally, and arranged around the curved parts to the satisfaction of the said Fred. Law Olmsted.

"It is understood and agreed by the party of the second part that in the event of any legal proceedings being taken by other parties against the contractor of the United States for the infringement of any patent or claimed patent during the execution of the work the contractor shall hold the United States harmless; and if said proceedings tend to create delay in the prosecution of the work the United States shall have the right to immediately employ other parties to complete the same, and the contractor shall reimburse the United States in any extra amount it may have to pay for such completion over and above the amount which the contractor would have been entitled to for the same work."

This is the only language found in the contract which in any manner suggests the use, or possibility of use, of the Schillinger patent. The contract price was 28½ cents per square foot. Certain of the claimants who had acquired by assignment the right to use the Schillinger patent in the District of Columbia were bidders for such contract, and proposed to do the work in accordance with the Schillinger patent at 45 cents per square foot. Cook proceeded to perform the contract; finished it,

and received payment between October, 1875, and July, 1881.

On March 22, 1887, these claimants filed their petition in the Court of Claims, asserting full ownership of the Schillinger patent, and seeking to recover from the United States, damages for the wrongful use thereof in the construction of this pavement.[1] The Court of Claims held, (24 C. Cl. 278,)

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[1] The material allegations in the petition respecting the claims for damage were these: (Reporter.)

"Your petitioners aver that during the year 1875 the aforesaid Architect Clark advertised for proposals to do this artificial stone work in the Capitol grounds, and your petitioners, in pursuance of said advertisement, put in a bid to do the work under the Schillinger patent aforesaid. The contract was awarded by said Architect Clark to one George W. Cook, who was a lower bidder, and the architect of the Capitol entered into a contract with the said George W. Cook to do the work aforesaid, which contract is made part hereof and marked Exhibit "C," and the said contract embraced the use of the said Schillinger patent, to the great damage and injury of your petitioners' business.

"Your petitioners aver that they protested against the use of their patent without compensation, and, notwithstanding said protest and notice, the said Architect Clark caused the said artificial stone sidewalk to be laid under the said Schillinger patent, and it has all been laid under said Schillinger patent without any compensation to your petitioners and contrary to the laws of the United States.

"Your petitioners also aver that the said Schillinger patent had at the time of the making of the said contract with the said Cook by the architect of the Capitol gone into general and public use, and was acquiesced in by the public as valuable and useful; that this wrongful appropriation of the patent by the United States government for its sole use and benefit encouraged others to infringe, and your petitioners were greatly damaged thereby.

"Your petitioners claim the right to recover the damages done to them by this wrong, and the saving or profit made by the United States as the basis of this suit is upon their patent rights, which are founded upon the patent laws of the United States.

"Your petitioners further aver that the said architect of the Capitol has laid or has directed and caused to be laid for the sole use and benefit of the United States about 249,361 feet of this sidewalk in the Capitol grounds, in all of which the Schillinger patent has been used and is embodied in it.

"The actual profit of which your petitioners have been deprived in this work is ($69,820.68) sixty-nine thousand eight hundred and twenty dollars and sixty-eight cents, and the actual saving to the Government by the use of said Schillinger patent in this work is about two hundred and fifty thousand dollars, for which last amount your petitioners claim judgment."

that there was no contract, either expressed or implied, on the part of the government for the use of such patent, and on that ground dismissed the petition as outside of the jurisdiction of the court.

From that judgment the claimants appealed to this court.

Mr. John C. Fay and *Mr. William G. Johnson* for appellants.

Mr. Eppa Hunton and *Mr. V. B. Edwards* filed briefs for appellants.

Mr. Robert Howard filed a brief for appellants.

Mr. Assistant Attorney General Conrad for appellees.

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

The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government.

Until the organization of the Court of Claims by the act of February 24, 1855, c. 122, 10 Stat. 612, the only recourse of claimants was in an appeal to Congress. That act defines the claims which could be submitted to the Court of Claims for adjudication as follows:

"The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

Opinion of the Court.

By the act of March 3, 1863, c. 92, 12 Stat. 765, this additional jurisdiction was given:

"That the said court . . . shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

On March 3, 1887, 24 Stat. 505, c. 359, a new act was passed in reference to the jurisdiction of the court, its language being as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. . . .

"Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court."

Under neither of these statutes had or has the Court of Claims any jurisdiction of claims against the government for mere torts; some element of contractual liability must lie at the foundation of every action. In *Gibbons* v. *United States*, 8 Wall. 269, 275, it was said: "The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties." And, again, in *Morgan* v. *United States*, 14

Wall. 531, 534: "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government."

The rule thus laid down has been consistently followed by this court in many cases up to and including the recent case of *Hill* v. *United States*, 149 U. S. 593, 598.

If there was any error in this interpretation, first announced in 1868, of the scope of the act, and if it was the intent of Congress to grant to the court jurisdiction over actions against the government for torts, an amending statute of but a few words would have corrected the error and removed all doubt. While the language of the act of 1887 is broader than that of 1855, it is equally clear in withholding such jurisdiction. It added, "all claims founded upon the Constitution of the United States," but that does not include claims founded upon torts, any more than "all claims founded upon any law of Congress" found in the prior act. The identity of the descriptive words excludes the thought of any change.

It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

It is true also that to jurisdiction over claims founded "upon

any contract, expressed or implied, with the government of the United States," is added jurisdiction over claims "for damages, liquidated or unliquidated," but this grant is limited by the provision "in cases not sounding in tort." This limitation, even if qualifying only the clause immediately preceding, and not extending to the entire grant of jurisdiction found in the section, is a clear endorsement of the frequent ruling of this court that cases sounding in tort are not cognizable in the Court of Claims.

That this action is one sounding in tort is clear. It is in form one to recover damages. The petition charges a wrongful appropriation by the government, against the protest of the claimants, and prays to recover the damages done by such wrong. The successive allegations place the parties in continued antagonism to each other, and there is no statement tending to show a coming together of minds in respect to anything. It is plainly and solely an action for an infringement, and in this connection reference may be made to the statutory provision (Rev. Stat. § 4919) of an action on the case, as the legal remedy for the recovery of damages for the infringement of a patent. If it be said that a party may sometimes waive a tort and sue in assumpsit, as on an implied promise, it is technically a sufficient reply to say that these claimants have not done so. They have not counted on any promise, either express or implied.

But we do not care to rest our decision upon the mere form of action. The transaction as stated in the petition, and as disclosed by the findings of the court, was a tort pure and simple. The case was, within the language of the statute, one "sounding in tort." It is in this respect essentially different from *United States* v. *Palmer*, 128 U. S. 262, 269. That was an action to recover for the authorized use of a patent by the government, and these observations in the opinion are pertinent:

"This is not a claim for an infringement, but a claim of compensation for an authorized use — two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. The first sentence in the

original opinion of the court below strikes the key-note of the argument on this point. It is as follows: 'The claimant in this case invited the government to adopt his patented infantry equipments, and the government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the government did was done with the consent of the patentee and under his implied license.' We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon."

Here the claimants never authorized the use of the patent right by the government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction from its commencement to its close where the minds of the parties met or where there was anything in the semblance of an agreement. So not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretence of a right to recover. There was no suggestion of a waiver of the tort or a pretence of any implied contract until after the decision of the Court of Claims that it had no jurisdiction over an action to recover for the tort.

It may be well to notice some of the cases in which the jurisdiction of the Court of Claims over implied contracts has been sustained. In the case of *United States* v. *Russell*, 13 Wall. 623, 626, which was an action to recover for the use of

certain steamers, the property of the claimant, it was found as a fact —

"That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States, *did not intend to 'appropriate' these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant;* and that each of said steamers, so soon as the services for which they were respectively required had been performed, were *returned* to the exclusive possession and control of the claimant."

Thus it appears that the minds of the claimants and the officers acting for the government met; both intended a contract; and the power of the officers to act for the government in the premises not being disputed, it was obviously just to treat the case as one of contract and not of tort. So also in the case of *United States* v. *Great Falls Manufacturing Company*, 112 U. S. 645. The appropriation of the claimants' property was under direct legislative enactment by Congress. The property thus appropriated was confessedly the property of the claimants, to which the government made no pretence of title. The claimants assented to such appropriation; entered into arbitration proceedings to determine the amount due them therefor. Hence all the elements of contract were found in the transaction.

But there is still another aspect in which this case may be considered. The patent of Schillinger runs to the mode of constructing concrete pavements. The mere form of a pavement with free joints, that is, in separate blocks, is not since the filing of his disclaimer within the scope of his patent. It may be that the process or mode by which Cook, the contractor, constructed the pavement in the Capitol grounds was that described in and covered by the Schillinger patent. He may, therefore, have been an infringer by using that process or mode in the construction of the pavement, and liable to the

claimants for the damages they have sustained in consequence thereof. It may be conceded, also, that the government, as having at least consented to the use by Cook of such process or method in the construction of the pavement, is also liable for damages as a joint tort feasor. But what property of the claimants has the government appropriated? It has, and uses, the pavement as completed in the Capitol grounds, but there is no pretence of a patent on the pavement as a completed structure. When a contractor, in the execution of his contract, uses any patented tool, machine, or process, and the government accepts the work done under such contract, can it be said to have appropriated and be in possession of any property of the patentee in such a sense that the patentee may waive the tort and sue as on an implied promise? The contractor may have profited by the use of the tool, machine, or process, but the work, as completed and enjoyed by the government, is the same as though done by a different and unpatented process, tool, or machine. Take, for illustration, a patented hammer or trowel. If a contractor in driving nails or laying bricks use such patented tools, does any patent right pass into the building and become a part of it, so that he who takes the building can be said to be in the possession and enjoyment of such patent right? Even if it be conceded that Cook, in the doing of this work, used tar paper, or its equivalent, to separate the blocks of concrete, and thus finally completed a concrete pavement in detached blocks or sections, was such completed pavement any different from what it would have been if the separation between the blocks had been accomplished in some other way; and is the government now in possession or enjoyment of anything embraced within the patent? Do the facts, as stated in the petition or as found by the court, show anything more than a wrong done, and can this be adjudged other than a case "sounding in tort"?

We think not, and therefore the judgment of the Court of Claims is

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Shiras, dissenting.

Dissenting Opinion: Harlan, Shiras, JJ.

I am constrained to withhold my assent to the opinion and judgment in this case.

The United States granted to Schillinger in 1870 a patent for an alleged new and useful improvement in concrete pavements. That patent was surrendered, and a new one issued in 1871 based on amended specifications. The present suit against the United States proceeds upon the ground that in a pavement constructed in the Capitol grounds, under the supervision of the Architect of the Capitol, the United States knowingly obtained and still enjoys the benefit of the improvement covered by the Schillinger patent.

Can a suit be maintained against the United States in the Court of Claims, as upon contract, for the reasonable value of such use of the patentee's improvement?

In *James* v. *Campbell*, 104 U. S. 356, 357, this court said: "That the government of the United States, when it grants letters patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use, without compensation, land which has been patented to a private purchaser, we have no doubt. The Constitution gives to Congress power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' which could not be affected if the government had a reserved right to publish such writings or to use such inventions without the consent of the owner. Many inventions relate to subjects which can only be properly used by the government, such as explosive shells, rams, and submarine batteries to be attached to armed vessels. If it could use such inventions without compensation, the inventors could get no return at all for their discoveries and experiments."

United States v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656, was a suit in the Court of Claims to obtain compensation for all past and future use and occupation by the United States of certain lands, water rights and privileges claimed by

the plaintiff and taken for public use by the agents of the government. This court said: "The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution — upon which question we express no opinion — there is no sound reason why the claimant might not waive that right and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374. In that view, we are of opinion that the United States having, by its agents, proceeding under the authority of Congress, taken the property of the claimant for public use, are under an obligation imposed by the Constitution to make compensation. The law will imply a promise to make the required compensation where property, to which the government asserts no title, is taken pursuant to an act of Congress as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions 'founded upon any contract, express or implied, with the government of the United States.'" In *Great Falls Manufacturing Co.* v. *Attorney General*, 124 U. S. 581, 597, 598, it appeared that the Secretary of War was authorized by an act of Congress to take possession of premises that might be covered by a survey and map directed to be made. He took possession of property and water rights that were alleged not to be embraced in such survey and map; and it was contended that in so doing he was guilty of trespass. This court said: "If the Secretary of War, who was invested with large discretion in determining what land was actually required to accomplish in the best manner the object Congress had in view, found it necessary to take, and has

taken and used, and still holds, lands of the plaintiff for the proposed dam, which happen not to be covered by the survey and map, the United States are as much bound to make just compensation therefor as if such lands had been actually embraced in that survey and map." After observing that it must not be understood as holding that the Secretary could bind the United States to pay for lands taken by him which manifestly had no substantial connection with the improvement under his charge, the court said: "It is sufficient to say that the record discloses nothing showing that he has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the government is under a constitutional obligation to make compensation for any property or property-right taken, used, and held by him for the purposes indicated in the act of Congress, whether it is embraced or described in said survey or map, or not. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 646. . . . Even if the Secretary's survey and map and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59, 67, the principles laid down in *James* v. *Campbell*, and in *United States* v. *Great Falls Manufacturing Co.*, above cited, were recognized and approved. And in *United States* v. *Palmer*, 128 U. S. 262, 269, the decision was that the United States was liable to suit in the Court of Claims, as upon implied contract, for the value of the use of an invention which was used with the consent of the patentee.

It may, therefore, be regarded as settled that the government may be sued in the Court of Claims, as upon implied

contract, not only for the value of specific property taken for public use by an officer acting under the authority of the government, even if the taking was originally without the consent of the owner and without legal proceedings for condemnation, but for the value of the use of a patented invention when such use was with the consent of the patentee.

It seems to me — looking at the case from the standpoint of mere contract — that these principles control the present inquiry, and sustain the right of the claimant to sue the government for the value of the use of his alleged invention. Congress made an appropriation of two hundred thousand dollars "for improvement of Capitol grounds according to the plans and under the general direction of Frederick Law Olmsted, to be expended by the Architect of the Capitol." Act of June 23, 1874, c. 455, 18 Stat. 204, 214. The Architect invited proposals for laying concrete pavement required for the proposed improvement according to those plans and specifications and one Cook was the lowest bidder. His bid was accepted. Schillinger protested against the contract being awarded to Cook, the latter having no right to use the Schillinger patent. He gave notice to the Architect of his patented rights. It was found by the Court of Claims that "at the time the bids were opened plaintiff protested to the Architect against the award being made to any one but his associate Roberts [who was entitled to use the Schillinger invention]; but the Architect and his advising engineers decided they would award the contract to the lowest bidder, on the ground that as the validity of the Schillinger patent had not been tested at law or in equity they could not decide whether it was valid or not, and that the interest of the government, in their judgment, would be best subserved by giving the contract to the lowest bidder, taking a bond to protect the government from the suit threatened by claimant." In the contract between the government, represented by the Architect of the Capitol, and Cook, for a concrete pavement, according to the Olmsted plans and specifications, it was provided "that in the event of any legal proceedings being taken by other parties against the contractor of the United States for

the infringement of any patent or claimed patent during execution of the work the contractor shall hold the United States harmless."

All this shows that the Architect of the Capitol was aware of the existence of the Schillinger patent. He did not dispute Schillinger's rights under the patent, nor did he, as the representative of the government, claim that the patent was invalid, nor if valid that the government could get the benefit of it in the contemplated improvement without compensating the patentee. On the contrary he, in effect, recognized a right to such compensation, if the patent was valid, and took a bond from the contractor for the protection of the government in the event of a suit against the contractor that would interfere with the use of the Schillinger invention in the pavement in the public grounds. But no such suit appears to have been brought. The patentee had the right to waive any suit against the contractor or the Architect that would interfere with the prosecution of the work, and look to the obligation of the government to make him just compensation for the use of his invention. It was so ruled in the *Great Falls case.* The authority of that case is not here disputed. As the government had granted the patent, the purpose to commit a tort cannot be imputed to the Architect as the agent of the United States. His action meant no more than that he would leave the question of the obligation of the United States to make compensation for the use of the Schillinger patent to depend upon a decision by the courts as to its validity.

Under the authority given by Congress to expend the money appropriated in improving the Capitol grounds according to specified plans, the Architect of the Capitol had a large discretion, and was authorized, so far as the government was concerned, to use in such improvement any patented invention that those plans would require, or that would best subserve the public interests, subject of course to the constitutional obligation to make just compensation to the inventor. The Constitution imposing that obligation is a covenant between the government and every citizen whose property is appropriated by it for public use. If Schillinger's patent was valid,

then the government is bound by an obligation of the highest character to compensate him for the use of his invention, and its use by the government cannot be said to arise out of mere tort, at least when its representative did not himself dispute, nor assume to decide, the validity of the patent. If the act of Congress under which the Architect proceeded had, in express terms, directed him to use Schillinger's invention in any pavement laid down in the public grounds, then such use, according to the decision in *United States* v. *Great Falls Manufacturing Co.*, would have made a case of implied contract based on the constitutional obligation to make just compensation for private property taken for public use. But such a case is not distinguishable, in principle, from the present one, where the Architect, proceeding under a general authority to expend the public money according to specified plans, uses or knowingly permits to be used a particular patented invention, not disputing the rights of the patentee, but leaving the question of the validity of the patent, and the consequent liability of the government for its use, to judicial determination.

I do not stop to discuss the question whether Schillinger's patent was valid nor whether it was infringed by the mode in which the pavement in question was constructed. Those questions would have been here for determination if the court below had assumed jurisdiction and decided the case upon its merits. That court dismissed the petition for want of jurisdiction on the ground simply that there was no contract, express or implied, between the owner of the patent and the government. It held that the appropriation or use of the Schillinger invention was in the nature of a tort, and this conclusion rested upon the ground that the Architect of the Capitol denied that any private right existed under the alleged patent. But this was an error. There is no finding by the court showing a denial of that character, even if it be assumed that such a denial could be deemed of any consequence in view of the constitutional obligation to make just compensation for private property taken for public use.

I am of opinion that when the government, by its agent, knowingly uses or permits to be used for its benefit a valid

patented invention, it is liable to suit in the Court of Claims for the value of such use, and that its liability arises out of contract based upon the constitutional requirement that private property shall not be taken for public use without just compensation.

It is proper to say that the claimant in his petition does not place the claim for compensation as distinctly upon the basis of contract as he might have done. But as the opinion of the court may be interpreted as proceeding upon the broad ground that the government could not be sued, as upon contract express or implied, unless its agent at the time the invention was used for its benefit recognized or admitted the validity of the patent, I have thought it appropriate to state my view of that question.

2. There is another view of the case which is independent of mere contract. The act of March 3, 1887, for the first time, gives the Court of Claims jurisdiction to hear and determine "all claims founded upon the Constitution of the United States." If the Schillinger patent be valid, and if the invention described in it has been used or appropriated by the government through its agent charged with the improvement of the Capitol grounds, then the patentee or those entitled to enjoy the exclusive rights granted by it, are entitled to be compensated by the government. And the claim to have just compensation for such an appropriation of private property to the public use is "founded upon the Constitution of the United States." It is none the less a claim of that character, even if the appropriation had its origin in tort. The constitutional obligation cannot be evaded by showing that the original appropriation was without the express direction of the government, nor by simply interposing a denial of the title of the claimant to the property or property rights alleged to have been appropriated. The questions of title and appropriation are for judicial determination. Those being decided in favor of the claimant, the Constitution requires a judgment in his favor. If the claim here made to be compensated for the use of a patented invention, is not founded upon the Constitution of the United States, it would be difficult to imagine one that would be of that character.

As the agent of the government was moved to use the Schillinger invention because the patent had not then been established by the decision of any court, it may be stated that it was subsequently sustained, as the findings below show, in numerous cases, the earliest being *California Artificial Stone Paving Co* v. *Perine*, 7 Sawyer, 190; *S. C.* 8 Fed. Rep. 821, (1881,) Sawyer, J., and the latest being *Hurlbut* v. *Schillinger*, 130 U. S. 456.

I am authorized by MR. JUSTICE SHIRAS to say that he concurs in this opinion.

UNITED STATES *v.* BLACKFEATHER.

APPEAL FROM THE COURT OF CLAIMS.

No. 622. Argued October 24, 25, 1894. — Decided November 19, 1894.

This court is not called upon to consider errors assigned by an appellee who has taken no appeal from the judgment below.

The findings of the court below touching the expenditures by the United States to support and keep a blacksmith for the use of the Indians are too indefinite to allow them to be made the subject of a set-off.

The United States having undertaken by Article VII of the Treaty of August 8, 1831, with the Shawnees to "expose to public sale to the highest bidder" the lands ceded to them by the Shawnees, and having disposed of a large part of the same at private sale, were thereby guilty of a violation of trust; and as all public lands of the United States were, by the act of April 24, 1820, c. 51, 3 Stat. 566, made open to entry and sale at $1.25 an acre, the measure of damages for the violation is the difference between the amounts realized, and the statutory price.

Under the provisions of said treaty the Shawnees were entitled to interest on such damages as an annuity.

The United States is not responsible to the Shawnees for moneys paid under a treaty to guardians of orphans of the tribe, appointed by the tribal council, who had embezzled the money when so paid.

Whether the Shawnees are entitled to recover in these proceedings money embezzled by an Indian superintendent, *quære*.

There was no error in the action of the court below ordering a percentage allowance to counsel.

Statement of the Case.

THIS was a claim by the Shawnee tribe of Indians under a special act of Congress passed October 1, 1890, c. 1249, 26 Stat. 636, conferring jurisdiction upon the Court of Claims, subject to an appeal to this court, to hear and determine the just rights in law or in equity of the Shawnee and Delaware Indians under certain treaties with the government.

The fourth section of the act authorizes the Shawnees to bring suit to recover "any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom."

The original petition in the case was filed December 10, 1890. An amended petition was filed by leave of the court February 3, 1891, to which the defendants filed a traverse.

On July 6, 1892, an amended and supplemental act of Congress was passed, c. 151, 27 Stat. 86, authorizing the Shawnees to present to the Court of Claims "all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them or either of them, and the United States."

Subsequently, on July 21, 1892, the appellee filed a second amended petition in the Court of Claims, introducing claims not embraced in the former petition.

The United States interposed a general denial of the allegations of the petition and also made a counter-claim of $12,182.03, alleged to have been overpaid, under a treaty of 1825.

The case having been heard by the Court of Claims, the court, upon the evidence, made the following findings of fact:

I. The following is the Spanish grant to the Shawnee Indians, to which reference is made in the preamble of the treaty between the United States and the Shawnees in Missouri, proclaimed December 30, 1825:

"Delawares and Shawnees, claiming a tract of country

between the river St. Coure and Cape Gira'deau, and bounded on the east by the Mississippi and west by the White Water, district of Cape Gira'deau, produced to the board as follows, to wit:

"The Baron de Carondelet, knight of the faith of St. John, colonel of the royal armies, governor intendant-general, subprefect of the provinces of Louisiana, west Florida, and inspector of their troops, etc. Be it known by these presents, that in consideration of the good and faithful services that the said Louis Lorimer has rendered to the State since he has been a subject of his Catholic Majesty, we allow him to settle with the Delaware and Shawnee Indians who are under his control in such places as he may select in the province of Louisiana, on the right bank of the Mississippi, from the Missouri to the Arkansas River, which may have no governor, and both to hunt and plant thereon for the support of their families, and no commandant, officer, or king's subject shall have the power to oppose him in occupying the lands by him and the said Indians sown, planted, or settled, so long as they shall think proper to abide there; provided, in case they abandon them to move elsewhere they will be considered as vacant; and as for the house that the said Sir Louis Lorimer built at Cape Gira'deau, it shall remain in his possession, not to be taken from him for any reason except the sole ones of illicit commerce or corresponding with the enemies of the State.

"Wherefore we have given these presents, signed by our hand, and countersigned by the secretary of this government, and to which we have caused the seal of our arms to be affixed at New Orleans, on January 4, 1793.

"Le Baron de Carondelet.

"By order of his lordship." "Andres Lopez Armesto.

II. The Missouri band of Shawnees have received payments in accordance with the provisions of the treaty of 1825, but the following balance remains unpaid, $1152.78.

III. The lands which the treaty of 1831, between the United States and the Ohio band of Shawnees, ceded to the defendant herein, were received and sold. Of these lands,

between December 24, 1832, and December 31, 1832, 9841.27 acres were sold at public sale to the highest bidder at the rate of $2.08\frac{3}{4}$ per acre; the total amount received for these lands is shown in Finding VI. The rest of the land so ceded was sold at private sale at the rate of $1.25 per acre. Some of the land sold at this rate of $1.25 per acre had improvements upon it; but most of the land so sold was unimproved. The lands were sold with reasonable expedition; the last sale was June 30, 1840. The total amount of the lands ceded was 96,051.48 acres.

The amount of land to be reserved to Francis Duchouquet (article 11, treaty of 1831) was 320 acres.

The amount of land to be reserved to Joseph Parks (article 13) was 640 acres. The amount of land the price of which was to be reserved to the Michigan Shawnees (article 13) was 640 acres.

IV. Whether the Shawnees, who, in 1831, resided on the River Huron, Michigan, have expressed a desire to follow the Shawnees of Wapaghkonnetta to their residence west of the Mississippi does not appear; nor does it appear that they have expressed a desire not to do so. Their wishes upon this subject are not disclosed.

V. Out of the proceeds of the land sales in Ohio the United States has retained (at 70 cents per acre) the amount shown in Finding VI; also $6994.40, the cost of the grist-mill and saw-mill; also $1011, the cost of surveying; also $13,000 for improvements.

VI. The following is the account between the United States and the Shawnee tribe under treaty of 1831:

Total amount of land ceded (acres)		96,051.48
Less:		
Reserved for Joseph Parks	640.00	
" " Francis Duchouquet	320.00	
" " Hurons (the price to be held as shown in treaty)	640.00	
Difference between plats and abstracts	5.43	
		1605.43
Acres		94,446.05

Of these acres there were sold, at $2.08\frac{3}{4}$ per acre, 9841.27 acres, yielding $20,543.65.

There remained (acres) 84,604.78, which, at $2 per acre, would have yielded $169,209.56; adding this to the $20,543.65 gives a total of $189,753.21.

There has been paid to the Shawnees:

Per 5th article treaty of 1831	$13,000 00
" 4th " " " "	6,994 00
" 7th " " " " (surveying)	1,011 00
Amount retained from sales, at 70 cents per acre	66,252 23
Total	$87,257 63
From the amount due as shown above	$189,753 21
Subtract	87,257 63
Balance (in 1840)	$102,495 58
Paid to the Shawnees (September 28, 1852) under the 7th article of the treaty of 1831	$37,180 58
Interest on $102,495.58 from June 30, 1840, to June 12, 1893, at 5 per cent	$271,357 04
Interest on $37,180.58 from September 28, 1852, to June 12, 1893, at 5 per cent	75,672 80
Difference	$195,684 24
Subtract amount paid	37,180 58
Balance	$158,503 66
Add (see *supra*)	102,495 58
Total	$260,999 24
Add amount unpaid under treaty of 1825	1,152 78
Total	$262,152 02

VII. Difficulties arose as to the 100,000 acres which the second article of the treaty of 1831 provided should be given the Indians, and the United States failed to perform their stipulation in this regard; because of this failure the United States paid the Ohio Shawnees $66,246.23, and received receipts stating that the moneys thus paid were "in full payment of all claims under that part of the treaty of 1831 which has relation to the grant of 100,000 acres of land in fee simple to

the Ohio Shawnees." It does not appear that the amount so paid the Ohio Shawnees was insufficient compensation.

VIII. Owing to laches or dishonesty, certain moneys due to orphan children under the treaty of 1854 with the Shawnees, to be distributed under the last clause of article 8 thereof, was lost to them. The President deemed best to pay their money over in severalty. The Shawnee Council created certain so called guardians of the orphan children, and to them the defendants paid a portion of the orphans' money, which by laches or dishonesty never reached the orphans. Another portion of the orphans' money was committed to a United States Indian superintendent for distribution; he embezzled it, and this money was lost to the orphan children.

The total amount lost to the orphan children in the manner above set forth was $10,506.39. On this amount the United States recovered from the Indian superintendent's sureties $1068.77, and in 1884 appropriated the balance, $9437.62, but no payment has been made, as the Secretary of the Interior and Commissioner of Indian Affairs deemed that the whole amount of the money should not go to the Shawnees as a tribe, but a part at least "should be paid directly to the parties to whom it belongs."

IX. There was paid the Shawnees for blacksmiths from 1825 to 1854 the sum of $17,408.73.

Upon these findings, the Court of Claims entered a decree to the effect that there was due to the Shawnees from the United States on June 12, 1893, the date of the decree, principal and interest, the sum of $262,152.02, and the further sum $10,506.39, due to certain infant Shawnees, which was ordered to be paid to said orphans or their personal representatives under the direction of the Secretary of the Interior. It was further ordered that there be paid to counsel for the Shawnees as compensation the sum of $26,215, which does not exceed ten per cent of the amount recovered by said Indians, and which is to be paid out of and deducted from the said abovementioned sum of $262,152.02. The opinion of the court is reported in 28 C. Cl. 447.

From this judgment the United States appealed to this court.

Mr. Assistant Attorney General Dodge, (with whom was *Mr. Charles W. Russell* on the brief,) for appellants.

Mr. Charles Brownell for appellee.

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

As the claimant took no appeal from the judgment of the court below, of course we are not called upon to consider the numerous errors assigned in his brief to its action in refusing to make certain allowances claimed in his petition. *The Stephen Morgan*, 94 U. S. 599. We are concerned only with the appeal of the government from the allowances actually made, and shall limit our decision to the errors assigned by the Attorney General in his brief.

1. Prior to December 30, 1825, a portion of the Shawnee Indians were individually and collectively in possession of a tract of land about twenty-five miles square near Cape Girardeau in the State of Missouri, under a permit from the Spanish government, granted to them on January 4, 1793, by the Baron de Carondelet. A translated copy of this grant constitutes the first finding of the court below. This tract of land was acquired by the United States under the treaty of cession with the French Republic of April 30, 1803, 8 Stat. 200, commonly known as the "Louisiana Purchase." The sixth article of this treaty obligated the United States to carry out such treaties and articles as might have been agreed upon between Spain and the Indian tribes, until by mutual consent of the United States and said tribes other suitable articles should be agreed upon.

On November 7, 1825, a treaty was made by the United States with these Indians, 7 Stat. 284, under which the Indians ceded to the United States the lands in question, in consideration of which the United States agreed to give to the Shawnees residing within the State of Missouri, "for themselves and for those of the same nation, now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to fifty miles square, situated west of the Missouri, and within the purchase lately made

from the Osages." The United States further agreed to make certain payments in money to the Shawnees as an equivalent for the loss and inconvenience which the tribe would sustain by removal, to enable them to obtain supplies, and to satisfy certain claims made against citizens of the United States for spoliations. It appears that the Shawnees received payments under this account, but the second finding of the court is that a balance remains unpaid of $1152.78. As this is a finding of fact upon the evidence, it is not controverted by the government, and no error is assigned to its allowance. The claim of the appellees that interest should have been allowed upon this residue cannot be considered, as no appeal was taken from such refusal.

The only question connected with this branch of the case arises from a counter-claim by the government, under the fourth article of the treaty, by which the government undertook to support and keep a blacksmith for the use of the Indians on the land thereby assigned to them, for the term of five years, " or as long as the President may deem it advisable; and it is further stipulated, that the United States shall furnish for the use of the Shawnees, the tools necessary for the blacksmith's shop and (300) three hundred pounds of iron annually, to be furnished at the expense of the United States." The court finds that there was paid the Shawnees for blacksmiths from 1825 to 1854 the sum of $17,408.73. As there is no finding how much of this sum was expended during the five years, or the extended period deemed "advisable" by the President, during which the government was bound to keep up the blacksmith shop, the finding is too indefinite to be made the subject of a set-off. Indeed, for all that appears, the President may have deemed it advisable to continue the shop until 1854. His discretion was absolute as to the time the shop should be continued. We can only say that, as the shop was established and equipped *under* the treaty, it was probably continued under the discretion vested in the President *by* the treaty. It is clear that the amount expended is not available as a set-off.

2. The second and principal assignment of error arises

from an allowance of the sum of $260,999.24, based upon a treaty made August 8, 1831, 7 Stat. 355, with a branch of the Shawnees residing in Ohio, under which they ceded to the United States their lands in Ohio, the government agreeing to give in exchange certain lands upon the western side of the Mississippi.

The seventh article of the treaty provided as follows:

"The United States will expose to public sale to the highest bidder, in the manner of selling the public lands, the tracts of land herein ceded by the said Shawnees. And after deducting from the proceeds of such sale the sum of seventy cents per acre, exclusive of the cost of surveying, the cost of the gristmill, sawmill, and blacksmith shop and the aforesaid sum of thirteen thousand dollars, to be advanced in lieu of improvements; it is agreed than any balance, which may remain of the avails of the lands, after sale as aforesaid, shall constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity. Said fund to be continued during the pleasure of Congress, unless the chiefs of the said tribe, or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them; in which case the President shall cause the same to be so paid, if in his discretion, he shall believe the happiness and prosperity of said tribe would be promoted thereby."

The court found (finding 6) the total amount ceded under this treaty to have been 96,051.48 acres, less certain reservations amounting to 1605.43 acres; that of this amount there was sold at public sale to the highest bidder between December 24 and December 31, 1832, 9841.27 acres at the rate of $2.08¾ per acre, or a total of $20,543.65.

The remainder of the land so ceded was sold at private sale at the rate of $1.25 per acre. Some of the land sold at this rate of $1.25 per acre had improvements upon it; but most of the land so sold was unimproved. The lands were

sold with reasonable expedition; the last sale being June 30, 1840.

In respect to this, the government is alleged to have violated its trust in selling the lands at private sale, the covenant of the treaty being to expose the land to public sale, to the highest bidder, in the manner of selling public lands. In this connection the court found that, by the act of May 18, 1796, c. 29, 1 Stat. 464, entitled "An act providing for the sale of the lands of the United States, beyond the territory northwest of the River Ohio, and above the mouth of the Kentucky River," it was provided that the land should be surveyed and laid out in sections of 640 acres, and by section 4, that they "shall be offered for sale at public vendue, under the direction of the governor or secretary of the western territory and the surveyor-general, . . . provided always, that no part of the lands directed by this act to be offered for sale, shall be sold for less than two dollars per acre." So by an act of May 10, 1800, amendatory of this, 2 Stat. 73, it was further provided, sec. 5, "that no lands shall be sold by virtue of this act, at either public or private sale, for less than two dollars per acre."

Construing the treaty of 1831 in connection with these acts, the court was of opinion that "the United States failed in their duty, when they sold any of these lands otherwise than *at public sale, to the highest bidder*, in the manner of selling the public land, and as trustees of these Indians and their guardians, are liable to them for any loss which the Shawnees may have thus sustained;" and that the best evidence of the amount these lands would have produced if sold according to the treaty stipulations was contained in the statutes above cited, and was, therefore, fixed by the court at $2 per acre.

Assuming that the court was correct in its legal proposition that the government was bound to expose all these lands to public sale to the highest bidder, we think it was mistaken in its inference that the land would have brought $2 per acre if so sold. The attention of the court does not seem to have been called to the act of April 24, 1820, c. 51, 3 Stat. 566, en-

titled "An act making further provisions for the sale of public lands," the third section of which provided "that from and after the first day of July next, the price at which the public lands shall be offered for sale, shall be one dollar and twenty-five cents an acre, . . . and all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands which shall thereafter be offered at public sale, according to law, and remain unsold at the close of said public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid." Now as this act was in existence at the time of the treaty of 1831, and was the latest act upon the subject, the reasoning of the court would indicate that the value of the land should have been fixed at $1.25 per acre instead of $2. By the express terms of the act of July 14, 1832, c. 240, 4 Stat. 601, the lands covered by this treaty were "attached to, and made to form a part of, the land districts in which the same are respectively situated, and liable to be sold as other public lands in the State of Ohio."

In view of the act of 1820, above cited, permitting lands which remained unsold after having been offered at public sale, to be sold at private sale at $1.25 per acre, and the act of July 14, 1832, attaching these lands to their several land districts and permitting them to be sold as other public lands in the State of Ohio, it may admit of some doubt whether the government can be held by this court to have been guilty of a violation of its trust in selling these lands at private sale. If it had appeared that the government had "exposed" these lands to public sale, to the highest bidder, and failing to find a bidder above the statutory price of $1.25 per acre, had then sold them at private sale at that price, its obligation would have been completely discharged. But as there is no evidence that they were ever exposed to public sale, we incline to the view expressed by the court below that, as between the government and the Indians, there was a failure on the part of the former to observe the stipulation of the treaty and a viola-

tion of its trust. The obligation being expressed to expose them to public sale, it was incumbent upon the government to show, either that it had done so and failed to find a bidder, or for some other reason it had been released from the provisions of the treaty. The privilege of selling the lands "in the manner of selling the public lands" does not nullify the obligation to expose them at public sale, which still remained; but it required them to be sold subject to the conditions and in the manner prescribed by the act of 1820.

The difficulty, however, is in estimating the damages the Shawnees suffered by its failure of duty in that particular. We cannot assume that, because a portion of the tract sold at auction brought $2.08\frac{3}{4}$ per acre, the whole tract might have been sold at that price, at least in the absence of evidence that all was of equal value, since the part so sold may have been the most valuable of the entire tract. We have shown that the estimate of $2 per acre was based upon a statute fixing the price of public lands, which had been repealed. In the absence of any proof of the actual value of these lands at this time, there would seem to be no method of estimation except by taking the price at which public lands were subject to be sold at private sale, namely, $1.25 per acre. Not only is there some presumption that the government would not sell them for less than they were worth, but the very fact that at that time all public lands were subject to entry at $1.25 per acre, would render it impossible to sell them at a greater price, unless by reason of their peculiar location, abundant timber, or extraordinary fertility, they were exceptionally valuable. We are not informed why the land sold at auction brought the price it did, but if the other lands were of like value, there is every reason to believe that the government, charged as it was with a trust to dispose of them at public sale for the best price that could be obtained, would have exposed them to sale in the same manner. The inference is that it was deemed for the best interests of the beneficiary to dispose of them at private sale for the statutory price, and while this may not excuse the government for a failure to comply with its obligation to sell them at auction, it tends

strongly to show that the Indians in reality suffered no damage by such action.

It results from this that from the total of $189,753.21, given as the yield of this tract, there must be deducted seventy-five cents per acre upon 84,604.78 acres, or $63,453.58, leaving $126,299.63. Subtracting from this the amount paid to the Shawnees, as found in the sixth finding, $87,257.63, leaves $39,042.00 as the balance due in 1840.

3. Are the Indians entitled to interest upon this amount? By Rev. Stat. § 1091: "No interest shall be allowed upon any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." The real question here is whether there was a contract expressly stipulating for the payment of interest, or is this a mere claim for unliquidated damages?

By the seventh article of the treaty, it was agreed that the proceeds of the lands, after making the several deductions, "should constitute a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity. Said fund to be continued during the pleasure of Congress, unless the chiefs of the said tribes or band, by and with the consent of their people, in general council assembled, should desire that the fund thus to be created, should be dissolved and paid over to them." While this is not literally an agreement to pay interest, it has substantially that effect. It is true it is called an annuity, but the amount of the annuity is measured by the interest paid upon funds held in trust by the United States, (Rev. Stat. § 3659,) upon investments for Indians, (§ 2096,) as well as by the interest paid upon an affirmance by this court of judgments of the Court of Claims. (§ 1090.) A case somewhat analogous is that of *United States* v. *McKee*, 91 U. S. 442, which was a claim of the heirs and legal representatives of one Vigo, on account of supplies furnished in 1778 to troops acting under a commission from the State of Virginia. As

the act, under which the Court of Claims took jurisdiction of the case, directed it to be governed by the rules and regulations theretofore adopted by the United States in the settlement of like cases, and as the case was similar to those in which interest had been allowed by the act of 1790, under which act the claim would have been made but for the statutes of limitation, the interest was allowed, though it was not claimed that there was literally a contract expressly stipulating for the payment of interest.

While the treaty bound the government to pay a five per cent annuity until the dissolution of the fund, which dissolution took place September 28, 1852, when the sum of $37,180.58, the amount of the fund resulting from actual sales, was paid over to the chiefs of the tribe, this dissolution terminated the stipulation for the annuity only *pro tanto*. If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continues until the money is paid over. Upon the whole, we think the court did not err in allowing interest.

4. An allowance of $10,506.39, based upon the eighth article of the finding, arose from a failure of certain orphan children to receive the annuity stipulated to be paid them by a treaty of May 10, 1854, 10 Stat. 1053. By this treaty the Shawnees ceded their lands to the United States, and as part consideration therefor received 200,000 acres in the State of Kansas, the government further agreeing to pay the sum of $829,000 in certain instalments. The eighth article of the treaty provided that "such of the Shawnees as are competent to manage their affairs, shall receive their portions of the aforesaid annual instalments in money. But the portions of such as shall be found incompetent to manage their affairs, whether from drunkenness, depravity, or other cause, shall be disposed of by the President, in that manner deemed by him best calculated to promote their interests, and the comfort of their families; the Shawnee Council being first consulted with

respect to such persons whom it is expected they will designate to their agent. The portions of orphan children shall be appropriated by the President in the manner deemed by him best for their interests." Under the discretion vested in him by the last clause of the section, the President deemed it best to pay their money over in severalty. The Shawnee Council created certain so-called guardians of the orphan children, and to them the defendants paid a portion of the orphans' money, which by laches or dishonesty never reached the orphans. Another portion of the orphans' money was committed to a United States Indian superintendent for distribution. He embezzled it, and this money was lost to the orphan children. The total amount thus lost was $10,506.39.

Conceding that the government is justly liable for such portion of this money as was committed to the Indian superintendent for distribution, and embezzled by him, it does not follow that it is liable for such portion as was paid over to guardians of the orphan children created by the Shawnee Council. The President was authorized to appropriate the portions of these children in the manner deemed best for their interests. He adjudged, probably wisely, that it should not be paid directly to the children. To whom should he pay it if not to their guardians — guardians who were created by a council of the tribe, which is now seeking to repudiate its own act and hold the government responsible for the misfeasances of its own agent? The finding does not show when the money was paid, but from the fact that the obligation to pay arose in 1854, it may safely be assumed that the payments were made before the act of July 5, 1862, the sixth section of which, embodied in Rev. Stat. § 2108, prohibited money to be paid to any person appointed by any Indian council to receive money due incompetent or orphan Indians. There can certainly be no presumption that it was paid in the face of an act expressly inhibiting such payment.

While there may be a moral obligation on the part of the government to reimburse the money embezzled by the Indian superintendent, and in fact an appropriation appears to have been made for that purpose, act of July 7, 1884, c. 334, 23

Stat. 236, 247, it is by no means clear that, under the acts of 1890 and 1892, the Shawnees were authorized to recover and collect from the government any other moneys than those which they claimed in their tribal relation or capacity. The money in question is not due the tribe as such, but to certain individual orphans, who claim to have been defrauded. But whether this be so or not, there is nothing in the record to indicate how much of this money was embezzled by the guardians created by the Indian Council, and how much by the Indian superintendent, so that there is in reality no basis for a decree in their favor. In this particular we think there was error in the decree of the court below. Whether in a suit by the individual orphans they would be held bound by the receipt of the money by the guardians appointed by the council of their tribe, may be a different question.

5. Exception is also taken to the decree of the court directing a payment of ten per cent of the amount recovered to the attorney and counsel of the Shawnees as his compensation, to be deducted from the total amount of the decree in their favor. By the third section of the act of 1890, (26 Stat. 636,) by which this suit was first authorized, it was enacted that "the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen." It is true that this provision, literally interpreted, refers only to compensation in suits authorized in the second section of the act, to be brought against the Cherokee Nation and the United States, to recover from the Cherokee Nation moneys unlawfully diverted by it; but we think that within the true intent and spirit of the act, the fourth section, which authorizes the suit in question against the United States to recover money wrongfully diverted from their tribal fund, should be read in the same connection. This view is emphasized by the fact that by the final clause of section 4, "the right of appeal, jurisdiction of the court, process, procedure, and proceedings

in the suit here provided for, shall be as provided for in sections one, two, and three of this act." It was evidently intended by this provision that section 3 should be read into and made a part of section 4, so far as the same could be made applicable. There was no error in authorizing a compensation to counsel of ten per centum on the amount recovered, and the action of the court in that particular was correct.

The judgment of the court below must, therefore, be

Reversed and the case remanded with directions to recompute the amount due to the Indians and their counsel in conformity with this opinion, and enter a decree accordingly.

CHEROKEE NATION *v.* JOURNEYCAKE.

APPEAL FROM THE COURT OF CLAIMS.

No. 619. Argued and submitted October 18, 1894. — Decided November 19, 1894.

The Cherokees and the Delawares having, on the 8th day of April, 1867, in pursuance of the provisions of the treaty of July 19, 1866, 14 Stat. 799, between the United States and the Cherokee Nation, entered into a contract, whereby it was agreed that, on the fulfilment by the Delawares of the stipulations on their part contained in said contract, all the members of that tribe, registered as provided in said contract, should become members of the Cherokee Nation, with the same rights and immunities and the same participation (and no other) in the national funds as native Cherokees, except as otherwise provided in the contract, the so registered Delawares were on such fulfilment of their stipulations, thereby incorporated into the Cherokee Nation, and, as members and citizens thereof, were entitled to equal rights in the lands of that Nation and their proceeds.

On July 19, 1866, the United States and the Cherokee Nation entered into a treaty, 14 Stat. 799, 803, the fifteenth article of which is as follows:

"The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96°, on such terms as may

be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz.: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens. And should any such tribe, thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to one hundred and sixty acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

"And the said tribe thus settled shall also pay into the national fund a sum of money, to be agreed on by the respective parties, not greater in proportion to the whole existing national fund and the probable proceeds of the lands herein ceded or authorized to be ceded or sold than their numbers bear to the whole number of Cherokees then residing in said country, and thence afterwards they shall enjoy all the rights of native Cherokees. But no Indians who have no tribal organizations, or who shall determine to abandon their tribal organizations, shall be permitted to settle east of the 96° of longitude without the consent of the Cherokee National Council, or of a delegation duly appointed by it, being first obtained. And no Indians who have and determine to preserve their tribal organizations shall be permitted to settle, as herein provided, east of the 96° of longitude without such consent being first obtained, unless the President of the United

States, after a full hearing of the objections offered by said council or delegation to such settlement, shall determine that the objections are insufficient, in which case he may authorize the settlement of such tribe east of the 96° of longitude."

Prior to that time, and in 1839, the Cherokee Nation had adopted a constitution, section 2 of article I and section 5 of article III being in these words:

"SEC. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made or may rightfully be in possession of them: *Provided*, That the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, That the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission."

"SEC. 5. No person shall be eligible to a seat in the National Council but a free Cherokee male citizen, who shall have attained to the age of twenty-five years.

"The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father's or the mother's side, shall be eligible to hold any office of profit, honor, or trust, under this government." (Const. and Laws, Cherokee Nation, ed. of 1892, pp. 11, 12, and 14.)

Statement of the Case.

Immediately following the treaty the Cherokee Nation amended these sections, first adopting the following preamble:

"Whereas, by the treaty executed at Washington, on the 19th day of July, A.D. 1866, between the United States and the Cherokee Nation, through its delegation, ratified by the Senate and officially promulgated by the President of the United States, August 11, 1866, certain things were agreed to between the parties to said treaty, involving changes in the constitution of the Cherokee Nation, which changes cannot be accomplished by the usual mode; and,

"Whereas, it is the desire of the people and government of the Cherokee Nation, to carry out in good faith all of its obligations, to the end that law and order be preserved, and the institutions of their government maintained."

The sections, as amended, read as follows:

"SEC. 2. The lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th July, 1866, between the United States and the Cherokee Nation."

"SEC. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained to the age of twenty-five years, and who shall have been a *bona fide* resident of the district in which he may be elected, at least six months immediately preceding such election. All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation." (Constitution and Laws, Cherokee Nation, ed. 1892, pp. 31, 32, and 33.)

In pursuance of this treaty, and under this amended constitution, the Cherokees and Delawares came together and

entered into an agreement of date April 8, 1867, which, after referring to certain treaties, among them this of July 19, 1866, and reciting that a "full and free conference has been had between the representatives of the Cherokees and the Delawares, in view of the treaties herein referred to, looking to a location of the Delawares upon the Cherokee lands, and their consolidation with said Cherokee Nation," stipulates as follows:

"Now, therefore, it is agreed between the parties hereto, subject to the approval of the President of the United States, as follows:

"The Cherokees, parties of the first part, for and in consideration of certain payments, and the fulfilment of certain conditions hereinafter mentioned, agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to one hundred and sixty acres for each individual of the Delaware tribe, who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elect to remove to the 'Indian country,' to which list may be added, only with the consent of the Delaware council, the names of such other Delawares as may, within one month after the signing of this agreement, desire to be added thereto, and the selections of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee Reservation east of said line of 96°, not already selected and in possession of other parties, and in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions when surveys are made, (that is to say, one hundred and sixty acres for each individual,) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation, nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are

by the laws of the Cherokee Nation imposed upon native citizens thereof.

"Provided that nothing herein shall confer the right to alienate, convey, or dispose of any such lands, except in accordance with the constitution and laws of said Cherokee Nation.

"And the said Delawares, parties of the second part, agree that there shall be paid to the said Cherokees from the Delaware funds now held or hereafter received by the United States, a sum of money equal to one dollar per acre for the whole amount of one hundred and sixty acres of land for every individual Delaware who has already been registered upon the aforesaid list, made February 18, 1867, with the additions theretofore provided for.

"And the Secretary of the Interior is authorized and requested to sell any United States stocks belonging to the Delawares to procure funds necessary to pay for said lands; but in case he shall not feel authorized, under existing treaties, to sell such bonds belonging to the Delawares, it is agreed that he may transfer such United States bonds to the Cherokee Nation, at their market value, at the date of such transfer.

"And the said Delawares further agree, that there shall be paid from their funds, now or hereafter to come into possession of the United States, a sum of money which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares registered as above mentioned and removing to the Indian country sustains to the whole number of Cherokees residing in the Cherokee Nation. And for the purpose of ascertaining such relative numbers, the registers of the Delawares herein referred to, with such additions as may be made within one month from the signing of this agreement, shall be the basis of calculation as to the Delawares, and an accurate census of the Cherokees residing in the Cherokee Nation shall be taken under the laws of that Nation within four months, and properly certified copies thereof filed in the Office of Indian Affairs, which shall be the basis of calculation as to the Cherokees.

"And that there may be no doubt hereafter as to the

amount to be contributed to the Cherokee national fund by the Delawares, it is hereby agreed by the parties hereto that the whole amount of the invested funds of the Cherokees, after deducting all just claims thereon, is $678,000.

"And the Delawares further agree, that in calculating the total amount of said national fund there shall be added to the said sum of $678,000 the sum of $1,000,000, being the estimated value of the Cherokee neutral lands in Kansas, thus making the whole Cherokee national fund $1,678,000; and this last-mentioned sum shall be taken as the basis for calculating the amount which the Delawares are to pay into the common fund.

"Provided, that as the $678,000 of funds now on hand belonging to the Cherokees is chiefly composed of stocks of different values, the Secretary of the Interior may transfer from the Delawares to the Cherokees a proper proportion of the stocks now owned by the Delawares of like grade and value, which transfer shall be in part of the *pro rata* contribution herein provided for by the Delawares to the funds of the Cherokee Nation; but the balance of the *pro rata* contribution by the Delawares to said fund shall be in cash or United States bonds, at their market value.

"All cash, and all proceeds of stocks, whenever the same may fall due or be sold, received by the Cherokees from the Delawares under the agreement, shall be invested and applied in accordance with the 23d article of the treaty with the Cherokees of August 11, 1866.

"On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

In pursuance of this agreement, which was approved by the President of the United States as stipulated in article XV of the treaty, 985 Delawares removed to the territory of the

Cherokees, paid $157,600 for the lands set apart for them, contributed $121,824.28, their share of the national fund as provided, and became incorporated into the Cherokee Nation.

At the time of this treaty the Cherokee Nation was possessed of the following tracts or bodies of lands:

	ACRES.
"Strip" lands in Kansas (about)	400,000
"Neutral" lands in Kansas (about)	1,000,000
Lands west of 96°, Indian Territory (about)	8,000,000
Lands east of 96°, Indian Territory, Home Reservation (about)	5,000,000

By article XVII of the treaty the strip lands and the neutral lands were ceded to the United States, to be sold for the benefit of the Cherokee Nation. The sum expected to be realized from the sale of the neutral lands was, by the agreement between the Cherokees and the Delawares, considered as already received and a part of the Cherokee national fund. The proceeds of the sale of the strip lands were subsequently appropriated to the uses of the Cherokee Nation as a Nation, and not for the benefit of the native Cherokees alone, leaving as still the property of the Cherokee Nation the two bodies of land in the Indian Territory (sometimes known as the "Home Reservation" and the "Cherokee Outlet"). Certain sums of money were received by the Cherokee Nation for the rental of the Cherokee outlet. These sums the Cherokee Council determined belonged wholly to the native Cherokees, to the exclusion of the Delawares. This brought about a controversy between the native Cherokees and the Delawares, involving not merely the right to share in these proceeds, but also the interest of the Delawares in the reservation and the outlet. On October 1, 1890, 26 Stat. 636, c. 1249, an act of Congress was passed providing for a reference to the Court of Claims of that controversy. Thereupon, on October 29, 1890, this suit was brought, the United States being made a party defendant, not as having any adverse interest, but as trustee, holding the funds of the Indians. The opinion of that court was filed April 24, 1893, 28 C. Cl. 281, the conclusion being that the

Delawares were incorporated into the Cherokee Nation, and, as members and citizens thereof, were entitled to equal rights in these lands and their proceeds. On May 22, 1893, a decree was entered in accordance with these views, from which decree the Cherokee Nation and the United States appealed to the court.

Mr. Assistant Attorney General Dodge for the United States, appellants, submitted on his brief.

Mr. Charles A. Maxwell and *Mr. George S. Chase* for the Cherokee Nation, appellants, submitted on their brief.

Mr. J. H. McGowan, (with whom was *Mr. Thomas C. Fletcher* on the brief,) for appellee.

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

This case hinges on the status of the individual Delawares as members and citizens of the Cherokee Nation, and the rights secured to them by the agreement of April 8, 1867. In order to a correct understanding of this agreement it is necessary to refer to the provisions of article XV of the treaty of 1866. That article contemplated the settlement of other Indians within the limits of the Cherokee country east of the ninety-sixth degree of longitude, and provided for such settlement in two ways: one, in which the Indians settled should abandon their tribal organization, in which case, as expressed, they were to "be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect with native citizens." The other was where the removal of the tribe to the Cherokee country should involve no abandonment of the tribal organization, in which case a distinct territory was to be set off, by metes and bounds, to the tribe removed. The one contemplated an absorption of individual Indians into the Cherokee Nation; the other a mere location of a tribe within the limits of the Cherokee reservation. If the removed Indians were to be absorbed into the

Cherokee Nation, they were to be absorbed on equal terms in every respect with native citizens.

In this connection reference may be had to article XVI of the treaty, which authorized the government to settle friendly Indians in any part of the Cherokee country west of the ninety-sixth degree of longitude. This article differs from article XV in that it contemplated a location of any friendly tribe as a tribe, authorized the government to place it anywhere within the reservation west of the ninety-sixth degree of longitude, on a tract in compact form, and provided for a conveyance of such tract in fee simple to the located tribe. It thus provided for taking a body of land out of this part of the Cherokee reservation and removing it wholly from the jurisdiction of the Cherokee Nation, making a new reservation for the occupancy of the tribe to whom it was conveyed; while in the case of Indians removed under the provisions of article XV, even though the tribal organization was preserved, the general jurisdiction of the Cherokee Nation over the territory occupied by the removed tribe was not disturbed.

Turning now to the agreement itself, its purpose, as expressed in its preliminary language, was "a location of the Delawares upon the Cherokee lands and their consolidation with the said Cherokee Nation." There is no provision for the setting apart of a distinct body of land in any portion of the reservation for the Delaware tribe, but the agreement is to sell to them for their occupancy a quantity of land equal in the aggregate to 160 acres for each individual Delaware, who may "elect to remove to the Indian country," and "the selection of the amounts to be purchased by the Delawares may be made by said Delawares in any part of the said Cherokee Nation east of said line of 96 degrees, not already selected and in possession of other parties." This contemplates personal selection of separate tracts by individual Delawares. Further, there is a guarantee "to each Delaware incorporated by these articles into the Cherokee Nation" of the lands thus by him purchased, and that his ownership and occupancy shall not be interfered with in any manner without his consent — not the consent of the Delaware tribe — and also that it shall be sub-

ject to the "same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof." But we are not limited to the plain inferences to be drawn from these expressions. The positive provision at the close of the agreement is as follows:

"On the fulfilment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participations (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees."

If nothing were presented other than the language of the agreement, the conclusion would seem irresistible that the registered Delawares, that is, those of the tribe who chose to remove from Kansas to the Indian Territory, were not only to become members of the Cherokee Nation, but also to stand equal with the native Cherokees in all the rights springing out of citizenship in the Cherokee Nation. Whatever rights the Cherokees had, the registered Delawares were to have, and it was an equality not limited to the living Delawares; but to guard against any misconception there was the express declaration that the children of the registered Delawares should in all respects be regarded as native-born Cherokees. This last clause was not inserted with the view of giving additional rights to such children, but to prevent any question as to their inheritance of all the rights which their fathers received under the agreement.

That the thirteen millions of acres, whether appropriately styled its "common property" or its "public domain," belonged to the Cherokee Nation as a nation, is beyond dispute. By the treaty of May 6, 1828, 7 Stat. 311, it was provided in article 2 that "the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows: . . . In addition to the seven

million of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the country lying West of the Western boundary of the above described limits, and as far West as the sovereignty of the United States, and their right of soil extend."

By subsequent treaties, of February 14, 1833, 7 Stat. 414, and December 29, 1835, 7 Stat. 478, certain changes were made in the boundaries of the reservation and the outlet, and by article 3 of the latter treaty it was provided that "the United States also agree that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them. The constitution of the Cherokee Nation, both as originally adopted in 1839 and as amended in 1866, declares in article 1, section 2, that "the lands of the Cherokee Nation shall remain common property," and while the amendment contemplates a time at which these lands shall cease to be common property, it is only when, by article 20 of the treaty of 1866, the National Council shall request that they be surveyed and allotted in severalty to the Cherokees. Not only does the Cherokee constitution thus provide that the lands shall be common property, but also the legislation of the Cherokee Nation from 1839 on to the present time abounds with acts speaking of these lands as "public domain" or "common property" of the Cherokee Nation. Quite a number of these acts are collected in the opinion of the Court of Claims in this case.[1]

[1] *Extract from the opinion of the Court of Claims.*

"The constitution and laws of the Cherokees, since that people came within the confines of civilization, have followed, in a limited extent, the

Now, if these lands be the public domain, the common property of the Cherokee Nation, all who are recognized as

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traditions and usages of the race, and have embodied in them in varying degrees the fundamental principle and characteristics of communal property.

"The preamble of their constitution, September 6, 1839, like that of the Constitution of the United States, sets forth the general purpose of the instrument:

"'We, the people of the Cherokee Nation, in national convention assembled, in order to establish justice, insure tranquillity, promote the common welfare, and to secure to ourselves and our posterity the blessings of freedom — acknowledging with humility and gratitude, the goodness of the Sovereign Ruler of the Universe, in permitting us so to do, and imploring His aid and guidance in its accomplishment — do ordain and establish this constitution for the government of the Cherokee Nation.'

"The constitution then takes up (and it is most significant that it does so by its first article) the subject of paramount importance in the Indian mind — of more importance than the form of government, than the right of representation, than the right of trial by jury, or of habeas corpus, or of any of those principles of civil liberty, which, in the Anglo-Saxon mind are held supreme, the subject of their lands:

"'SEC. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them: Provided, that the citizens of the nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, that the national council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the nation, on memorializing the national council for such readmission.

"'Moreover, the national council shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements with the view of speculation.'

"The amendment of 1866 modified the foregoing as follows:

"'SEC. 2. The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation.'

"With these restrictive provisions should be considered the brief grant which the constitution contains of legislative power:

members and citizens of that Nation are alike interested and alike entitled to share in the profits and proceeds thereof.

"'SEC. 14. The national council shall have power to make all laws and regulations which they shall deem necessary and proper for the good of the nation, which shall not be contrary to this constitution.'

"The legislation of the Cherokees recognizes again and again the communal character of the seizin or occupancy of the land. It is not 'lawful for any citizen of the Cherokee Nation to sell any farm or other improvement in said nation to any person other than a "bona fide" citizen thereof;' nor 'to rent any farm or other improvement to any other person than a citizen of the Indian Territory.' Revised Code, 1874, Art. xxi, sec. 112, p. 234. 'No person shall be permitted to settle or erect any improvement within one-fourth of a mile of the house, field, or other improvement of another citizen without his, her, or their consent, under the penalty of forfeiting such improvement and labor for the benefit of the original settler; provided, it may be lawful, however, where a settler has a field one-half mile or more from his residence, and where there may be a spring or running water and timber, for another citizen to improve and settle one hundred yards from such field so situated.' Act 24th September, 1839; *id.*, p. 249.

"The law regulating intermarriage with white men or foreigners provides that should a citizen of the United States or any foreign country 'become a citizen of the Cherokee Nation by intermarriage' and be left a widower, he shall continue to enjoy the rights of citizenship unless he shall marry a person 'having no rights of Cherokee citizenship by blood; in that case, all of his rights acquired under the provisions of this act shall cease.' Revised Code, 1874, Art. xv, sec. 74, p. 223. If he abandons his wife, he 'shall thereby forfeit every right and privilege of citizenship,' and shall 'be removed from the nation.' Sec. 75. There is also a significant provision attached to the law allowing citizenship by intermarriage which shows how clearly the communal character of the property of the nation is recognized, that is to say, property of which all the citizens of the nation are joint owners and in which each has a direct personal interest:

"'*Provided, also*, That the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the national treasury a sum of money to be ascertained and fixed by the national council equal to the "pro rata" share of each native Cherokee, in the lands and vested wealth of the nation, estimated at five hundred dollars,' (*id.*, p. 224).

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"Herbert Spencer has said, 'Did primitive communal ownership survive, there would survive the primitive control of the uses to be made of land.' The Man *versus* The State, p. 386, ed. 1892. In the Cherokee county the converse of this is the condition of affairs. 'The primitive control of the uses to be made of land' has passed from the communal owners and

Given, therefore, the two propositions that the lands are the common property of the Cherokee Nation, and that the reg-

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become lodged in the State — that is to say, in the government of the nation — and the communal owners as such exercise no more control over the national territory than the citizens of the United States exercise over the public lands of the United States. Of this the statutes of the Cherokees afford overwhelming evidence.

"The constitution, as before quoted, recognizes a right of occupancy under the name of 'improvements' as 'an exclusive and indefeasible property' in citizens rightfully in possession, but at the same time expressly vests in the National Council 'power to adopt such laws and regulations as its wisdom may deem expedient and proper to prevent citizens from monopolizing improvements [*i.e.* occupancy] with the view of speculation.' A statute contemporaneous with the constitution is entitled 'An act regulating settlements on the *public domain*.' Act September 24, 1839, Laws of the Cherokee Nation, ed. 1875, p. 249. A statute for the preservation of trees refers to trees 'standing and growing upon the public domain' (*id.*, p. 143, § 67). The act 14th December, 1870 (*id.*, p. 252), declares the conditions upon which railroad ties and other material shall 'be furnished from the public domain.' The Act 17th December, 1869 (*id.*, p. 255), is entitled 'An act for the protection of the public domain,' and the act 14th December, 1870 (*id.*, p. 257), 'An act in relation to the Public Domain.'

"All of these statutes and many others justify by their provisions the use of the term 'Public Domain.' A statute relating to minerals declares that 'All gold, silver, lead, copper, iron, stone, coal, petroleum, salt, or medicinal water' which has been or may be discovered within the limits of the country 'is the property of the Cherokee Nation,' and provides for the leasing of mines, petroleum beds, salt-works, and of mineral springs (*id.*, p. 226). The act regulating settlements on the public domain declares that if they be left unoccupied they shall 'revert to the nation as common property' (*id.*, p. 249). The statute for the preservation of trees makes it a misdemeanor to cut down, kill, or destroy any fruit or nut-bearing tree 'standing and growing upon the public domain of the Cherokee Nation' (*id.*, p. 143). The act relating to railroad ties imposes a royalty to be paid for taking timber from the public domain or stone from the quarries of the nation (*id.*, p. 252). The act for the protection of the public domain requires a citizen to take out a license before he can dispose of sawed lumber, and to pay into the treasury fifteen per cent of the money he receives for it (*id.*, p. 255). The act in relation to the public domain provides that at each and every station along the line of any railroad passing through 'the lands of the Cherokee Nation there shall be reserved to the Cherokee Nation one mile square,' and that these tracts so reserved 'shall be laid off into town lots and sold at public sale to the highest bidder,' who shall acquire thereby no other rights 'than those of use and occupancy,' 'provided that this act shall not be so construed as to interfere with any of the mineral resources

istered Delawares have become incorporated into the Cherokee Nation and are members and citizens thereof, it follows necessarily that they are equally with the native Cherokees the owners of and entitled to share in the profits and proceeds of these lands.

As against this conclusion the argument of the counsel for the Cherokees runs along these lines: First, that the terms "rights and immunities" refer only to political rights and immunities, and do not include property rights; second, that as it is specifically provided that the registered Delawares shall have equal participation in the national funds, while no

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of the public domain' (*id.*, p. 257). The act for the support and education of orphan children empowers the trustees 'to occupy and hold as much land, not exceeding two miles square, as they may deem necessary for farming and mechanical purposes' (*id.*, p. 258). The act authorizing the transfer or sale of Cherokee lands west of the Arkansas authorizes the sale of 'all the Cherokee lands,' 'commonly known as the Cherokee Outlet.' The act 19th May, 1883, recognizes 'the unoccupied lands belonging to the Cherokee Nation' as having been set apart by a previous statute 'to produce revenue from grazing,' and authorizes and directs the principal chief 'to execute a lease for all the unoccupied lands of the Cherokee Nation' west of the Arkansas. And other statutes and treaties have recognized and exercised the power of absolute sale and alienation without authority from or ratification by communal owners.

"With this power of regulation and control of the public domain and the *jus disponendi* lodged in the government of the Nation, it is plain that the communal element has been reduced to a minimum and exists only in the occupied lands. And it is manifest that with the growth of civilization, with all of its intricacies, and manifold requirements, the communal management of the public domain would have been utterly insufficient, and if it had continued would have been a barrier to the advancement of civilization itself.

"With these powers of absolute ownership lodged in the Cherokee government, the power to alienate, the power to lease, the power to grant rights of occupancy, the power to restrict rights of occupancy, and with the exercise of those powers running back to the very year of the adoption of the constitution, and receiving from that time to the present the unquestioning acquiescence of the former communal owners, the Cherokee people, it is apparent that the 'public domain' of the Cherokee Nation is analogous to the 'public lands' of the United States or the 'demesne lands of the Crown,' and that it is held absolutely by the Cherokee government, as all public property is held, a trust for governmental purposes and to promote the general welfare."

mention is made of these lands which constituted the bulk of the Cherokee property, it is to be taken that no interest therein was intended to be transferred; third, that this is strengthened by the fact that there was a stipulation for the purchase of certain lands at one dollar per acre; and, fourth, that the contribution of the Delawares to the national property was so small, and the value of these lands so great, that it could not have been in the contemplation of the parties that the Delawares were to receive any interest in them.

Commenting generally upon this line of argument, it is rather an endeavor to induce the court to reconstruct the contract and frame one more in accord with what, from the present standpoint, would seem to have been equitable, than to interpret the contract which the parties made, in accordance with the plain import of the language which they used.

It is true that "rights and immunities" are often used as descriptive of only political rights and immunities, and do not necessarily include property rights, so that if these were the only words by which the intent of the contracting parties was to be determined, there would be room for the argument that only political rights and immunities were intended to be granted. But it must be borne in mind that the rights and interest which the native Cherokees had in the reservation and outlet sprang solely from citizenship in the Cherokee Nation, and that the grant of equal rights as members of the Cherokee Nation naturally carried with it the grant of all rights springing from citizenship. So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees in their long occupation of this reservation had generally secured homes for themselves; that the laws of the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee reservation. And as a further consideration for the payment of this sum

for the purchase of homes the Delawares were guaranteed not merely the continued occupancy thereof, but also that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. So that if, when the allotment was made, there was for any reason not land enough to secure to each member of the Cherokee Nation 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees *pro rata.* In other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee reservation. The individual Delawares took their homes in and remaining in the Cherokee reservation, and as lands to be considered in any subsequent allotment in severalty among the members of the Cherokee Nation. All this was in the line of the expressed thought of a consolidation of these Delawares with and absorption of them into the Cherokee Nation as individual members thereof. If it be said that all of the Delaware trust funds were not turned into the national fund it will be remembered that there was no impropriety in the reservation of a part thereof in order to enable the Delawares to make such improvements as they might desire on the tracts that they selected for homes, and also that there was no certainty that all the members of the Delaware tribe would elect to remove to the Cherokee country, and that those who remained in Kansas were entitled to their share in the Delaware national funds.

With regard to the claim that the Delawares paid an inconsiderable sum, if it was the intent that they should share equally with the native Cherokees in this vast body of lands included in the reservation and outlet, it will be borne in mind that the alleged gross inadequacy depends largely upon the value of these thirteen millions of acres. Counsel for the Cherokees place this value at $1.25 per acre — the minimum price for government lands — and upon that valuation base

their claim of inadequacy of consideration. They point to the fact that the neutral lands in Kansas were estimated in the agreement to be worth $1.25 an acre, and infer therefrom that the lands in the Indian Territory were of like value. But that is a mere inference, and over against it may be placed such facts as these: On June 14, 1866, only about a year before this agreement, the Creeks, by treaty, sold to the government a tract in the Indian Territory estimated to contain 3,250,560 acres, at the price of 30 cents per acre. 14 Stat. 785, 786. The Seminoles, on March 21, 1866, likewise ceded a tract estimated at 2,169,080 acres, at the rate of 15 cents an acre, (14 Stat. 756,) and on April 28, 1866, the Chocktaws and Chickasaws ceded a large tract, also in the Territory, for the gross sum of $300,000 — a sum which, as counsel for the appellees stated, was only at the rate of about 5 cents an acre. 14 Stat. 769. The significance of these figures is not destroyed by the fact that in 1889 Congress appropriated a large sum for both the Creeks and Seminoles, to wit: to the Creeks the sum of $2,280,857.10, and to the Seminoles the sum of $1,912,942.02, 25 Stat. c. 317, 757, 758; c. 412, 980, 1004, apparently in further payment of these lands. For while this may tend to show that Congress then felt that the Creeks and Seminoles had not received a full price for their lands, it is not inconsistent with the claim that in 1866 the contracting parties considered the lands to be worth only the stipulated price. Further than that, in pursuance of the provisions of the fifth section of the act of May 29, 1872, c. 233, 17 Stat. 165, 190, an appraisement was made of the Cherokee lands west of the 96th meridian, which appraisement, approved by the President, fixed the value of a portion of such lands (230,014.04 acres) at 70 cents, and the balance (6,344,562.01 acres) at 47.49 cents per acre. It may well be that lands within the limits of a rapidly growing State were worth at the time of this agreement $1.25 per acre, while lands within the Indian Territory, situate as these were, were of much less value. Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of a dollar an acre, for by that purchase they acquired no title

in fee simple, and it is not unreasonable to believe that the price thus fixed was not merely as compensation for the value of the lands, (to be taken in the eastern portion of the reservation, where the body of the Cherokees had their homes, and therefore probably the most valuable portion of the entire reservation,) but also as sufficient compensation for an interest in the entire body of lands, that interest being like that of the native Cherokees limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and a right to share in any future allotment. At any rate, with the uncertainty that exists as to its value, it cannot be said to be clear that there was such gross inadequacy of consideration as is urged by the counsel for the Cherokees; certainly nothing which would justify a court of equity in setting aside the contract on the ground of inadequacy.

But further, the thought of sale — at least of an early sale — was evidently not in contemplation of the parties, or in line with the then policy of the government. This Indian Territory was looked upon as the permanent home of the Indians. The government was making the effort to bring within its limits all the Indians from all parts of the land, and it was not in the contemplation of the government, or of these contracting parties, that at any early day these lands would be thrown open to settlement and sale, but rather the idea was that they were to be continued as their permanent place of abode. Considered as such, so long as each individual Indian, whether Delaware or Cherokee, had his particular tract for occupancy as a home, it was not unnatural or unequal that the vast body of the lands not thus specifically and personally appropriated should be treated as the common property of the Nation, in respect to which all who were members thereof, whether by birth or adoption, should be entitled to equal rights and privileges. That there might come a time when an allotment in severalty would be advisable, was something that was contemplated and provided for. And while, if allotment had been made at the time among the 13,573 Cherokees there would have been enough land to have given each nearly 1000 acres,

yet, with the expected coming in of other tribes, either to take certain selected portions of the reservation as tribes by an absolute title, or to enlarge the numbers of the Cherokee Nation by adoption, (as in the case of these Delawares,) it was foreseen that the time might come when the allotment might not secure even 160 acres to each individual, and so was added the express guarantee that the purchasing Delawares should obtain at least that amount in the allotment. True, the course of events has not been what was then contemplated, but in order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations. In that light we see nothing in the matters suggested by counsel sufficient to overthrow the plain import of the language used in the agreement, and must conclude that by such agreement the Delawares became incorporated into the Cherokee Nation, became members thereof, and, as such, entitled equally with the native Cherokees to all their rights in the reservation and outlet.

Further, it may be remarked that the action of the Cherokee Nation up to the year 1882 was in the line of the construction we have placed upon this contract, for up to that date there was no distinction made between the native Cherokees and these Delawares in the distribution of funds from whatever source obtained. Out of the moneys received by the Cherokee Nation on account of lands west of the 96th degree set apart for the Osage Indians, under the act of June 5, 1872, $200,000 was distributed per capita, in which distribution the Delawares shared equally with the native Cherokees. And again, when, on account of sales west of the 96th degree, Congress on June 16, 1880, appropriated $300,000, such sum was also paid out per capita, the Delawares sharing equally with the native Cherokees. Such action is of significance in determining the understanding of the parties to the contract. It is a practical interpretation by the parties themselves of the contract they made. It is also worthy of note that when in 1883 a bill passed the National Council for the payment to the native Cherokees alone of a certain sum of money received as rental from the Cherokee Strip Live Stock Association, which

so far as appears was the first manifestation of a claim of a difference between the native Cherokees and the registered Delawares as to the extent of their interests in the lands or the proceeds thereof, it was vetoed by D. W. Bushyhead, the then Principal Chief of the Cherokee Nation, on the ground that such action was in violation of the agreement of 1867. It is true the bill was passed over his veto. While the veto message is too long to quote in full, these extracts sufficiently disclose the reasons on which it is based:

"3d. The 'patent' was made to the 'Cherokee Nation' in 1838, and the Cherokee Nation was then composed of citizens by right of blood, and so continued to be until the exigencies of the late war arose, when, in 1866, it became necessary to make a new treaty with the United States government. By this treaty, made by and with this Nation, other classes of persons were provided to be vested with all the rights of 'native Cherokees' upon specified conditions. These conditions have been fulfilled as regards the acknowledged colored citizens of this Nation and the so-called Delaware and Shawnee citizens. I refer you to article 9th of said treaty in regard to colored citizens, and article 15th, first clause, as regards Indians provided to be settled east of 96°. The language is, they shall have all the rights of native Cherokees 'and' they shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect with native Cherokees.

* * * * *

"6th. If the lands of the Nation were and are the common property of citizens, then no citizen can be deprived of his or her right and interest in the property without doing an injustice, and without a violation of the constitution which we are equally bound to observe and defend. While the lands remain common property, all citizens have an equal right to the use of it. When any of the land is sold under provisions of treaty, all citizens have an equal right to the proceeds of their joint property, whether divided *per capita* or invested.

"Senators, such is the treaty and such is the constitution. I have referred you to them, and stated their evident meaning in the premises 'to the best of my ability,' as is my duty. To

the classes of citizens this bill would exclude, attach 'all the rights and privileges of citizenship according to the constitution.' To three of these classes attach also all the rights of 'native Cherokees,' according to treaty."

Further comment on this case is unnecessary. We see no error in the conclusions of the Court of Claims, and its decree is

Affirmed.

CHEROKEE NATION *v.* BLACKFEATHER.

APPEAL FROM THE COURT OF CLAIMS.

No. 671. Argued and submitted October 18, 1894. — Decided November 19, 1894.

A stipulation on the part of the Cherokees in an agreement made by them with the Shawnees under authority of the act of October 1, 1890, c. 1249, 26 Stat. 636, that the Shawnees in consideration of certain payments by them, etc., "shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect and with all the privileges and immunities of native citizens of said Cherokee Nation," secured to the Shawnees equal rights with the Cherokees in that which was the common property of the Cherokee Nation, namely, the reservation and the outlet as well as all profits and proceeds thereof.

Without an appeal taken, a party will not be heard in an appellate court to question the correctness of the decree in the trial court.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dodge for the United States, submitted on his brief.

Mr. Charles A. Maxwell and *Mr. George S. Chase* for the Cherokee Nation, appellant, submitted on their brief.

Mr. Charles Brownell for Blackfeather, appellee.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is similar to that just decided in which the same parties were appellants, and Charles Journeycake, Principal

Chief, etc., defendant. The petition was filed under the authority of the same act of October 1, 1890, c. 1249, 26 Stat. 636, and to enforce the claim of the Shawnee Indians domiciled in the Cherokee Nation to an equal interest in the Cherokee reservation and outlet, and the proceeds and profits thereof.

In pursuance of article XV of the treaty of July 19, 1866, 14 Stat. 799, 803, an agreement was, on June 7, 1869, entered into between the Shawnees and the Cherokee Nation, through their representatives, the substantial portions of which are as follows:

"Whereas the Shawnee tribe of Indians are civilized and friendly with the Cherokees and adjacent tribes, and desire to settle within the Cherokee country on unoccupied lands east of 96°: It is, therefore, agreed by the parties hereto that such settlement may be made upon the following terms and conditions, viz.: That the sum of five thousand dollars belonging to the Shawnee tribe of Indians and arising under the provisions of treaties between the United States and the said Shawnee Indians as follows, viz., for permanent annuity for educational purposes, per fourth article of treaty 3d of August, 1795, and third article treaty 10th of May, 1854, one thousand dollars; for interest at five per cent on forty thousand dollars for educational purposes, per third article of treaty 10th of May, 1854, two thousand dollars; for permanent annuity in specie for educational purposes, per fourth article of treaty 29th of September, 1817, and third article 10th of May, 1854, two thousand dollars, shall be paid annually to the Cherokee Nation of said Indians, and that the annuities and interests as recited and the investment or investments upon which the same are based shall hereafter become and remain the annuities and interest and investment or investments of the Cherokee Nation of Indians, the same as they have been the annuities and interest and investments of the Shawnee tribe of Indians. And that the sum of fifty thousand dollars shall be paid to the said Cherokees as soon as the same shall be received by the United States for the said Shawnees from the sales of the lands in the State of Kansas known as the absentee Shawnee lands in accordance with the resolution of Congress approved

April 7, 1869, entitled 'A resolution for the relief of settlers upon the absentee Shawnee lands in Kansas,' and the provisions of the treaty between the United States and the Shawnee Indians concluded May 10, 1854, and also that the said Shawnees shall abandon their tribal organizations.

"And it is further agreed by the parties hereto that in consideration of the said payments and acts agreed upon as hereinbefore stated that the said Cherokees will receive the said Shawnees — referring to those now in Kansas and also to such as properly belong to said tribe who may be at present elsewhere and including those known as the absentee Shawnees now residing in the Indian Territory — into the country of the said Cherokees upon unoccupied lands east of 96°, and that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect and with all the privileges and immunities of native citizens of said Cherokee Nation: *Provided*, That all of the said Shawnees who shall elect to avail themselves of the provisions of this agreement shall register their names and permanently locate in the Cherokee country, as herein provided, within two years from the date hereof; otherwise they shall forfeit all rights under this agreement."

The rights of the petitioners are to be determined by this agreement in the light of article XV of the treaty. The principal difference between this contract and that made between the Cherokees and the Delawares consists in the fact that in this there is no provision for the purchase of "homes" or any payment of moneys on account thereof into the national fund of the Cherokees; but, nevertheless, there is the express stipulation "that the said Shawnees shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation."

For the reasons stated in the opinion in the former case it must be held that this stipulation secured to the Shawnees equal rights with the native Cherokees in that which was the common property of the Cherokee Nation, to wit, the reservation and the outlet, as well as all profits and proceeds thereof.

So far, therefore, as the appellants are concerned, there was no error in the decree.

There is an application by the appellee for a modification of the decree increasing the sums awarded per capita to the Shawnees. It is enough to say in reference to this application that no appeal was taken by the appellee. Without an appeal, a party will not be heard in an appellate court to question the correctness of the decree of the trial court. *The Stephen Morgan*, 94 U. S. 599.

The decree of the Court of Claims is

Affirmed.

DELAND *v.* PLATTE COUNTY.

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

No. 82. Submitted November 13, 1894. — Decided December 3, 1894.

Final judgments of Circuit Courts of the United States in actions of assumpsit can only be revised in this court on writ of error.

THE case is stated in the opinion.

Mr. George A. Sanders for appellant.

No appearance for appellee.

THE CHIEF JUSTICE: This was an action of assumpsit brought by F. N. Deland against the county of Platte to recover on certain bonds and coupons in the petition set forth. The case was submitted to the court for trial, a jury having been waived by agreement of the parties. The court made findings of fact and gave an opinion, which concluded thus: "On the facts of this case I declare the law to be that the plaintiff cannot recover."

November 5, 1890, judgment was entered for the defendant, preceded by the recital of a general finding in its favor. Motion for new trial was made and overruled, and defendant

moved "for appeal, which motion was by the court sustained and appeal allowed," and plaintiff was granted time for bill of exceptions. The record then states that plaintiff presented "his bond for appeal . . . which bond was approved by the clerk and filed in said cause," but the bond is not set out. Then follows an assignment of errors and bill of exceptions. No writ of error was issued or citation signed, and no appearance has been entered for the county of Platte. The record was filed in this court February 2, 1891.

In many jurisdictions an appeal from a court of general jurisdiction is in the nature of a writ of error, but that is not so in respect of the Circuit Courts of the United States, as to which the distinction between the two modes of review has generally, if not always, been observed in the acts of Congress.

Whatever the course pursued in the courts of the State of Missouri under the statutes of that State in relation to the allowance of appeals, the appellate jurisdiction of this court is regulated by the acts of Congress, and final judgments of the Circuit Court in cases such as this can only be revised on writ of error. *Appeal dismissed.*

LLOYD *v.* MATTHEWS.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 81. Argued and submitted November 19, 1894. — Decided December 3, 1894.

In this court, acting under its appellate jurisdiction, whatever was matter of fact in a state court, whose judgment or decree is under review, is matter of fact here.

Whenever a court of one State is required to ascertain what effect a public act of another State has in that other State, the law must be proved as a fact.

When in the courts of a State the validity of a statute of another State is not drawn in question, but only its construction, no Federal question arises.

The decision by the highest court of the State of Kentucky that the laws of the State of Ohio permit an insolvent debtor to prefer a creditor, which was made in a case in which the assignee of the insolvent, a party to the suit contesting the preference, failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed

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books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority thereof, or a certified copy thereof, raises no Federal question.

HATTIE A. MATTHEWS held the demand note of E. L. Harper for $5000, on which the interest had been paid to January 1, 1882. June 21, 1887, Harper was the owner of some shares of stock in the Fidelity Building, Savings and Loan Company of Newport, Kentucky, worth about $5000, which he, being insolvent, transferred on the morning of that day to Miss Matthews in part payment of the debt, by blank indorsement in the building company's book. Afterward the name of J. H. Otten was inserted as a proper person to obtain the money, and for this reason he was made a party to these proceedings, though having no real interest therein. A few hours after the transfer, Harper made an assignment of all his property for the benefit of his creditors under the insolvent laws of Ohio, and, the person named as assignee failing to qualify, H. P. Lloyd, the present plaintiff in error, was appointed, by the proper court, such assignee. Certain creditors of Harper brought suit in the chancery court of Campbell County, Kentucky, on their several debts and attached the stock as the property of Harper. These cases were consolidated, and while they were pending, September 16, 1887, Miss Matthews and Otten filed their joint petition to be made parties defendant, which was done. They alleged the ownership by Harper of the stock; the transfer by indorsement in the book, which was made an exhibit; that Miss Matthews was a creditor of Harper to an amount equal to the face value of the stock; that the transfer of the stock was made some hours before the execution of the deed of assignment by Harper; and was *bona fide* and for a valuable consideration, and passed all Harper's interest; that Harper was a citizen and resident of the State of Ohio at the time of the assignment and theretofore; that "by the laws in existence at that time in said State of Ohio, debtors had the right to make preferences in the payment of their creditors either in the deed of assignment or by paying them therefor in such a way as they saw proper;" that

Lloyd had been made a party as assignee, and was claiming the stock as part of Harper's estate, while the plaintiffs in the consolidated cases asserted their claims under the attachments; and praying that the stock be adjudged to Miss Matthews. January 14, 1888, Miss Matthews and Otten filed a joint amended answer, attaching the note as an exhibit, and making this and their former petition a cross-petition. On the same day Lloyd, assignee, filed a reply to the answer and an answer to the cross-petition. This pleading contained five paragraphs. The first denied that Harper owed Miss Matthews anything at the time the stock was assigned; admitted that at the time of the execution of the assignment Harper and Miss Matthews were both citizens and residents of the State of Ohio; denied "that at the time of making said assignment debtors had by the laws of the State of Ohio the right to prefer their creditors in the deed of assignment." The second paragraph asserted that the transfer and conveyance of the stock to Otten by Harper was made for the purpose and with the intent to defraud the creditors of Harper of their just and lawful debts, and that such transfer and assignment was fraudulent and void under and by virtue of section 4196 of the Revised Statutes of the State of Ohio, which provided as follows, to wit:

"Every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons purchasing such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect."

The third paragraph denied any consideration for the transfer. The fourth alleged the transfer to be fraudulent and done with intent to hinder and delay Harper's creditors. The fifth averred that the transfer was made by Harper with the intent to prefer Miss Matthews, if she was a creditor, which defendant denied, over his other creditors, and was void under section 6343 of the Revised Statutes of the State of Ohio, which read as follows:

Counsel for Parties.

"All assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

On May 18, 1888, Miss Matthews filed reply to the original answer and cross-petition of Lloyd, trustee, as follows:

"The defendant Hattie A. Matthews for reply to answer and cross-petition of H. P. Lloyd says she admits E. L. Harper was insolvent when he assigned the building association stock to her.

"She admits that he assigned the stock to her with the intention to prefer her to the exclusion of the creditors, but, as was stated in her original pleadings, this was allowable under the laws of Ohio.

"She denies that under the provisions of the laws which are set out in said pleading of Lloyd, to which this is a reply, that there is anything which invalidates the transfer of the stock to this defendant, the same involved in the case.

"Wherefore the defendant prays as in her original pleadings and for general relief."

The chancery court rendered judgment in favor of Lloyd, trustee, for the full value of the stock, amounting as a money demand against the building association to the sum of $4914.89, and Miss Matthews and Otten appealed to the Court of Appeals of the State of Kentucky, which reversed the judgment of the chancery court and remanded the cause, with directions to render judgment in favor of Miss Matthews in conformity to the opinion. *Matthews* v. *Lloyd*, 89 Kentucky, 625.

To review this judgment a writ of error from this court was allowed.

Mr. H. P. Lloyd, (with whom was *Mr. C. L. Raison, Jr.*, on the brief,) for plaintiff in error.

Mr. Charles J. Helm, *Mr. Charles H. Fisk*, and *Mr. John S. Ducker* for defendants in error, submitted on their brief.

Opinion of the Court.

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

The Federal question upon which plaintiff relies to sustain our jurisdiction is that under the statutory law of Ohio, set out in his pleading, the transfer of the stock in question was void, and that the Court of Appeals of Kentucky in rendering judgment did not give that full faith and credit to the public acts, records, and judicial proceedings of the state of Ohio which the Constitution and the law of the United States require. Const. Art IV, § 1; Rev. Stat. § 905.

The first error assigned is as follows: "The Court of Appeals of Kentucky erred in the decision rendered in this case below, in failing to give full faith and credit to the laws of the State of Ohio which were presented in the pleadings; in failing to give full faith and credit to the judicial construction of such laws by the highest court of said State; and in failing to give full faith and credit to the judicial proceedings of the probate court of Hamilton County, Ohio, as set forth in the pleadings."

We do not find that the record contains any judicial proceedings of the probate court of Hamilton County, Ohio, but suppose the reference to be to proceedings in insolvency upon the filing of the deed of assignment by Harper, under which Lloyd, trustee, claims, and that such insolvency proceedings could have no greater effect on the question of title than allowed by the laws of Ohio in the matter of the preference of creditors.

The Court of Appeals of Kentucky held that, as the parties all resided in Ohio, and the entire transaction occurred there, its validity was to be tested by the law in force there; that at common law a debtor had a right to prefer a creditor, either by payment or an express preference in a deed of assignment; that he had a right to pay his debt, and it was only by virtue of statutory law that such a payment could be held invalid and the creditor be compelled to surrender his advantage; that, in the absence of any showing of the existence of such a statute in another State, it must be presumed that the common law was in force there; that section

6343 of the Revised Statutes of Ohio, set out in the pleadings, did not appear "to embrace a case like this one, but to relate alone to preferences made in deeds of assignment to trustees for creditors generally;" that this transfer could not properly be held to be a part of the deed of assignment; and that, tested by the rules of the common law, the preference was not invalid.

Now, in arriving at these conclusions, the Court of Appeals did not concur with the views of Harper's assignee, but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of that State? The courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several States, but in the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact there. And whenever a court of one State is required to ascertain what effect a public act of another State has in that State, the law of such other State must be proved as a fact. *Chicago & Alton Railroad* v. *Wiggins Ferry Company*, 119 U. S. 615; *Hanley* v. *Donoghue*, 116 U. S. 1.

The Court of Appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that State by the parol evidence of persons learned in that law, or to put in evidence the laws of that State as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky. Gen. Stats. Ky. 1888, c. 37, §§ 17, 19, pp. 546, 547.

The Court of Appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that, under such circumstances, where the validity of a state law is not drawn in question, but merely its construction, no Federal question arises. As was remarked in *Glenn* v. *Garth*, 147 U. S. 360, 368: "If every time the courts of a State put a construction upon the statutes of

another State, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." *Grand Gulf Railroad* v. *Marshall*, 12 How. 165; *Cook County* v. *Calumet Canal & Dock Co.*, 138 U. S. 635.

This record contains nothing to show, as matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the Court of Appeals of Kentucky.

Writ of error dismissed.

MR. JUSTICE HARLAN was of opinion that the writ of error should be retained and the judgment affirmed.

ORIGET *v.* HEDDEN.

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

No. 19. Argued October 10, 11, 1894. — Decided December 3, 1894.

The remedy of an importer on a question of valuation is to call for a reappraisement; though, if his contention be that a jurisdictional question exists, he may make his protest, pointing out the defect, and stand upon it as the ground of refusal to pay the increased duty.

What an importer's agent says to an assistant appraiser, or conversations had subsequently to the appraisement, are not competent evidence in an action like this.

The court below properly excluded a question propounded to the merchant appraiser as to whether or not he and the general appraiser did not agree to apply the valuation of one case in each invoice to the entire importation of which it was a part; and also the question whether or not those goods in the several cases were all of the same character as to value.

Reappraisers may avail themselves of clerical assistance to average appraisements given by different experts, when it appears that it was for their guidance only.

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Under the plaintiff's protest the question is not open that Rev. Stat. § 2900 is unconstitutional in its provisions for fixing or authorizing 20 per cent additional duty; but that question has been disposed of on its merits in *Passavant* v. *United States*, 148 U. S. 214.

If an importer is afforded such notice of a reappraisement and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain, even though he be not allowed to be present throughout the proceedings on the reappraisement, or to hear and examine all the testimony, or to cross-examine the witnesses.

It appeared in this case that the merchant appraiser examined the goods sufficiently to satisfy him that they were the same order of goods that his firm imported. *Held*, that this established the familiarity required by the statute, and placed his qualifications as an expert beyond reasonable doubt.

An importer whose goods, in several packages, are sent by the collector to the public store and are there examined, cannot take advantage of the fact that the appraisers in making up their opinion did not examine every case, unless it also appears that they were directed by the collector to make such examination of all, and failed to do so.

This was an action seasonably brought by Arthur Origet against Edward L. Hedden, then collector of the port of New York, in the Circuit Court of the United States for the Southern District of New York, to recover an alleged excess of duty exacted by the collector upon goods imported by plaintiff on February 8, 9, 17, and 23, 1886, (the last two importations being by steamships Oregon and Chicago, respectively,) and paid under protest.

The invoice and entered value of each of the four importations were raised by the appraisers to an amount exceeding ten per cent thereof, and the collector liquidated and exacted duty upon the value so increased and the additional duty of twenty per cent thereon mentioned in section 2900 of the Revised Statutes.

Upon the two entries of the eighth and ninth of February, plaintiff did not call for any reappraisement, but protested against the assessment of duty upon any values higher than those declared on the entry, the protest stating that "said valuations are correct, and that said goods are liable to no more duty than would accrue upon said valuations, and that the additional values were not legally ascertained; that the appraiser made no proper or legal examination or appraise-

ment of said goods; that he arbitrarily added to the values upon an arbitrary and assumed basis of the cost thereof; that in so doing he acted under instructions from special agents of the Treasury and not upon his own knowledge or judgment, and we specially protest against the additional duty of 20%, claiming for the reasons aforesaid that it did not accrue and said goods are not dutiable as charged."

On the trial plaintiff's New York manager testified that he saw Brown, the assistant appraiser, regarding the appraisal of these importations, and was then asked: "State whether or not you said anything to Mr. Brown (and, if so, what) as to the production of evidence as to the value of these goods?" The question was objected to on the ground that the importer's remedy was to call for a reappraisement. The court thereupon excluded the question and plaintiff excepted. The witness then testified that he had conversed with the collector as to a reappraisal, or a call for a reappraisal, of these first two entries, and was asked what the conversation was. To this the defendant objected, because it was not claimed in the protest that any reappraisal was called for and refused. The question was excluded and plaintiff excepted.

The record thus proceeded: "Upon the two later importations, of February 17th and 23d, per the Oregon and the City of Chicago, reappraisements were called for and had. The Oregon importation consisted of four cases, and the other of three cases, all of which (both importations) were by the collector ordered to the public store, and were there at the time of the reappraisements."

The merchant appraiser was then called as a witness by plaintiff, and testified: "I did not examine one case. I merely looked over the goods. Q. You did not examine any case? A. Not specially; not to appraise it." But he explained on cross-examination that he examined the goods in one case out of each importation sufficiently to satisfy himself that the goods were of the same order as those imported by the firm of which he was a member; that the average of the different valuations of the witnesses was made up in his office by another person at his direction; "that the report of the

appraisal was based upon that computation and the witnesses' reports;" and that the general appraiser sat with the witness "in the reappraisal, in the writing up of the reappraisal."

The following question was then propounded by plaintiff's counsel: "What I ask you is, Mr. Brower being the general appraiser and sitting with you on the reappraisal, was there or not any agreement (and, if any, what?) as to the application of the valuation of one case on each invoice to the entire importation?" This was objected to, the question excluded, and plaintiff excepted.

The witness also testified that the general appraiser in examining the goods "simply passed and looked at them to see that they were woollens — he was not competent to judge of their value — to see that they corresponded with the invoices." He further said that the general appraiser generally went with him in examining the goods, but what he did when witness was not present he did not know; that after the computations were made, the general appraiser and himself had a joint session, in which they made up their reports.

Plaintiff's manager was asked in reference to the goods reappraised: "State whether or not those goods in the several cases were all of the same character as to value?" The witness testified to the presence of a Treasury agent at the reappraisement, and was asked: "Did you hear any of the questions put to the witness?" The witness was also asked if the Treasury agent did not himself put questions to him on that examination. These questions were severally objected to as immaterial and were excluded by the court, and plaintiff excepted, but only the exception to the first was argued.

When the reappraisement was about to take place, plaintiff's counsel, Mr. Clarke, was present and made application to the appraisers "to be present to examine the schedules of the different witnesses, to ask them questions, or to suggest questions to you to be asked them, and hear and know the testimony which you have or may receive," and, if this request be denied, that plaintiff and his associate in business "be present when the witnesses are examined in the case of Origet, and that one of them be allowed to see the schedules of the witnesses."

To which the general and merchant appraisers responded that they denied the application of the attorney to be present, but desired to hear the importers in regard to their reappraisements, and that they would be glad to have any suggestions that they might have to make as to asking questions of witnesses.

The record then gives the following statement by the general appraiser: "Mr. Clarke further asks that they may be permitted to examine the various affidavits made by the experts, importers, merchants, and others, and also to be present at the taking of any testimony herein, and to cross-examine all such witnesses as may be produced here on this reappraisement, or to suggest questions to the general appraiser.

"The general appraiser and the merchant appraiser say, in regard to that, they cannot permit the importers to be present during the taking of the testimony or the examination of the affidavits, but they will be glad to receive suggestions from the importers in asking any questions of any and all who may be called."

The request was then renewed so that plaintiff might "be enabled to suggest questions," and disposed of by the same ruling.

Plaintiff protested against the assessment and exaction of duties upon the values ascertained by the reappraisements upon the grounds: That the goods were "liable to no greater amount of duty than that accruing upon the invoice or entered value thereof;" that the appraiser's return "was made contrary to law and without legal or proper examination of the goods;" that plaintiff "was entitled to a reappraisement of said goods, according to law, by a general and merchant appraiser, and made due demand therefor;" that "notwithstanding said demand for reappraisement, no legal reappraisement of said merchandise was ever had;" that the so called reappraisement "was illegally conducted and was not a valid reappraisement, according to which duties might be assessed, in this, that the general appraiser, George V. Brower, did not act upon his knowledge or judgment of the goods, but permitted his judgment and return of value to be controlled and

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dictated by special agents of the Treasury; that he did not personally examine and appraise the merchandise," nor did the merchant appraiser; that the general appraiser refused to allow plaintiff to be represented by counsel or allow counsel to be present to examine the schedules of the different witnesses, to ask them questions, or to suggest questions to be asked, or to hear or know the testimony received; that the appraiser refused to allow plaintiff and his associate to be present at the examination of witnesses, or to see the schedules; that the general appraiser permitted special agents of the Treasury and business rivals to attend; that after the proceedings on the first day the general appraiser called other witnesses and parties to estimate the value of the goods without giving plaintiff notice; that in arriving at the valuation returned, the appraisers took the average of the valuations of the witnesses without regard to their competency or knowledge of the goods; that "witnesses were permitted to return schedules of the value of all the goods without an examination thereof by them;" that such schedules were considered by the merchant and general appraiser; and some other particulars.

Testimony was given as to the difference between the duties upon the goods as entered and the duties exacted.

The foregoing was all the evidence adduced in the case, the defendant offering no testimony.

The case was tried before Lacombe, J., and a jury. A verdict was directed in favor of the collector, and plaintiff brought error to the judgment rendered thereon.

The following are sections of the Revised Statutes particularly referred to:

"SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number, should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and

they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

"SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined."

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

1. Certain rulings of the court in respect of the exclusion of evidence are complained of, but we fail to discover any error therein.

In reference to the first two importations, plaintiff's manager was asked what he said to the assistant appraiser as to the production of evidence of the value of the goods, and what

the conversation was which he had with the collector about a reappraisal or a call for a reappraisal. The objections of the district attorney were that the importer's remedy for any defect or informality was to call for a reappraisement, and that the protest was insufficient. Undoubtedly the remedy of the importer on the question of valuation simply is to call for a reappraisement, though if his contention is that a jurisdictional defect exists, he can make his protest, pointing out the defect, and stand upon it as the ground of refusal to pay the increased duty. It was not claimed in the protest that any reappraisal was called for and refused. It does not seem to us that what plaintiff's agent said to an assistant appraiser, or conversations had subsequently to the appraisement, could be competent, and, even if this might be so, there is no explanation in the record as to what evidence plaintiff sought to elicit. No offer of proof was made, nor did the questions clearly admit of an answer favorable to plaintiff on a matter manifestly relevant to the issue. *Buckstaff* v. *Russell*, 151 U. S. 626, 636. No reason was given for the exclusion of the questions, and as it does not appear that plaintiff was deprived of any right by that exclusion, we cannot hold that error was committed.

The court excluded a question propounded to the merchant appraiser as to whether or not he and the general appraiser did not agree to apply the valuation of one case in each invoice to the entire importation of which it was a part. This was correct. If it were obligatory to open and examine all the cases, the evidence was immaterial, for it was conceded that all were not opened and examined. If the examination of one case in each invoice was sufficient, then the application of the valuation of that case to the entire importation of which it formed a part was proper.

The question "whether or not those goods in the several cases were all of the same character as to value," was also excluded. As the question covered both the importations, and the appraisers examined one case of each, it was immaterial. If there was a difference between the goods in the different cases of either importation, it is singular that the invoices are

not set forth in the record. The inference is a reasonable one that they showed the goods in each importation to be of the same character and value, so that the examination of one case would be sufficient for all. There is nothing to indicate the contrary.

Some objection is made because the reappraisers availed themselves of clerical assistance to average the appraisements given by the different expert witnesses who appeared before them, but the merchant appraiser testified "it was for guidance simply. The report of the appraiser, signed by the witness, was based upon that computation and the witnesses' reports." No exception seems to have been taken in reference to this matter, probably for want of legal basis.

2. Plaintiff made the point in the argument upon defendant's motion to have a verdict directed in his favor, that section 2900 of the Revised Statutes "was unconstitutional in its provisions for fixing or authorizing a twenty per cent additional duty." The court expressed the opinion that this point was not open under plaintiff's protest, and this would seem to be so, but the question has been disposed of on its merits in *Passavant* v. *United States*, 148 U. S. 214.

3. The contention that the importer has the right to be present throughout the proceedings on the reappraisement; hear or examine all the testimony; and cross-examine the witnesses, which was passed on in *Auffmordt* v. *Hedden*, 137 U. S. 310, is renewed in this case.

The importer appeared at the opening of the reappraisal and made application that he or his associate, or his counsel, might examine the various affidavits made by experts, importers, merchants and others; be present at the taking of any testimony, and cross-examine all witnesses produced, or suggest questions to the general appraiser. The appraisers ruled that they could not accede to this request, but expressed their desire to hear the importers in regard to their reappraisements, and their assurance of appreciation of any suggestions the importers might make as to asking questions of the witnesses. The presumption in favor of official action sustains this ruling as being in accordance with the rules and regula-

tions established by the Secretary of the Treasury, under section 2949 of the Revised Statutes, to secure a just, faithful and impartial appraisal of all merchandise imported into the United States, and just and proper entries of the actual market value or wholesale price thereof; and this was indeed the fact, as appears by reference to the general regulations of 1884 and instructions of June 9, 1885, given at length in *Auffmordt* v. *Hedden.*

The following quotation from the instructions of 1885 will suffice to explain the reasons for the rule: "The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the reappraising board are the same as those of the original appraisers. They are themselves to appraise the goods, and not to depend for their information upon the appraisement of so-called experts in the line of goods in question. . . . Appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses or their cross-examination by importers or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in determining market values are deterred from appearing or testifying by the publicity given to reappraisement proceedings."

As already stated, plaintiff in the case at bar was invited by the appraisers to present his views in regard to the reappraisement and to suggest questions to be put to the witnesses. He did not avail himself of the opportunity, but insisted on the right to remain throughout the proceedings, to be informed

as to all the evidence, and to cross-examine the witnesses as in open court. This, according to *Auffmordt* v. *Hedden*, and *Passavant* v. *United States*, could not be conceded. In those cases it was ruled that under the revenue system of the United States the question of the dutiable value of imported articles is not to be tried before the appraisers, as if it were an issue in a suit in a judicial proceeding; that such is not the intention of the statutes; that the practice has been to the contrary from the earliest history of the government, and that the provisions of the statute in this behalf are open to no constitutional objection.

As respects taxation and assessment for local improvements, such notice and hearing as are appropriate to the nature of the case and afford the opportunity to assert objections to the methods pursued or to the amount charged, are deemed sufficient for the protection of the individual. *Lent* v. *Tillson*, 140 U. S. 316, 327.

Duties imposed under tariff laws are paid in order that goods may be brought into the country, and provisions in respect of their levy and collection are framed in view of the character of the transaction. The finality of the appraisal is a condition attending the importation prescribed by the government as essential to the operation of the system, and if the importer is afforded such notice and hearing as enables him to give his views and make his contention in respect of the value of his goods, he cannot complain.

4. It is further claimed that the examination of the goods was not such as to qualify the merchant appraiser to act, that is, that he did not examine with sufficient care the cases of goods which he did examine. It is not denied that he was "a discreet and experienced merchant," but that he was "familiar with the character and value of the goods in question," as prescribed by section 2930, appears to be questioned on the ground of carelessness in investigation. His testimony-in-chief was not happily expressed; yet, on cross-examination, it clearly and distinctly appeared that he examined the goods in one case out of each importation sufficiently to satisfy him that they were the same order of goods that his firm imported. This

established the familiarity required by the statute, and placed his qualifications as an expert beyond reasonable doubt. We agree with the Circuit Court that the verdict of a jury, controlled by the theory that such an expert was not qualified for appraising the goods, could not have been sustained.

5. The stress of the argument is laid, however, upon the proposition that all the seven packages were not examined. The argument is that the collector deemed it necessary under section 2939 that all the cases should be examined, and, therefore, directed them all to be sent to the public store "for examination and appraisement;" that it thus became the imperative duty of the appraisers to examine every one of the cases; and that as they examined but one out of each invoice, or only two out of the seven, there was a want of examination fatal to the appraisement. On behalf of the government it is argued that sections 2901 and 2939 were intended for the benefit of the government and not of the importer; but although that was the primary intention, we are not inclined to deny that it might happen where the collector had given specific direction for the examination of more than one package out of ten, and the importer had relied on the direction, the omission to examine the number of packages directed might under some circumstances be availed of by him as constituting a want of the examination to which he was entitled. We can suppose a case in which the importer might truthfully contend that he did not request the more extensive examination because of the direction, and did not demand the full execution of the direction because of the rightful assumption on his part that it would be so executed, and his ignorance that it was not. The objection would be exceedingly technical where there was nothing to indicate that any injury could have ensued, as where there was no reasonable basis for the claim that one package differed in intrinsic value from another; but giving it the full force insisted on, it is clear enough that a case in which it would be applicable could not arise unless it appeared that the collector had given such direction. And in that particular this record is deficient. What the record shows is that the seven cases "were by the collector ordered to the public

store, and that they were there at the time of the reappraisements;" but it does not affirmatively show that the collector deemed it necessary that all the cases should be examined, while, as a matter of convenience, by having all sent there, (and there were but seven,) the general appraiser and the merchant appraiser could open and examine each case if either of them deemed it necessary, or if the importer desired them to do so, or informed them that the packages differed in value. The collector could have directed all the cases to be opened and examined, or either of the appraisers could have done it; but it would be going an inadmissible length to hold that the mere fact that the cases were sent to the public store necessarily amounted to a specific direction by the collector that all should be examined, and if all were not, (although the appraisers did not deem it necessary and no demand by the importer to have them all sent there for that purpose was shown,) that jurisdiction failed and the reappraisement was illegal. We are of opinion that the Circuit Court rightly directed a verdict for the defendant.

Judgment affirmed.

MUSER *v.* MAGONE.

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

No. 37. Argued October 25, 1894. — Decided December 3, 1894.

The valuation of imported merchandise by designated officials is conclusive in the absence of fraud, when the official has power to make it.

In case of disagreement between the general appraiser and the merchant appraiser in regard to the true market value of imported goods, the decision of the collector is final and fixes the valuation.

In this case the appraisers evidently considered that the market value of the goods could be satisfactorily ascertained by the method which they pursued, and their determination, in the absence of fraud cannot be impeached by requiring them to disclose the reasons which impelled their conclusions, or proving remarks made by them.

The dutiable market value of goods is to be determined by their general market value, without regard to special advantages which the importer may enjoy; and in ascertaining that value, it is proper in some instances

to consider the cost of production, including such items of expense as designs, salary of buyer, clerk hire, rent, interest, and percentage on aggregate cost of the business.

This was an action brought by Frederick W. Muser, Richard Muser, and Curt Muser, composing the firm of Muser Brothers, against the collector of the port of New York, to recover duties alleged to have been illegally exacted of them on certain importations of cotton embroideries, manufactured at St. Gall, Switzerland, where they had a branch house. Their course of business there was as follows: The cloth on which the embroideries were stitched was purchased in the gray state by plaintiffs at Manchester, and received in their warehouse in St. Gall. It was then sent out to various parties at St. Gall who had stitching machines, and stitched the goods according to patterns or designs furnished by plaintiffs, which designs had either been purchased by them in Paris or made in their St. Gall establishment by designers employed by them. The goods when stitched were returned to the warehouse, and having been examined by plaintiffs' employés to see if they were properly done, were sent out again to a bleacher to be bleached. When bleached, they were brought back, reëxamined, cut into strips of suitable size for the American market, ticketed, boxed, and shipped. To carry on this business in St. Gall, plaintiffs rented a building, employed a staff of assistants, paid insurance, and kept a certain amount of capital invested.

Finished embroideries were not kept in stock for sale at St. Gall in 1887, the date of these importations. The goods were usually ordered from samples submitted by the manufacturers or by so-called commissionaires. The commissionaires, as a rule, submitted samples to the purchasers, bought the cloth, and turned it over to the manufacturer to make up. Their charge for their own services, according to plaintiffs, was three per cent besides all expenses. According to other testimony, the commissionaire would require an advance of the necessary capital to do the trade with, and also all the cash discounts, amounting to another three per cent. If he were asked to employ his own capital and make his own

designs, his charge would vary; it might be less than ten per cent, or it might be more, but ten per cent would not be any more than a fair profit. It was within the knowledge of one of the merchant appraisers that one of the largest manufacturers in St. Gall was coming to New York to do business for ten per cent profit.

Plaintiffs' goods were invoiced at their actual gross cost, omitting any cash discount; any charge for designing; any interest and risk on capital; any allowance for salaries or other office expenses at St. Gall. They added three per cent to the invoice price "to make market value," but they claimed upon the trial that this addition was not voluntary, but was made to avoid the advance of duty provided by statute in cases where the appraised value exceeds the entered value by ten per cent. This three per cent was not more than enough to cover the expense of designing alone, and interest and risk on capital was sometimes itself rated at eight per cent.

It appeared that for many years prior to 1887, St. Gall embroideries had been appraised in the same way as in that year, but, the question of undervaluation being raised, they had been advanced from ten to forty per cent. In the fall of 1885, the Treasury Department appointed a commission to investigate the matter, which met at the public stores in New York city. Merchants interested in the cotton embroidery trade also had a meeting, arrived at certain recommendations, and appointed a committee to present them to the commission and see them carried out. A member of Muser Brothers was one of this committee. The conviction was expressed in the resolutions of the meeting that the counting of the stitches was "the only proper way for arriving at a correct valuation of cotton embroideries, Oriental and Egyptian laces;" and "that it be recommended that the appraiser, in appraising cotton embroideries, Oriental and Egyptian laces, should appraise them by counting the stitches and valuing them at the rate at which they are quoted by the U. S. consul on the day of shipment, adding to this the cost of the cloth, and adding to this ten per cent, to be called manufacturer's profit, then the cost of bleaching, finishing,

and putting up." Subsequently, and after conference with the general appraiser and the commission, the committee agreed that the ten per cent should "be added to the cost of the goods in a finished condition, including the cost of the bleaching, finishing, and putting up." It was also recommended that "the minimum rates for stitching adopted by the manufacturers' union at St. Gall should be the basis of the appraisement, but if the price of the stitching should be advanced, the invoice should be in accordance therewith." One of the plaintiffs signed the committee's communication to the commission and the subsequent agreement, but on the same day sent to the commission a written protest stating that he doubted the authority for the exaction of the ten per cent on the cost of the price for cloth and stitching, but had no doubt at all as to the illegality of the exaction on the charges incurred for bleaching and finishing.

As to one of the importations in question here, an advance of seven per cent was made by direction of the merchant appraiser, but the reason therefor did not appear, and no reappraisement was called for or had. As to the other importations, the appraiser raised the entered value about nine per cent. The plaintiffs demanded a reappraisement, upon which the merchant appraiser in one case approved the entry; in the other cases the merchant appraisers recommended an advance of six per cent; the general appraiser made the advance about ten per cent; and the collector decided in favor of the general appraiser.

Plaintiffs protested "against the standard of value adopted by the appraising officers and of their appraised value as returned by them and approved by" the collector, upon various grounds, in substance, because the standard dutiable value of the merchandise established by the collector included, "besides the actual market value or wholesale price, commissions and charges non-dutiable under section 7, act of March 3, 1883, c. 121, 22 Stat. 488, 523;" because the goods should have been appraised at their actual market value or wholesale price in the gray, adding to such value the cost for laundrying and finishing them, and no more, as provided by section 2906 of the Revised Statutes and section 7 of the act of March 3, 1883, whereas

there had been illegally included "a further amount to cover the incidental charges incurred in the purchase and preparation of said goods for shipment, such charges or incidental expenses being for designs furnished the manufacturer, salary of the buyer, and clerk hire, rent of buyer's office, and rooms for putting up and packing for shipment, interest on money credits for the purchase of the goods and for a profit or commission in excess of such aggregate cost, or one or more of such charges," which charges or items of costs were non-dutiable under section 7; because the goods were dutiable "at no more than the cost or value of the materials composing such merchandise, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment as provided in section 9, act March 3, 1883;" "that the standard marketable condition of embroideries is in the gray; that the wholesale current market prices for regular goods bought in the regular manner is usually quoted in the gray, according to the number of stitches contained in a given pattern; such price plus the market value of the muslin upon which the stitching is done constitutes their marketable value in their wholesale marketable condition; to this value is to be added the expenses for laundrying and finishing, to make dutiable value under existing laws, and no more."

By section 2902 of the Revised Statutes, it was made the duty of the appraisers of the United States, . . . by all reasonable ways and means, . . . to ascertain, estimate, and appraise the true and actual market value and wholesale price . . . of imported merchandise, at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States; and, by section 2904, the day of actual shipment is made the day as of which the duty is to be estimated.

Section 2906 provided:

"When an ad valorem rate of duty is imposed on any imported merchandise, or when the duty imposed shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such merchandise, the collector . . . shall cause the

actual market value, or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed."

By section 2907, in determining the dutiable value, there was to be added to the market value "the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of . . . manufacture . . . to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and a half per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment. All charges of a general character incurred in the purchase of a general invoice shall be distributed *pro rata* among all parts of such invoice."

Section 2908 provided that all additions made to the entered value of merchandise for charges should be regarded as part of the actual value of such merchandise, and if such addition exceeded by ten per cent the value declared, in addition to the duties, twenty per cent duty should be collected.

Section 2930 read thus:

"If the importer, owner, agent or consignee, of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

Sections 2907 and 2908 were repealed by the seventh section of the act of March 3, 1883, which further declared —

"And hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable." 22 Stat. 523, c. 121, § 7.

The ninth section of this act was as follows:

"SEC. 9. If upon the appraisal of imported goods, wares, and merchandise, it shall appear that the true and actual market value and wholesale price thereof, as provided by law, cannot be ascertained to the satisfaction of the appraiser, whether because such goods, wares, and merchandise be consigned for sale by the manufacturer abroad to his agent in the United States, or for any other reason, it shall then be lawful to appraise the same by ascertaining the cost or value of the materials composing such merchandise, at the time and place of manufacture, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment, and in no case shall the value of such goods, wares, and merchandise be appraised at less than the total cost or value thus ascertained." 22 Stat. 525.

The action was tried before Judge Lacombe and a jury, and a verdict directed in favor of the collector. Judgment having been entered upon the verdict given in accordance with such direction, this writ of error was sued out. The opinion of the Circuit Judge is reported in 41 Fed. Rep. 877.

Mr. Edwin B. Smith, (with whom was *Mr. Charles Curie* on the brief,) for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

The conclusiveness of the valuation of imported merchan-

dise made by the designated officials, in the absence of fraud, is too thoroughly settled to admit of further discussion. *Hilton* v. *Merritt*, 110 U. S. 97; *Auffmordt* v. *Hedden*, 137 U. S. 310; *Passavant* v. *United States*, 148 U. S. 214. In *Auffmordt* v. *Hedden*, it was said: "The government has the right to prescribe the conditions attending the importation of goods, upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final. . . . The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector."

Yet, though the valuation is final and not subject to review and change and reconstruction by the verdict of a jury, it is open to attack for want of power to make it, as where the appraisers are disqualified from acting; or have not examined the goods; or illegal items have been added independent of the value. The principle applied in such cases is analogous to that by which proceedings of a judicial nature are held invalid because of the absence of some strictly jurisdictional fact, or facts, essential to their validity.

But, in the language of Mr. Justice Blatchford in *Auffmordt* v. *Hedden*, p. 328: "This case does not present any question like that of substituting a new merchant appraiser for one already selected, as in *Greely* v. *Thompson*, 10 How. 225; nor is it a case where the appraiser did not see the original packages, as in *Greely's Administrator* v. *Burgess*, 18 How. 413; nor a case where it was offered to show that the merchant appraiser was not a person having the qualification prescribed by the statute, as in *Oelbermann* v. *Merritt*, 123 U. S. 356, and in *Mustin* v. *Cadwalader*, 123 U. S. 369; nor a case where it was contended that the appraisers did not open, examine, and appraise the packages designated by the collector, as in *Oelbermann* v. *Merritt;* nor a case where to the admitted market value of an importation there was added such additional value as was equal to a reduction made in the valuation of the cases containing the goods, as in *Badger* v. *Cusimano*, 130 U. S. 39. Those were instances of errors outside of the valuation itself and outside of the appraisement prescribed by the statute."

The protest in this case had no relation to want of qualification or to insufficiency of examination, but was directed to the alleged illegality of the valuation, whether the method pursued was to ascertain "the true and actual market value and wholesale price," under section 2902 of the Revised Statutes, or the value on the basis of cost of production under section 9 of the act of March 3, 1883, because, as alleged, one of the constituent elements of the value as found was illegally included.

The Circuit Court held that the action of the appraisers was a finding of market value, and that conclusion was clearly right. The certificates of the appraisers were in the usual form, that "the actual market value or wholesale price of the said goods at the period of the exportation thereof to the United States, in the principal markets of the country from which the same were imported into the United States," was as stated; and it appeared in terms therefrom that the advances by the original appraiser, and by the importers, were "to make market value," though the importers contend their advance was made to avoid the imposition of additional duties.

We must assume that the conclusion of the appraisers was that the market value could be ascertained to their satisfaction, and such determination is binding. *Stairs* v. *Peaslee*, 18 How. 521.

The Circuit Judge was of opinion that section 9 of the act of March 3, 1883, applied to cases where goods are made abroad but are sold only in this country, and that the section did not apply to these goods, which were in effect purchased at St. Gall at an ascertainable expenditure. He said: "So far as the evidence shows, any one can go to St. Gall, and can there buy these very cotton embroideries, not precisely of the same pattern as Mr. Muser's, but he can get a selection from a large variety of assorted patterns, and upon paying the cost of the cloth, stitching, bleaching, cutting up, and boxing, and the additional charge, he can obtain these goods in St. Gall. He may have to wait for a week, or three weeks, or five or six weeks; but the title to the goods changes hands in St. Gall, and the purchaser may have them delivered to him there, if he chooses to wait and take them."

Opinion of the Court.

We concur in this view and in the argument that the appraisers in treating the goods as having a true market value, evidently considered that while such value might vary as the quality of the materials and size or intricacy of the patterns varied, it could be satisfactorily ascertained by a general computation of all charges incurred by the commissionaire, who occupied the position of a wholesale dealer, including that for his own service, and that the elements entering into the true valuation of the commodity would embrace such items as office rent, wages of employés, superintendence, interest on capital, risk, etc.; so that what was called manufacturers' profit was merely a percentage to cover the miscellaneous expenses and allowances necessary to be taken into account in reaching the true valuation of the goods.

In the matter of *Cliquot's Champagne*, Judge Hoffman defined the market value of goods to be "the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade;" and the definition was approved by this court. *Cliquot's Champagne*, 3 Wall. 114, 125, 142.

We regard it as quite sufficient for the inquiry here, and cannot discover any legal ground which would have justified the Circuit Court in overhauling the judgment of the revenue officials that the mode of doing business in respect of these embroideries at St. Gall afforded the data for a "true and actual market value and wholesale price," within the intent and meaning of the act, for the commissionaires stood in the place of wholesale dealers, and the items made up the price they were willing to receive and purchasers were made to pay in the ordinary course of the trade.

It is argued for the collector that much of the evidence which was admitted was incompetent, but, waiving that question, we are of opinion that the Circuit Court did not err in directing a verdict for the defendant.

We do not consider it necessary to specifically review the

fifty-one errors assigned in the brief of plaintiffs in error. What we have said disposes of those relating to the direction to the jury, and the others, which present exceptions to the rulings of the Circuit Court in the admission or exclusion of evidence, require but few observations. Some of the questions to which objections were sustained were propounded as to matters which were fully brought out elsewhere in the evidence, and the exclusion of merely cumulative testimony cannot be said to have injured the plaintiffs, since that which was admitted was sufficient to test the correctness of the direction of the verdict. Some of them were aimed at eliciting the expenses of Muser Brothers' establishment at St. Gall; the total expenditures there; what they paid their designer; the amount of embroideries obtained; and so on, in 1887, but all this was immaterial. The question was not whether through the special advantages which Muser Brothers enjoyed the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the latter was determined by the general market value and wholesale price of all goods of the same description.

Other questions went to the grounds of the decision of the revenue officers, and involved the extent, if at all, to which they might be examined in relation thereto. For instance, the general appraiser was called as a witness, and asked the following questions: "Q. In making your report upon these several invoices, and in adding ten per cent to the invoice value, did you or not take into consideration as a part of that ten per cent any manufacturer's profit?" "Q. Did you in making that addition ascertain the cost of the cloth, of the stitching, the bleaching, and finishing, and then add to that sum as a part of the ten per cent, anything for charges incurred in the purchase and preparation of said goods for shipment?" "Q. Upon what ground and to cover what did you add the ten per cent or the sum that you did add to the invoice?" Objections to these questions were severally sustained and exceptions taken. Upon the case made these inquiries were either immaterial or incompetent.

It is not pretended that the action of the appraisers was in

bad faith or in any respect fraudulent. The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses, (one or more of them,) as for designs, salary of buyer, clerk hire, rent, interest, and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value added thereto to make dutiable value.

Plaintiff contended that the dutiable value consisted in the market price of the embroideries in the gray, according to the number of stitches in a given pattern, plus the market value of the muslin and the expenses for laundrying and finishing and no more, but, as we have indicated, the Circuit Court rightly declined to sustain that contention.

The law imposed the duty upon the general appraiser and the merchant appraiser to ascertain and determine the value, and it was provided that in case of disagreement the collector should decide between them. The collector affirmed the decision of the general appraiser, and the valuation became fixed accordingly.

These officers were appointed and required to pronounce a judgment in each case, and the proper operation of the revenue system necessitated, in the opinion of Congress, that their decisions should be final and conclusive. The presumption is that a sworn officer, acting in the discharge of his duty, upon a subject over which jurisdiction is given him, has acted rightly, and there is nothing in this record which, in the slightest degree, tends to indicate that the general appraiser did not endeavor by all reasonable ways and means to arrive at the true and actual market value. Among such ways and means are market price or the quotations for a given day; amounts realized on sales, public and private; and in some instances the cost of production. The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transactions. How these

various elements impressed the general appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final, and could not be reviewed and the verdict of a jury substituted. The proper evidence of the decision of the appraisers and of the collector was to be found in their official returns, and if they acted without fraud and within the powers conferred on them by statute, their decision could not be impeached by requiring them to disclose the reasons which impelled their conclusions or by proving remarks they may have made in the premises.

The adjudication was of true market value, and did not consist in taking market value and adding the cost and charges specified in section 2907 in order to get at dutiable value. The percentage of the commissionaires was not the "commission" named in that section, which plainly refers to other agents than these St. Gall dealers, and, moreover, all these ingredients must be regarded as simply taken into consideration in making up an opinion, and the valuation could not be picked to pieces by an investigation into the sources of information which may have influenced the officers in the judgment they pronounced. The seventh section of the act of March 3, 1883, had no application.

We think that the cause was properly tried, and that the record exhibits no material error, if any.

Judgment affirmed.

THE BREAKWATER.

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

No. 61. Argued November 9, 1894. — Decided December 3, 1894.

In view of the large number of ferry-boats plying between New York and the opposite shores, steamers running up and down the river should keep a sufficient distance from the docks, and hold themselves under such

Statement of the Case.

control as to enable them to avoid ferry-boats leaving their slips upon their usual schedules of time.

Rule 19, (Rev. Stat. § 4233,) requiring, in the case of crossing steamers, that the one having the other on her starboard side should keep out of the way of the other, is applicable to an ocean steamer meeting a ferry-boat in the harbor of New York on her starboard side.

Exceptions to the operation of the rule should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24.

The Pavonia was a ferry-boat, running at regular intervals between a slip at the foot of Chambers Street, New York, and the Erie Railway Station on the opposite Jersey shore, northwesterly from Chambers Street. As she was leaving her slip on the afternoon of December 16, 1887, the steamer Breakwater, arriving from sea, was proceeding northward along the line of the New York docks and about 400 feet distant therefrom, and had arrived opposite Barclay Street, which is distant about 880 feet to the southward from Chambers Street. The Breakwater was on her way to her dock, at the foot of Beach Street, in New York, a short distance northerly from Chambers Street. She was then moving at the rate of about six miles an hour. The tide was strong ebb, the wind northwest, and the weather clear. As the Pavonia moved slowly out under a hard-a-port wheel, her bow was swung southerly down the river by the force of wind and tide. She sounded a single whistle, and the Breakwater replied with the same. The Pavonia then put her engine to full speed, and made another single whistle, to which the Breakwater made the same reply. Meanwhile the Pavonia had recovered from her downward swing, and swung up the river on her course. When the Breakwater sounded her first whistle, her engines were immediately stopped: when she sounded the second, they were put full speed astern. Notwithstanding this, the stem of the Breakwater struck the Pavonia on her port side, and seriously damaged her. *Held*,

(1) That when the Pavonia sounded a single whistle, the statutory rules became operative, and it was the duty of the Breakwater to keep out of the way;

(2) That no fault could be imputed to the Pavonia for leaving when she did, or for her failure to stop and reverse;

(3) That the Breakwater was alone in fault.

This was a libel in admiralty for a collision which took place on December 16, 1887, between the steam ferry-boat Pavonia of the Erie Railway line, as she was leaving her slip at the foot of Chambers Street in the North River, and the steamship Breakwater of the Old Dominion line, as she was coming up the river to her berth at the foot of Beach Street above the ferry slip.

Statement of the Case.

The collision occurred a short distance below the ferry slip, the Breakwater striking the Pavonia on her port side a little abaft her wheel, and seriously damaging her. The libel charged the Breakwater with having been in fault for not keeping out of the way of the ferry-boat, as required by the starboard hand rule; and for coming up the river too near the shore, and at too great speed. The answer attributed the collision either to unavoidable accident, or to the negligence of the ferry-boat in leaving her slip, either without seeing the Breakwater, or at a time when, if she had seen her, she must have known there was danger of collision in so leaving.

The District Court found the Breakwater to have been wholly in fault, (39 Fed. Rep. 511,) and upon appeal to the Circuit Court this decree was affirmed by Mr. Justice Blatchford upon the following finding of facts:

"1. The steam ferry-boat Pavonia, owned by the New York, Lake Erie and Western Railroad Company, and the steamship Breakwater, owned by the Old Dominion Steamship Company, collided with each other at or about 4.50 o'clock P.M. on the 16th day of December, 1887, in the North River, about abreast of the middle of the slip between pier 28, (old number,) known as the Fall River pier, and pier 29, (old number,) known as the Providence pier, and about 400 feet out in the river from the ends of those piers.

"2. Immediately adjacent to pier 29 (old number) and to the northward thereof, there were two slips of the Pavonia or Erie ferry, which was operated by the New York, Lake Erie and Western Railroad Company. The more northerly of those slips was bounded on the north by a pier known as No. 20, (new number,) which was the first pier to the north of pier 29, (old number,) and extended out into the river about 150 feet further than pier 29, (old number,) and the piers below it. Those slips were at the foot of Chambers Street.

"3. Shortly before the collision the Pavonia left her upper or northerly slip, on the New York city side, on one of her regular trips, bound to her slip across the river in New Jersey, which latter slip was to the northward of Chambers Street.

"4. The distance from the upper or northerly rack of the

slips at Chambers Street to the upper or northerly side of the pier at Barclay Street, which was the fourth street south of Chambers Street, was 881¼ feet. The upper slip at Chambers Street was 87½ feet wide; the whole slip was 200 feet wide.

"5. At the time the Pavonia left her bridge the Breakwater was about off Barclay Street, coming in from sea on one of her regular trips to her berth at the foot of Beach Street, which was to the north of Chambers Street.

"6. The tide was strong ebb, the wind was northwest, and the weather was clear.

"7. The Pavonia started to move slowly out of her slip under a hard-a-port wheel, which was fastened in the becket, and so remained until the collision. As her bow emerged the effect of the wind and tide was to swing her bow somewhat down the river, but this swing was overcome before the collision, at which time her bow was on a swing up the river. The wind and tide had the effect also to set her bodily down the river. Her course from the time of her starting until the collision, was the usual course of ferry-boats on leaving their slips under like circumstances. The course of the Breakwater from the vicinity of the Battery was along the New York docks. As she neared the Cortlandt Street ferry slip she approached closer to the docks, and from that time continued on a course about 400 feet therefrom.

"8. The Pavonia sounded the usual long single whistle, to warn approaching vessels as she commenced to move. Shortly thereafter the Breakwater sounded in reply a single whistle, at which time the Pavonia was moving slowly, her bow having reached about the outer end of pier 20, (new number). The Pavonia immediately replied by a single whistle, which was answered by a single whistle from the Breakwater. The Pavonia, when her stern was about as far out as the outer end of pier 20, (new number,) sounded another single whistle to the Breakwater, which was answered by the Breakwater by a single whistle. Before the collision the Pavonia sounded alarm whistles.

"8. As soon as the Pavonia received the first whistle from the Breakwater her engine was put to full speed ahead, and

so continued until the collision. As soon as the Breakwater sounded her first whistle her engine was immediately stopped, and when the Pavonia sounded her second whistle the engine of the Breakwater was immediately put full speed astern.

"9. The speed of the Breakwater at the time she sounded her first whistle was about six miles an hour, but at the time of the collision her headway by the land was almost entirely, if not quite, stopped.

"10. The stem of the Breakwater struck the Pavonia on the port side of the latter a little abaft her wheel, cut through her guard into her hull, and the Pavonia was thereby seriously damaged.

"11. If the engine of the Breakwater had been promptly reversed when she blew her first whistle her headway could have been entirely stopped in going her length of 212 feet and the collision would have been avoided.

"12. The New York, Lake Erie and Western Railroad Company suffered damages by reason of the collision as follows, viz: Repairs to the Pavonia, $4770.02, with interest from February 1st, 1888; demurrage, $2800, with interest from June 18th, 1889.

"On the foregoing facts I find the following conclusions of law:

"1. The Breakwater was in fault because, having the Pavonia on her own starboard side and being on a crossing course, she did not keep out of the way of the Pavonia, and in not taking into consideration the probable and usual course of the Pavonia under the circumstances of the tide and the wind, and in not reversing her engine at the time she gave her first whistle.

"2. The Pavonia was without fault.

"3. In the suit brought by the New York, Lake Erie and Western Railroad Company it is entitled to a decree for $4770.02, with interest from February 1st, 1888, and for $2800, with interest from June 18th, 1889, and for its costs in the District Court, taxed at $159.75, and for its costs in this court, to be taxed.

"4. In the suit brought by the Old Dominion Steamship

Argument for Appellant.

Company a decree must be entered dismissing the libel and awarding to the New York, Lake Erie and Western Railroad Company its costs in the District Court, taxed at $41.95, and its costs in this court, to be taxed."

Subsequently, and upon motion of the claimant, the court made the following additional finding:

"The Breakwater is an iron steamer of 1100 tons burden and 212 feet long. Before and at the time of the collision her master, chief officer, quartermaster, and a Sandy Hook pilot, who was only a passenger, were in her pilot-house. The second officer was on the forward deck in front of the wheel-house."

From the decree of the Circuit Court the owners of the Breakwater appealed to this court.

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

I. The collision was due to the fault of the Pavonia in starting from her slip at a time and under circumstances which gave the Breakwater no alternative except to reverse in order to avoid her.

The District Court condemned the Breakwater, because having the Pavonia on her starboard hand and the vessels being on crossing courses, she did not reverse as soon as possible after she stopped. The Circuit Court affirmed this decision. No suggestion of fault in any other particular is made.

She could not starboard, for that would carry her out in the river across the Pavonia's course, contrary to the signals; she could not port, by reason of the vessels accompanying her; and she did stop. The only other action she could have taken was to reverse. She is, therefore, to be judged for her omission in that respect.

Rule 19, (Rev. Stat. § 4233,) known as the starboard hand rule, does not apply.

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

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

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

Two vessels are not under steam when one is at rest; nor are they on crossing courses when one is moored to her dock.

Obedience to the rules is not required until the necessity arises for obedience, until the time arrives for precautions to be taken. Then the regulations must be observed, and continuously, until the necessity ceases. *The Peckforton Castle*, 3 P. D. 11; *The Seaton*, 9 P. D. 1; *The State of Texas*, 20 Fed. Rep. 254.

It is well established that when two vessels are in motion and have drawn together into a situation which requires the observance of a given rule, neither has the right to change that situation so as to bring it within the provisions of any other rule. But when one vessel is at rest, it is her duty to remain so until the approaching vessel has passed out of the situation.

We submit that the Pavonia, being at rest in her slip and seeing the Breakwater approaching under no obligation towards her except as a vessel at rest, and in such a position as left no alternative except to reverse if she started, had no right by starting to change the duty of the latter towards her as a vessel at rest, and then claim immunity under the starboard hand rule. By her voluntary action she brought another rule into play at a time and under circumstances which restricted obedience to that rule to one course of action; thus limiting the operation of the rule, and making its provisions more onerous than they were intended to be, or is reasonable.

The fact that after the Pavonia started signals were ex-

changed does not affect the principle. The signals were in conformity with the course adopted by the Pavonia. Our contention is that she had no right to take such a course, and having taken it voluntarily, she could not create a new obligation under it upon the Breakwater, by giving or receiving signals.

II. The Pavonia was at fault for violating rule 21, which requires vessels to slacken speed or to stop and reverse.

This rule is more comprehensive and sweeping in its purpose and in its terms than any other. Its language does not require that *both* vessels should be in motion, nor that either should take any given course. It applies with equal force to vessels in all positions — crossing, meeting and overtaking. Its only condition is, that one vessel shall be approaching another "so as to involve risk of collision," and relates to direction, proximity and speed; and *is imperative* in all cases where it applies. *The Albemarle*, 8 Blatchford, 200; *The Beryl*, 9 P. D. 137; *The John McIntyre*, 9 P. D. 135; *The Nichols*, 7 Wall. 656; *The Johnson*, 9 Wall. 146; *The Huntsville*, 8 Blatchford, 228.

Nor is one vessel relieved from obedience to the rule because the other is not obedient thereto, or obedient to any other rule. *The Beryl, supra; The Ericsson*, Swabey, 38; *The Galileo*, 28 Fed. Rep. 469; *The Aurania*, 29 Fed. Rep. 98; *Williamson* v. *Barrett*, 13 How. 101; *The A. Denike*, 3 Cliff. 117; *The Manitoba*, 122 U. S. 97; *The Khedive*, 5 App. Cas. 876; *The Ceto*, 14 App. Cas. 670.

The Pavonia had no right to leave her slip after seeing the Breakwater in the situation in which she was, if by so leaving risk of collision was involved; or if the movement was hazardous, or even subjected the vessels to the chance of collision. *The Columbus*, Abbott Adm. 384; *The Manhasset*, 34 Fed. Rep. 408. This was the case of a ferry-boat.

The fact that the court held that when the Pavonia started the Breakwater was required to reverse in order to avoid her, establishes that at that time rule 21 was applicable. There is no right of way into collision; nor can one vessel insist upon a right of way, if by so doing she creates risk, or renders

collision certain by proceeding when danger already exists. *The Sunnyside*, 91 U. S. 208; *The Maria Martin*, 12 Wall. 31; *The Pegasus*, 19 Fed. Rep. 46; *The Columbia*, 23 Blatchford, 268.

Assuming, however, that the situation did not involve risk of collision until after the Pavonia had commenced to pass beyond the end of pier 20 and her bow swung down towards the Breakwater, at this time the situation had changed; collision was imminent and danger immediate; the Pavonia recognized the danger, for, not satisfied with the first exchange of signals, or with the action of the Breakwater under those signals, she again gave a signal of one whistle, showing that she did not believe the Breakwater had understood what she intended to do, or that she thought the Breakwater was not pursuing a proper course toward her, and that there was danger. As was said in the case of *The D. S. Gregory and The Washington*, 2 Ben. 226, in view of the fact that the ferryboat herself apprehended peril of collision, as manifested by her signal that she was going to adopt a certain course to avoid such peril, she cannot now be heard to say that there was not, at the time she gave the signal, any risk of collision.

No claim has or can be made that she maintained her headway as a measure *in extremis*. On the contrary, she insists that she kept her speed as a matter of right. To hold the Breakwater in fault for not reversing at the first signal, and to hold that the Pavonia was not then required to reverse, nor at the second signal, is certainly a position that cannot be upheld.

III. The Breakwater did not violate the provisions of rule 21.

It is apparent that when the Breakwater arrived off Barclay Street no duty towards the Pavonia rested upon her under the rule in question. She was proceeding at a moderate speed towards her dock on a course that was proper in order to make her landing against the tide and wind, and was three or four lengths below Chambers Street, where the Pavonia was lying at rest in her slip, moored to her bridge. She was headed up the river, and not approaching the Pavonia, so as to involve

risk of collision, and, therefore, the rule had not come into effect.

Mr. George Bethune Adams, (with whom was *Mr. Franklin A. Wilcox* on the brief,) for appellee.

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

The principal contention of the appellant is that the Pavonia was in fault for leaving her slip at the time she did, in view of the strong ebb tide, northerly wind, and the proximity of the Breakwater.

The facts were that, at the time the Pavonia left her bridge, the Breakwater was off Barclay Street, about 880 feet down the river, pursuing her course up the river about 400 feet distant from the outer line of the piers. It is true that there was a strong ebb tide and a northwest wind, but although the effect of this was to swing the Pavonia's bow somewhat down the river, as it emerged from the slip, this swing, with the aid of her wheel, which was put hard-a-port, was overcome before the collision, at which time her bow was on a swing up the river. While the wind and tide had the effect of setting her bodily down the river, this was an incident which the pilot of the Breakwater must or ought to have anticipated, and being warned by the Pavonia's whistle that she was about leaving her slip, ought also to have provided against.

In view of the large number of ferry-boats plying between New York and the opposite shores, sometimes as often as once in three or four minutes from the same slip, their departure at any moment is a contingency which ought to be reckoned upon and guarded against. There is a necessity that these transits be made with great frequency and regularity, not only in order that the public may be accommodated, but that ferry-boats arriving from the opposite shores, shall not be compelled to lie in the stream, with a chance of encountering other vessels, to await the departure of their consorts from the New York slip. Steamers plying up and down the river should,

therefore, keep a sufficient distance from the dock, and hold themselves under such control, as to enable them to avoid ferry-boats leaving their slips upon their usual schedules of time. The respective obligations of ferry-boats and other steamers were fixed in accordance with this rule by Judge Betts as early as 1845, in the case of *The Relief*, Olcott Adm. 104, in which he spoke of the rights of ferry-boats "to an undisturbed passage between their landing places, in the performance of their duties in that capacity, as a species of privilege or immunity not accorded to other vessels," and declared it to be the duty of other steam vessels to keep as near as possible to the centre of the stream in passing up and down, in order that the exit from and entrance into the ferry slips should not be checked or embarrassed by the presence of other vessels passing close to them. This practice has been acquiesced in for at least half a century, and has been repeatedly recognized by the local courts. *The Favorita*, 8 Blatchford, 539; *The Monticello*, 15 Fed. Rep. 474; *The John S. Darcy*, 29 Fed. Rep. 644; *The West Brooklyn*, 45 Fed. Rep. 60; *S. C.* 49 Fed. Rep. 688; *The Brooklyn*, 62 Fed. Rep. 759. *The Favorita* was also affirmed by this court upon a similar recognition of this rule. 18 Wall. 598.

It is hardly necessary to say, however, that it would not be applicable, if the circumstances were such as to indicate that it would be impossible for an approaching steamer to avoid the ferry-boat. This seems to have been the case in *The Columbus*, Abbott's Adm. 384, since it can hardly be supposed that the judge, who decided the case of *The Relief*, should have intended to overrule that case within three years, without, at least, calling attention to the fact. Perhaps, too, the practice here suggested might be subject to some modification in a harbor less crowded than New York, where the transits of the ferry-boats are made with less frequency. As Mr. Justice Davis remarked in the case of *The Favorita*, p. 601: "Manifestly the rules of navigation must vary according to the exigencies of business and the wants of the public. The rule which would be applicable in a harbor where the business was light, and the passage of vessels not liable to be

impeded, would be inapplicable in a great thoroughfare like the East River." As it is clear in this case that a collision might have been avoided by prompt and decisive action on the part of the Breakwater, after the Pavonia left the wharf, and that with proper management there was no risk of collision, we think that no fault can be imputed to the latter in leaving at the time she did.

Was she in fault for her manner of leaving? The finding is that as she began to move she sounded the usual long, single whistle to warn approaching vessels, and as her bow reached the outer end of the pier, she received in reply a single whistle from the Breakwater. From this moment, at least, the statutory rules of navigation became operative, and required the ferry-boat to keep her course and speed, and the Breakwater to keep out of her way. But that there might be no misunderstanding as to her intention, the Pavonia again gave a single whistle, in reply to that of the Breakwater, and the latter answered by another single whistle. Finding 8 indicates also that the same signals were exchanged the third time. Under these circumstances there certainly should have been no misunderstanding as to the proposed movements of each vessel, and no misapprehension as to their respective duties. The Pavonia fulfilled her obligation by keeping her wheel hard-a-port, and her engine at full speed, to counteract the tendency of the wind and tide to carry her down the river. The Breakwater knew, or was bound to know, as well as the Pavonia, that the immediate effect of the wind and tide, striking the ferry-boat broadside, would cause her to sag down the stream as she passed the outer end of the pier, and was bound to provide against this contingency. This she failed to do effectively. As she sounded her first whistle her engine was stopped, but not until the Pavonia sounded her second whistle did she reverse.

In this connection counsel for the Breakwater claims that rule 19, requiring in the case of crossing steamers, that the one having the other upon her starboard side shall keep out of the way of the other, has no application. We think, however, the rule became obligatory from the moment the

Pavonia got under way, when it became her duty to keep her course and speed, and that of the Breakwater to avoid her. *The Britannia*, 153 U. S. 130. It was said by this court in the case of *The Pacific*, (*New York, &c. Steamship Co.* v. *Rumball*,) 21 How. 372, 384, and *The Wenona*, 19 Wall. 41, 52, that "rules of navigation, such as have been mentioned, are obligatory upon vessels approaching each other, from the time the necessity of precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain." Where rules of this description are adopted for the guidance of seamen who are unlearned in the law and unaccustomed to nice distinctions, exceptions should be admitted with great caution, and only when imperatively required by the special circumstances mentioned in rule 24, which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger. The moment the observance or non-observance of a rule becomes a matter of doubt or discretion, there is manifest danger, for the judgment of one pilot may lead him to observe the rule, while that of the other may lead him to disregard it. The theory of the claimant that a vessel at rest has no right to start from her wharf in sight of an approaching vessel, and thereby impose upon the latter the obligation to avoid her, is manifestly untenable, and would impose a wholly unnecessary burden upon the navigation of a great port like that of New York. In the particular case, too, the signals exchanged between the steamers indicated clearly that the Breakwater accepted the situation and the obligation imposed upon her by the starboard hand rule, and was bound to take prompt measures to discharge herself of such obligation.

No fault is to be imputed to the Pavonia for her failure to stop and reverse, since it is quite obvious that if she had slackened speed her tendency to sag down the river would have been greatly increased, and she would practically have been at the mercy of the wind and tide. Her only safe course was to do precisely as she did: put her wheel hard-a-port and her engine at full speed. The duty to slacken speed manifestly

does not apply where the effect would be to carry a steamer bodily down the current upon another vessel which is trying to avoid her.

That the Breakwater did not reverse with sufficient promptness is evident from the fact that at the time the Pavonia started she was off Barclay Street, a distance of nearly 900 feet, while the collision occurred abreast the slip immediately below the one from which the Pavonia started, or about 580 feet from where the Breakwater was when the Pavonia left her bridge; while, if the Breakwater had promptly reversed, she would have stopped within her own length, (212 feet,) or about 360 feet below the spot where the collision took place.

Upon the whole, notwithstanding the earnest argument of appellant's counsel, we think the decision of the Circuit Court was correct, and its decree is, therefore,

Affirmed.

WARREN *v.* KEEP.

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

No. 60. Argued and submitted November 8, 1894. — Decided December 3, 1894.

This court will not reverse the conclusions of the master, sustained by the court below, upon the extent of the infringement of a patent, when the evidence is conflicting, unless some obvious error or mistake is pointed out.

Where a patent is for a particular part of an existing machine, it is necessary, in order to establish a claim for substantial damages for infringement, to show what portion of the profits is due to the particular invention secured by the patent in suit; but when the patented invention is for a new article of manufacture, the patentee is entitled to damages arising from the manufacture and sale of the entire article.

The defendants not having set up in the court below a claim for an allowance of manufacturer's profits, or offered evidence by which it could be estimated, there is no foundation on which to base such a claim in this court.

THE case is stated in the opinion.

Mr. Esek Cowen for appellants submitted on his brief.

Mr. Nelson Davenport for appellee.

Mr. Justice Shiras delivered the opinion of the court.

On the 14th day of March, 1881, William I. Keep filed a bill of complaint in the Circuit Court of the United States for the Northern District of New York, against John Hobert Warren, Joseph W. Fuller, George A. Wells, and Walter P. Warren, alleging complainant's ownership of several letters patent and infringement by the defendants.

The subject-matter of the letters patent was certain devices and designs for base-burning stoves and stove grates.

The case was put at issue by an answer and replication, but on the 20th day of March, 1883, a decree was entered by consent, declaring the validity of the letters patent set forth in the bill, and infringement by the defendants of some of them.

The decree directed that an account should be taken for profits and damages upon all the patents so declared to be infringed, but contained the following provision: "That such gains, profits, damages, and accounting shall not apply to any stoves made or sold by said defendants before February 1, 1876, nor to any grates made or sold by said defendants before that date, except as to grates covered by said letters patent No. 139,583, and supplied by defendants after January 1, 1876, to stoves originally sold by them without such grates."

The master found that, between January 1, 1876, and January 1, 1882, the defendants sold grates upon which the profits amounted to $11,363.54, and that amount, with six cents' damages and costs, were awarded by the master to and in favor of the complainant.

Exceptions to this report were filed by the defendants, alleging that the evidence did not sustain the master in finding the number of the infringing grates sold by the defendants, nor in finding the amount of profits which the defendants had realized from the infringement.

The court below sustained an exception to the action of the master in allowing the sum of $348.00 as profits on four hundred grates, made and sold by the defendants between January 1, 1879, and July 1, 1879, but overruled the other exceptions, and entered a final decree in favor of the complainant for the sum of $10,510.86 with costs, from which decree the defendants appealed to this court.

The first error insisted upon is that the evidence did not justify the master in finding the number of grates sold by the defendants during the six years over which the accounting extended. The defendants' contention is not that due effect was not given to the evidence adduced on their behalf, but that the plaintiff's evidence, consisting chiefly of the testimony of Keep himself, did not clearly establish the number of the infringing grates sold.

Our examination of this part of the subject has not enabled us to approve the defendants' contention. The master's action in restricting his finding to grates sold as separate and independent articles, and in excluding from the account all grates which were sold in or with a stove, was quite as favorable to the defendants as they had any right to claim. In finding the number of grates sold during the period in question, as separate articles, the master depended chiefly on the entries in the defendants' books, as testified to and explained on the part of the complainant by Keep, who had been engaged with the defendants for more than eight years, and claimed to be thoroughly acquainted with their methods of business, and, on the part of the defendants, by L. W. Drake, who was their assistant superintendent. There was a considerable amount of this evidence, and it was, to some extent, conflicting. The master acted in view of this evidence, and the court below concurred in his finding, except in some unimportant particulars. As no obvious error or mistake has been pointed out to us, their conclusions must be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Crawford* v. *Neal*, 144 U. S. 585; *Furrer* v. *Ferris*, 145 U. S. 132.

Assuming that the number of infringing grates sold by the defendants was correctly found, we have next to consider

whether the master erred in awarding to the complainant the entire profits made upon the grates so sold. The appellants' contention is that there was no evidence tending to show how much of the profits was due to the complainant's invention, and that hence he was entitled to recover nominal damages only. It is, no doubt, well settled that where a patent is for a particular part of an existing machine, it is not sufficient to ascertain the profits on the whole machine, but it must be shown what portion of the profits is due to the particular invention secured by the patent in suit. *Blake* v. *Robertson*, 94 U. S. 728; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439. But it is equally true that, where the patented invention is for a new article of manufacture, which is sold separately, the patentee is entitled to damages arising from the manufacture and sale of the entire article. *Manufacturing Co.* v. *Cowing*, 105 U. S. 253; *Hurlbut* v. *Schillinger*, 130 U. S. 456; *Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441.

The grates, on whose sale the master assessed profits, were not sold as an incident to any particular stove, but as an independent, marketable article, and the infringers must pay the entire profits realized from the sale thereof. The statement that, at this late day, there can be a grate, for use in ordinary stoves, which is entirely new, and patentable in all its parts and as an entirety, is somewhat surprising; but that is what we learn from this record. The patent infringed contains eight claims, of which seven are for the several parts of the grate, and the eighth for the entire device, and the defendants are precluded by the decree, to which they consented, from contending that the plaintiff is to be restricted, in his demand for damages, to any one feature or part of the grate.

It is further claimed that the master ought to have reported nominal damages only, because there was evidence before him to the effect that the defendants, at the time they made and sold the complainant's grate, likewise made and sold another kind of a grate, called the Hathaway grate, and that the same price was received for both kinds. From this it is said to follow that there was no advantage derived by the defendants from the manufacture and sale of the complainant's grate,

above that which they would have received had they made and sold the Hathaway grate only. We do not think that the consequence suggested necessarily follows as matter of fact, nor that it has any relevancy as matter of law.

Mowry v. *Whitney*, 14 Wall. 620, and *Littlefield* v. *Perry*, 21 Wall. 205, which are relied on by the defendants to sustain this contention, were both cases in which the patented features were so blended with other features not covered by the patent that it became necessary to inquire what portion of the defendants' profits was due to the patented features, and to apportion the profits accordingly. Thus it was said in *Mowry* v. *Whitney*, p. 652: "The patent is for an entire process, made up of several constituents. The patentee does not claim to have been the inventor of the constituents. The exclusive use of them singly is not secured to him. What is secured is their use when arranged in the process."

In *Littlefield* v. *Perry*, the patent was for certain improvements in cooking stoves, and the court below, having found an infringement, decreed an account "of all the profits, gains, and advantages which the said defendants have received, or which have arisen or accrued to them, from the manufacture, use, or sale of stoves embracing the improvements described in and covered by the said letters patent." This court said, p. 228: "The decree is, as we think, too broad. . . . The order is to account for all profits received from the manufacture, etc., of stoves embracing the improvements covered by any of the patents. This would cover all the profits made upon a stove having in it any one of the improvements patented. The true inquiry is as to the profits which the defendants have realized as the consequence of the improper use of these improvements. Such profits belong to the plaintiff, and should be accounted for to him."

We think the court below was justified in saying: "The complainant's grate was made and sold separately from stoves. Unquestionably it was intended for use in stoves; but so are many devices that may be the subject of distinct inventions. It was not sold for use in one pattern of stove alone; it could be used in many different stoves. Although in general appear-

ance like other grates, it is so constructed that no part can be used upon any other grate, and no parts of other grates can be used upon it. Remove the patented features, and nothing remains. Although it is an improvement upon stoves, the complainant is not seeking to recover the profits upon the stoves, but upon the improvement only. The rule requiring that the profits arising from the patented features must be separated from those arising from the unpatented features has little application in a case where every feature is patented."

Finally, it is contended that the master and the court below erred in not allowing credit to the defendants for a manufacturer's profit.

We are relieved from considering what might be a problem of some difficulty, namely, when a complainant's damages are to be measured by the profits of the defendant, what credit should be allowed to the latter, as a mere agency for producing the patented article, for a so-called manufacturer's profit, by the fact that the defendants, neither before the master nor in the court below, made any claim for such an allowance, or offered any evidence by which it could be estimated. The complainant testified as to the cost of making the grates, and stated that he included in his estimate of the cost a manufacturer's profit. As no countervailing evidence was put in by the defendants and no specific exception was made to the master's calculations, that he made no allowance for a manufacturer's profit, we think there is no foundation on which to base such a claim now.

The decree of the Circuit Court is

Affirmed.

THOMPSON v. UNITED STATES.

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

No. 637. Submitted October 18, 1894. — Decided December 3, 1894.

Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and a defendant is not thereby twice put in jeopardy, within the meaning of the Fifth Amendment to the Constitution of the United States.

Sundry errors in the charge of the court below commented on, and *Gourko* v. *United States*, 153 U. S. 183 approved and applied to the issues in this case, viz.:

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

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

In the District Court of the United States for the Western District of Arkansas, on November 23, 1893, a jury was sworn to try the issue formed between the United States and Thomas Thompson, under an indictment wherein said Thompson was charged with the murder of one Charles Hermes, and to which the accused pleaded not guilty.

After the case had been opened by counsel for the government and the defendant respectively, and after Jacob Hermes, a witness for the government, had been called and examined in chief, the judge stated that it had come to his knowledge that one of the jurors was disqualified to sit on account of having been a member of the grand jury that returned the indictment in the case. The defendant, by his counsel, ob-

jected to proceeding further in the trial of the cause with the said juror on account of his incompetency as aforesaid. Whereupon the court ordered the discharge of the jury and that another jury be called, to which action of the court the defendant, by his counsel, at the time excepted.

On November 27, 1893, the defendant filed a plea of former jeopardy, and also a motion for a jury from the body of the district; and it appearing from an examination, in the presence of the defendant, that a number of the regular panel of jurors were disqualified because of opinions formed after having heard part of the evidence, the court ordered the marshal to summon from the bystanders twenty-eight legal voters of the Western District of Arkansas, to be used as talesmen in making up a jury for the trial of the case. On December 1 a motion was filed on behalf of the defendant, to quash that part of the panel of jurors consisting of twenty-eight men summoned from bystanders, which motion was overruled, and the petition of the defendant asking for a jury from the body of the district, drawn in the regular manner from the jury-box by the jury commissioners, was refused. The government's attorney then moved that a jury be called for the trial. The defendant objected to the twelve men being called who had been theretofore empanelled for the trial of the cause, which objection the court sustained, and the clerk was ordered to omit in the call the names of said jurors.

Among the jurors called by the clerk were Wilson G. Gray, William M. Perkins, and Isaac B. Sloan, who were members of the regular panel for the present term of the court, and whose names were on the list of jurors served upon defendant at the beginning of the term, and before the first jury in this cause was empanelled, and when the first jury was empanelled these three jurors were by the defendant peremptorily challenged. Their names were not upon the certified list of jurors last served upon the defendant after the first jury had been discharged. The challenge for cause made by defendant to these three jurors was overruled, whereupon the defendant peremptorily challenged them. The defendant likewise filed a written challenge for cause to the twenty-eight men called

as talesmen, for the reasons that they did not belong to the regular panel of jurors, that they were not from the body of the district, but were all residents of the city of Fort Smith, in the immediate neighborhood of the place of trial. This challenge was overruled.

The jury was thereupon sworn, and the trial proceeded with, resulting in a verdict, under the instructions of the court, for the government in the issue formed by the plea of former jeopardy, and in a verdict that the defendant was guilty of murder as charged in the indictment.

Motions for a new trial and in arrest of judgment were overruled and sentence of death was pronounced against the defendant.

Upon errors alleged in the proceedings of the court, and in the charge to the jury, a writ of error was sued out to this court.

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

Mr. Assistant Attorney General Whitney, for defendants in error.

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

The record discloses that, while the trial was proceeding, a jury having been sworn and a witness examined, the fact that one of the jury was disqualified, by having been a member of the grand jury that found the indictment, became known to the court. Thereupon the court, without the consent of the defendant, and under exception, discharged the jury, and directed that another jury should be called. The defendant, by his counsel, pleaded that he had been once in jeopardy upon and for the same charge and offence for which he now stood charged. The court permitted this plea to be filed, and submitted the question to the jury, with instructions to find the issue in favor of the government. Such a verdict was accordingly rendered, and the cause was then disposed of

under the plea of not guilty, and resulted in a verdict of guilty under the indictment.

The defendant now seeks, in one of his assignments of error, the benefit of the constitutional provision that no person shall be subject for the same offence to be twice put in jeopardy of life and limb.

As the matter of the plea *puis darrein continuance*, setting out the previous discharge of a jury after having been sworn, and the plea of not guilty were not inconsistent with each other, it accorded with the rules of criminal pleading that they might stand together, though, of course, it was necessary that the issue under the first plea should be disposed of before the cause was disposed of under the plea of not guilty. *Commonwealth* v. *Merrill*, 8 Allen, 545; 1 Bishop on Criminal Procedure, § 752.

As to the question raised by the plea of former jeopardy, it is sufficiently answered by citing *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U. S. 148, and *Logan* v. *United States*, 144 U. S. 263. Those cases clearly establish the law of this court, that courts of justice are invested with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy within the meaning of the Fifth Amendment to the Constitution of the United States.

The evidence in the case substantially disclosed the following facts:

The defendant, Thompson, was an Indian boy about seventeen years of age, and lived with Sam Haynes, a Creek Indian, who had a farm near Okmulgee in the Creek Nation. The deceased, Charles Hermes, lived with his father on land rented from Haynes, and distant about half a mile from the house of the latter. There was testimony tending to show ill feeling on the part of Hermes and his sons towards this Indian boy, and that they had threatened to injure him if he

came about where they were. Thompson could not speak or understand the English language, but he had been told by Haynes and another witness that old man Hermes had claimed that he, Thompson, had been abusing and killing his hogs, and that if he "came acting the monkey around him any more he would chop his head open."

In the afternoon of June 8, 1893, Mrs. Haynes directed the boy to take a bundle to Mrs. Checotah's, who lived two or three miles away. The boy caught a horse, got on it without a saddle, took the bundle that Mrs. Haynes gave him, and went off on his errand. Mrs. Haynes testified that he had no arms of any kind when he left her house, and that he appeared in a good humor with everybody at that time. The road to Checotah's ran by a field where the deceased, his father and brother were working, ploughing corn. There was testimony, on the part of Thompson, tending to show that, as he rode along past the field, the old man and the deceased began quarrelling with him; that Thompson saw that they were angry with him, but could not understand much that was said to him, although he could tell that they were talking about hogs. Thompson says that he remembered the threats against him they had made to Haynes and Checotah, and thought they were going to hurt him. He further states that he rode on to Checotah's, where he left the bundle; that he got to thinking about what Sam Haynes had told him as to the threats that Hermes had made, and as there was no other road for him to return home by, except the one alongside of the field, he thought it was best for him to arm himself so that he could make a defence in case he was attacked; that he went by Amos Gray's house, and there armed himself with a Winchester rifle belonging to Gray. The defendant further testified that, after he got the gun, he went back by the road, and, as he got opposite where the men were ploughing the boys were near the fence, and the old man was behind; that the boys called at him and said something about a gun, and the deceased started towards a gun that was standing in the corner of the fence, and that, thinking they intended to kill him, he drew his gun and fired at

the deceased, and then ran away on his horse, pursued by the old man, who afterwards shot at him. These particulars of the transaction were principally testified to by Thompson himself, but he was corroborated, to some extent, by William Baxter and James Gregory, who testified that they visited the field where was the body of the deceased, and that Hermes, the father, described the affair to them, and, as so told, the facts differed but little from Thompson's version.

In this state of facts, or, at all events, with evidence tending to show such, the court instructed the jury at great length in respect to the law of the case. Exception was taken to the charge of the court as a whole, because it was "prolix, confusing, abstract, argumentative, and misleading," and this exception is the subject of one of the assignments of error. But we do not need to consider this aspect of the case, as the record discloses errors in vital portions of the charge, and specifically excepted to, which constrain us to reverse the judgment, and direct a new trial.

In instructing the jury as to the right of self-defence, the learned judge said: "It is for you to say whether at the time of the killing of Charles Hermes by this defendant that this defendant was doing what he had a right to do. If he was not, notwithstanding Charles Hermes might have made a violent demonstration that was then and there imminent, then and there impending, then and there hanging over his head, and that he could not avoid it except by killing him; if his conduct wrongfully, illegally, and improperly brought into existence that condition, then he was not in an attitude where, in the language of the law, he was in the lawful pursuit of his business." And again: "Now, in this connection, we have a maxim of the law which says to us that notwithstanding the deceased at the time of the killing may be doing that which indicates an actual, real, and deadly design, if he by his action who seeks to invoke the right of self-defence brought into existence that act upon the part of the deceased at that time by his wrongful act, his wrongful action did it, he is cut off from the law of self-defence, no matter what may have been the conduct of the deceased at that time."

It is not easy to understand what the learned judge meant by those portions of these instructions, in which he leaves it to the jury to say whether the defendant was "doing what he had a right to do," and whether the defendant brought into existence the act of the deceased, in threatening to attack the defendant, "by his, defendant's, wrongful act." Probably what was here adverted to was the conduct of the deceased in returning home by the same route in which he had passed the accused when going to Checotah's, and the implication seems to be that the accused was doing wrong and was guilty of a wrongful act in so doing. The only evidence on that subject was that of the defendant himself, that he had no other mode of returning home except by that road, because of swamps on the other side of the road, and there was no evidence to the contrary.

The learned judge, in these and subsequent instructions, seems to confuse the conduct of the defendant in returning home by the only convenient road, with a supposed return to the scene of a previous quarrel for the purpose of renewing it. Thus, he further instructed the jury that "if it be true that Charles Hermes, at the time of the killing, was actually and really, or apparently, in the act or executing a deadly design, or so near in the execution of it that the defendant could not avoid it, and that it was brought into existence by his going to that place where Charles Hermes was, with the purpose of provoking a difficulty, or with the intention of having an affray, he is cut off from the law of self-defence." And again: "You are to look to the evidence to see whether the defendant brought that state of case into existence, to see whether or not in consequence of a conception on his part of a state of grudge, or ill-will, or any hard feelings that existed between the parties, that he went off and armed himself for the purpose of making an attack on Hermes, or any of the party whom the government offered as witnesses, this law of self-defence cannot avail him. Of course, the law of self-defence gives him the right to arm himself for the purpose of defending himself so long as he is in the right, but if he has a conception that deadly danger may come upon him, but he is

away from it so he can avoid it, his duty is to stay away from it and avoid it, because he has no right to go to the place where the slain person is, with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray."

These instructions could, and naturally would, be understood by the jury as directing them that the accused lost his right of self-defence by returning home by the road that passed by the place where the accused was, and that they should find that the fact that he had armed himself and returned by that road was evidence from which they should infer that he had gone off and armed himself and returned for the purpose of provoking a difficulty. Certainly the mere fact that the accused used the same road in returning that he had used in going from home would not warrant the inference that his return was with the purpose of provoking an affray, particularly as there was evidence that this road was the proper and convenient one. Nor did the fact that the defendant, in view of the threats that had been made against him, armed himself, justify the jury in inferring that this was with the purpose of attacking the deceased and not of defending himself, especially in view of the testimony that the purpose of the defendant in arming himself was for self-defence.

We had occasion to correct a similar error in the recent case of *Gourko* v. *United States*, 153 U. S. 183. That was a case where the deceased had previously uttered threats against the defendant, and there had been a recent *rencontre* at the post office. The parties then separated, and the defendant armed himself, and subsequently, when the parties again encountered each other, the defendant shot and killed the deceased. The court instructed the jury that, in those circumstances, there was no right of self-defence, and that there was nothing to reduce the offence from that of murder to manslaughter.

In discussing the question this court, by Mr. Justice Harlan, said:

"Assuming, for the purposes of the present inquiry, that the defendant was not entitled to an acquittal as having acted

in self-defence, the vital question was as to the effect to be given to the fact that he armed himself with a deadly weapon after the angry meeting with Carbo in the vicinity of the post office. If he armed himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, then he was guilty of murder. But, if in view of what had occurred near the post office, the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm, and so believing armed himself solely for necessary self-defence in the event of his being pursued and attacked, and if the circumstances on the occasion of the meeting at or near the saloon were such as, by themselves, made a case of manslaughter, then the defendant arming himself, after the difficulty near the post office, did not, in itself, have the effect to convert his crime into that of murder.

"Stated in another form: Although the defendant may not have been justified on the occasion and in the particular circumstances of the difficulty at the billiard saloon in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm, nevertheless the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully armed himself for purposes simply of self-defence, and if, independently of the fact of arming himself, the case, tested by what occurred on the occasion of the killing, was one of manslaughter only. The court, in effect, said, or the jury may not unreasonably have understood the judge as declaring, that preparation by arming, although for self-defence only, could not be followed, in any case, by manslaughter, if the killing, after such arming, was not in fact in necessary self-defence. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye of the law in arming himself for self-defence, and if, without seeking, but on meeting his adversary, on a subsequent occasion, he killed him, not in necessary self-

defence, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it the one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self-defence."

We think there was also error in that portion of the charge wherein the court instructed the jury as to the effect which they should give to the evidence on the subject of previous threats, uttered against the defendant by Hermes and his sons. The learned judge seems to have regarded such evidence not merely as not extenuating or excusing the act of the defendant, but as evidence from which the jury might infer special spite, special ill-will, on the part of the defendant. The language of the learned judge was as follows:

"Previous threats fill a certain place in every case where they are brought out in the evidence. If, at the time of the killing, the party is doing nothing which indicates a deadly design, or a design to do a great bodily mischief — if he is doing nothing, I say, of that kind — then previous threats cannot be considered by the jury. If they are satisfied from the law and the testimony that the deceased was not doing anything that amounted to a deadly attack, or there is no question in their minds as to what the attitude of the deceased was, previous threats cannot be considered by them; they cannot enter into their consideration of the case by the way of justifying any act that resulted in the death of Charles Hermes from the act of defendant; they cannot be considered, I say, because you cannot kill a man because of previous threats. You cannot weigh in the balance a human life against a threat. There is no right of that kind in law. Threats are only admitted as illustrative of another condition that exists in the case. If the party, at the time of killing, who is killed, is doing that which indicates a purpose to do great bodily harm, to kill, or is about to do it, so near doing it, and goes so far that it can be seen from the nature of the act what his purpose is, then for the purpose of enabling you to more clearly see the situation of the parties you can take into consideration the

threats made by him. But if there is an absence in the case of that which indicates a deadly design, a design to do great bodily harm, really or apparently, threats cannot be considered in connection with the asserted right of a defendant that he can avail himself of the right of self-defence. You cannot do that. But if threats are made, and there is an absence from the case of the conditions I have given you where you can use them as evidence, *you can only use them and consider them for the purpose of showing the existence of special spite or ill-will or animosity on the part of the defendant.*"

And again:

"If this defendant killed this party, Charles Hermes, because the old man, the father of Charles Hermes, had threatened him with violence, or threatened to have something done to him because of his belief that he had done something with his hogs or killed them and made threats, that is no defence, that is no mitigation, but that is evidence of malice aforethought; it is evidence of premeditation; it is evidence of deliberation of a deliberately formed design to kill, because of special spite, because of a grudge, because of ill-will, because of animosity that existed upon the part of this defendant towards these people in the field."

While it is no doubt true that previous threats will not, in all circumstances, justify or, perhaps, even extenuate the act of the party threatened in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill-will and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the alleged conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats.

The instructions which have thus far been the subject of our criticism were mainly applicable to the contention that the defendant acted in self-defence, but they also must have been understood by the jury as extending to the other proposi-

tion that the defendant's act constituted the crime of manslaughter and not of murder. The charge shows that the instructions of the learned judge, on these two distinct defences, were so blended as to warrant the jury in believing that such instructions were applicable to both grounds of defence.

Whether this be a just view or not, there were distinct instructions given as to the contention that the act of killing in this case was manslaughter and not murder, which we think cannot be sustained. A portion of such instructions was as follows:

"Now I have been requested to charge you upon the subject of manslaughter. Manslaughter is defined by the law of the United States to be the wrongful killing of a human being, done wilfully, and in the absence of malice aforethought. There must be out of the case that which shows the existence of this distinguishing trait of murder, to find the existence of a state of case that authorizes a mitigation of the offence from murder to manslaughter. It is an unlawful and wilful killing, but a killing in such a way as that the conduct of the deceased Hermes, in this case, at the time he was killed, was not of a character to authorize him to shoot, but that the defendant could so far have the benefit of that conduct provocative in its nature as that he could ask you to mitigate his crime, if crime exists here, from murder to manslaughter. Let us see what is meant by that. It cannot grow out of any base conception of fear. It cannot grow out of a state of case where there is a killing because of threats previously made, because of that which evidences special spite or ill-will, for if the killing is done on that ground, and if it is shown by the threats, and the previous preparation of the defendant, or the fact of his arming himself, and going back to the field where they were at work, and while there he shot Charles Hermes to death, it cannot be evidence of that condition; but at the time of the killing there must have been that in the conduct of Charles Hermes in the shape of acts done by him that were so far provocative as to then and there inflame the mind of the deceased [defendant] to authorize you to say that it was so inflamed; in such an inflamed condition that the defendant did not act

with premeditation; that he did not act from a previously formed design to kill, but that the purpose to kill sprang into existence upon the impulse of the moment because of the provocative conduct of Charles Hermes at the time of the killing, that would be a state of manslaughter. . . . The law says that the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before that affray existed, and whenever that exists, when it is done unlawfully and improperly so that there is no law of self-defence in it, the fact that they may have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter."

The error here is in the assumption that the act of the defendant in arming himself showed a purpose to kill formed before the actual affray. This was the same error that we found in the instructions regarding the right of self-defence, and brings the case within the case of *Gourko* v. *United States*, previously cited, and the language of which we need not repeat.

These views call for a reversal of the judgment, and it is therefore unnecessary to consider the assignments that allege errors in the selection of the jury.

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

MASSACHUSETTS AND SOUTHERN CONSTRUCTION COMPANY *v.* CANE CREEK TOWNSHIP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 112. Submitted November 20, 1894. — Decided December 3, 1894.

Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable, and not a formal, party.

This was a suit commenced by the appellant, a citizen of the State of Massachusetts, in the Circuit Court of the United

States for the District of South Carolina, to recover the possession of certain bonds. The defendants were the township of Cane Creek, Lancaster County, South Carolina, a citizen of that State, and the Boston Safe Deposit and Trust Company, a corporation created by and a citizen of the State of Massachusetts, the State of which the plaintiff was a citizen.

The facts as alleged in the bill were that $19,000 of the bonds of the township of Cane Creek, one of the defendants, had been by agreement deposited with the Deposit and Trust Company, the other defendant, to be delivered to the plaintiff when a certain railroad in the township was completed and ready for operation, as shown by the certificate of the engineer of the railroad company, and a majority of the board of county commissioners of Lancaster County, the corporate agent of said township; that the road had been fully completed, but that the commissioners wrongfully refused to sign the required certificate; that the Deposit and Trust Company had no interest in the bonds, and claimed none, and was ready and willing to deliver the bonds whenever it was protected in so doing. The prayer was, first, for process; "second, that pending said suit, and until further order of the court, the said trust company be ordered to deliver and pay over said bonds to the complainant; third, that the said defendant township may be required to specifically perform its aforesaid agreements by assenting to the delivery of said bonds now in the hands of said defendant trust company to the complainant; fourth, that said defendant trust company be ordered to pay over and deliver said bonds to the complainant;" fifth, for further relief. The township defended by a motion to set aside the service of process, by a plea to the jurisdiction of the court, on the ground that one of the defendants was a citizen of the same State as the plaintiff, and a necessary party to the controversy, and by an answer to the merits. The Deposit and Trust Company also filed an answer, which set forth that it had no interest in the bonds, or the debt represented thereby, made no claim for any services in connection therewith, that it was a mere stakeholder, and ready to deliver the bonds whenever protected in so doing. It was agreed by counsel

"that the motion to set aside service and the pleas to the jurisdiction should be heard when the case was tried on its merits without prejudice, the motion not to be deemed as waived or overruled by the pleas and answer, and the pleas not to be deemed waived or overruled by the answer, and for the sake of convenience this agreement shall continue of force for the purposes of this appeal and hearing in the Supreme Court."

The motion to set aside service and the plea were overruled, but upon the merits a decree was entered in favor of the defendants. To reverse this decree the plaintiff appealed to this court, the bond on appeal running only to the township.

Mr. Samuel Lord for appellants.

Mr. Ira B. Jones for appellee.

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

The plea to the jurisdiction should have been sustained. The substantial object of the suit was to obtain possession of the bonds. The Deposit and Trust Company was the party in possession, and, although it claimed no interest in the bonds as against the plaintiff and its codefendant, yet possession could not be enforced in favor of the plaintiff except by a decree against it. Where the object of an action or suit is to recover the possession of real or personal property, the one in possession is a necessary and indispensable (and not a formal) party. The case of *Wilson* v. *Oswego Township*, 151 U. S. 56, is decisive on this point. In that case a suit was commenced in a state court in Missouri to recover possession of certain bonds in the custody of the Union Savings Association. There were several defendants, among them one Montague, and an intervenor, Oswego township, who, claiming the bonds, removed the case on the ground of diverse citizenship to the Federal court. Such removal was adjudged to be erroneous, this court holding that "the Union Savings Association, being the bailee or trustee of the bonds, was a necessary and indispensable party to the relief sought by the petition, and that

defendant, being a citizen of the same State with the plaintiff, there was no right of removal on the part of Montague, or of the intervening defendant, the Oswego township, on the ground that the Union Savings Association was a formal, unnecessary, or nominal party."

Further comment is not required. The decree of the Circuit Court must be

Reversed, and the case remanded, with instructions to sustain the plea, and to dismiss the bill for want of jurisdiction.

DEERING *v.* WINONA HARVESTER WORKS.

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

No. 54. Argued November 5, 6, 1894. — Decided December 3, 1894.

The first claim in letters patent No. 223,812, issued January 27, 1880, to William F. Olin for an improvement in harvesters, describing a swinging elevator, located upon the grain, (or ascending,) side of the main belt, pivoted at its lower end and movable at its upper end, is not infringed by a similar device, located upon the stubble side, pivoted at its upper end, and swinging at its lower end.

When an inventor, who may be entitled to a broader claim than he makes, describes and claims only a part of his invention, he is presumed to have abandoned the residue to the public.

Oral testimony, unsupported by patents or exhibits, tending to show prior use of a patented device is open to grave suspicion.

Unsuccessful and abandoned experiments do not affect the validity of a subsequent patent.

The 20th claim in letters patent No. 272,598, issued February 20, 1883, to John F. Steward for an improvement in grain binders is valid, and was infringed by the appellees.

The 21st claim in those letters patent was not infringed by the appellees.

This was a bill in equity for the infringement of letters patent No. 223,812, issued January 27, 1880, to William F. Olin, for an improvement in harvesters, and patent No. 272,598, issued February 20, 1883, to John F. Steward, for an improvement in grain binders. The original bill was founded upon five different patents, but appellant acquiesced in the

decree of the Circuit Court dismissing his bill as to all but the two patents above named.

In the patent to Olin for an improvement in harvesting machines, the patentee stated in his specification as follows:

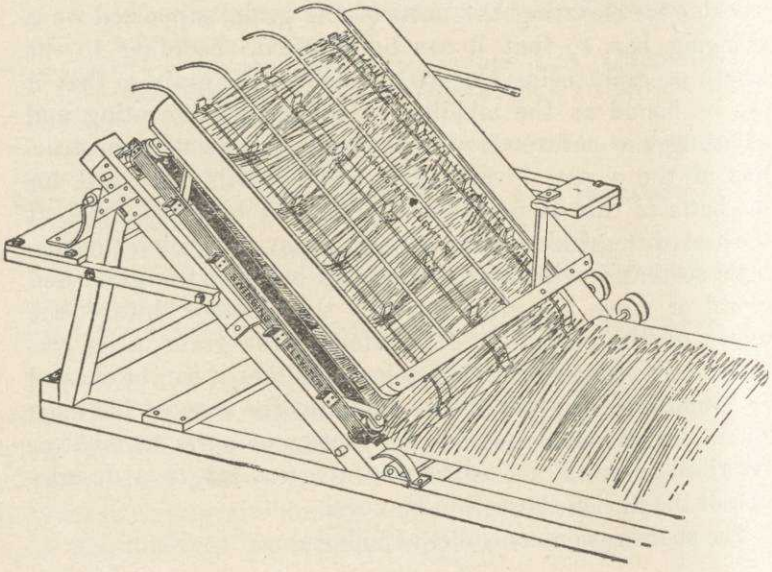
"In that class of harvesting machines where the grain is received upon a carrier-platform and elevated over the drive-wheel by an elevator and deliverer to the binders or an automatic binder, it is desirable that there shall be no stoppage in the flow of the grain in its passage to its place of delivery; that the butts of the grain shall be carried up parallel, or nearly so, with the heads of the grain, so as to deliver the grain in proper shape for binding purposes, and that the grain shall be delivered to the receiving-table so that it can be bound at or near the middle.

"The object of this invention is to provide devices for attaining all of these results; and it consists in interposing a roller between the lower end of the elevator and the inner end of the grain-carrier, to facilitate elevating the grain and prevent clogging at that point, and prevent the grain from being carried down or falling through between the elevator and carrier; in providing a belt or chain at the grain side of the machine for elevating the butts of the grain, supported on a swinging bar, so that it can be adjusted, according to the length of grain being elevated, to deliver the grain so that it can be bound at the middle; in devices for operating and adjusting the elevator for the butts; in the peculiar construction of the cover; in arranging and operating the belt for the butts so that it prevents any clogging by short grain at the heel of the sickle; in arranging the device for elevating the butts so that it will bear against the butts of the grain and crowd or move the grain back on the elevator toward the centre, for the purpose of straightening the grain in its passage up the elevator, and delivering it so that it can be clasped or bound near the middle, to facilitate the ease of binding; and in the several parts and combination of parts hereinafter described as new." Here follows at great length a description of the device claimed to be novel.

The specification concludes as follows:

"The butts of grain are heavier than the heads, and consequently lag behind unless some means are provided to make them move faster than the heads. In order to elevate the butts even with the heads the belt or elevator Q is so arranged that the teeth *b* will engage with the butts of the grain on the roller I and carry them up while the heads are being carried up by the elevator-belts M. The lower pulley, *c*, is to be so arranged that it will permit the teeth *b* on the elevator Q to clear the end of the roller and engage the butts, and this pulley *c* is located as close to the main frame as is possible and permit the operation of the butt-elevator, which location of the pulley brings the butt-elevator in position to enable it to catch any short grain, which short grain is liable to fall down and be caught by the heel of the sickle and clog the sickle. By locating the lower pulley, *c*, of the belt Q at the proper distance above the main frame A the teeth *b* on the elevator will come in contact with such short grain and force it forward on to the carrier-platform, thus keeping the heel of the sickle clear at this point."

The following drawing exhibits the "swinging elevator" feature of the patent:



Statement of the Case.

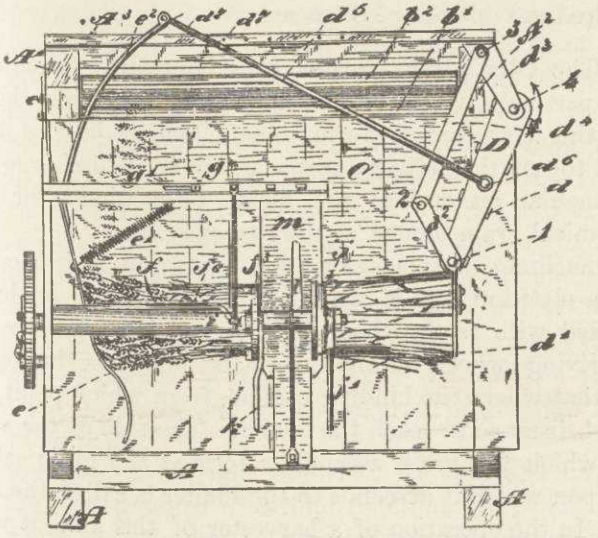
The plaintiff claimed an infringement of the first claim of the patent, which reads as follows:

"1. In combination with a harvester elevator a swinging elevator pivoted at its lower end and suitable devices for shifting its upper end, whereby the swinging elevator forms a means for elevating the butts of the grain and delivering grain of different lengths at the same point, substantially as specified."

In the patent to Steward for improvements in grain binders the patentee stated —

"The object of my invention is to provide means, that, combined with an automatic grain binder, shall make it automatically regulate the position of the band on the gavel — that is, shall automatically place the band upon the gavel in its proper position relative to the length of the grain without any aid or attention from the operator — and its nature consists in locating, in such a position as to be influenced by the heads of the incoming grain, or gavel or bundle, a device to be moved thereby, the said device connected with means for adjusting the relative positions of the said grain and the binding mechanism."

The following drawing exhibits the patented device:



The plaintiff claimed an infringement of the twentieth and twenty-first claims of the Steward patent, which read as follows:

"20. The combination, in a grain-binder, of moving butt-adjusting mechanism and the board d^1, substantially as described.

"21. The combination of the swinging butt-adjuster, the arms d^2, d^3, d^4, and the board d^1, pivoted to the swinging butt-adjuster, substantially as described."

Upon a hearing upon pleadings and proofs, the court below dismissed the bill upon the ground that the Olin patent was not infringed, and that the Steward patent was invalid by reason of a certain device theretofore used, which was held to have anticipated the patent. From this decree plaintiff appealed to this court. The opinion of the Circuit Court is reported in 40 Fed. Rep. 236.

Mr. Thomas A. Banning for appellant.

Mr. Philip C. Dyrenforth for appellees.

Mr. Justice Brown, after making the foregoing statement, delivered the opinion of the court.

1. The Olin patent relates to a harvesting machine, and more particularly to a certain method of elevating the grain from the harvester platform, upon which it falls as it is cut, to the top of the delivery apron, where it is discharged from the machine either into the hands of a binder, or into a mechanical grain binder, as the case may be.

In machines of this description the grain, as it is cut, falls upon a platform, and is carried to the base of an endless belt provided with teeth, which seize the grain and carry it over the driving wheel of the harvester, up to a higher level than that where the binding is done, from which point it falls a short distance to reach the binder. The side of the elevator upon which the grain ascends is termed the grain side; the side upon which it descends to the binder is called the stubble side. In the operation of a harvester of this kind it was ob-

served that, as the grain mounted the elevator on the grain side, the butt end of the stalks, being heavier than the heads, exhibited a tendency to lag behind, so that the stalks assumed a diagonal position across the harvester platform. The consequence of this was that the heads of the stalks were delivered to the binder in advance of the butts, and obliquely — a peculiarity which interfered with the proper binding of the grain. In addition to this, the different lengths of the stalks required some means whereby the binding band might be placed centrally to their lengths, that is, if the stalks, after being cut, are twelve inches long, the band should be placed about six inches from each end, but if the stalks are five feet long, it should be placed about two and a half feet from each end. To obviate the difficulty of the butts lagging behind, and also to secure proper delivery of the grain as to length, Olin invented an auxiliary belt located at a right angle to the main belt, but moving in the same direction and at somewhat greater speed. This auxiliary belt was also provided with teeth, which engaged the butt end of the stalks, and, moving faster than the main belt, kept the butts up to a level with the heads. As shown and described in the patent, this auxiliary belt was arranged with one end located at the lower end of the main belt and near the carrier platform, and the other end at the apex of the main belt or the highest point at which the grain ascends. The mechanism was intended to act upon the swath of flowing grain, and change its direction, pushing the stalks endwise, so that they might be delivered to the binder in proper position to be bound in their centre, and also hastening their butts so that the stalks might not be delivered diagonally, but parallel with each other and with the flow of the main belt. The claim describes this swinging elevator as pivoted at its lower end, with suitable devices for shifting its upper end, whereby it forms a means for elevating the butts of the grain, and delivering grain of different lengths at the same point.

Devices bearing certain similarity to this, and having in view the performance of a like function, were not wholly unknown to the prior art. These devices, though not claimed

to fully anticipate the Olin patent, are important in their bearing upon the construction of this patent and upon the alleged infringement by the defendants.

Thus the patent to Elward of July 6, 1875, exhibits two rollers mounted in front of the horizontal belt. These rollers carry a short belt or apron, whose face, like that of the Olin patent, is perpendicular to the face of the horizontal belt. It is stated in the patent that one of these rollers may be driven by proper gearing, and it is so represented in the model. The face of this small belt moves in the same direction as the horizontal belt, and is set at an angle with the line of direction or travel of the grain. The specifications state that this belt or apron "may be operated either by the friction of the passing butts of the grain, or it may be given a positive movement by gears or belts and pulleys from any convenient driving shaft, the movement of the apron in either case serving to move or shove backwards the butts of the grain projecting over the finger-bar." This auxiliary belt of Elward's acts much in the same way in relation to grain moved by and on the horizontal apron that the auxiliary belt of Olin does upon grain carried upward by the main horizontal belt, shoving the grain endwise toward the rear of the machine while it is being carried along. No method is stated, however, by which the canvas may be rotated, and even if it were, it would still be incompetent to perform the office of the Olin belt, because it is not adjustable at either end.

The patent to George F. Green of March 6, 1877, also shows an adjustable butter, which he designates as a grain guide, pivoted at the lower front corner of the elevator frame, on the grain side, and provided at its upper end with a handle convenient to the driver sitting in his seat. This so-called grain guide is much like that of Olin's in shape and location, though apparently not provided with a movable belt, and hence not adapted to hasten the ascent of the butts, but only to shove back the butts of the shorter stalks. Instead of operating to hasten the butts, it can only operate to retard them to the extent of the friction between the butts and the surface of the board.

The patent to C. W. and W. W. Marsh of January 5, 1864, shows alongside of the main belt, an auxiliary belt, mounted on the same rollers as the main belt, and therefore proceeding at the same speed. The horizontal belt carrying the grain over the harvester platform is described as travelling faster than the main elevator, so as to operate to straighten the grain, or bring the stalks parallel to each other before beginning their ascent. The auxiliary belt, however, is not arranged on vertical rollers as in the Olin patent, but upon the same rollers as those carrying the main belt; neither is it pivoted at its lower end, nor capable of being shifted at its upper end, and hence is incapable of moving the grain endwise to even the butts. There are two or three other patents, which appear to have a somewhat remoter bearing upon the Olin patent, but are not necessary to be noticed in the consideration of this case.

The gist of Olin's invention seems to be in his taking the grain guide used by Green, providing it with a belt and teeth somewhat upon the principle of the independent belt or bands used by the Marshes, travelling faster than the main belt, and for the purpose of keeping the butts in line with the heads of the stalks. The important feature, however, connected with all these prior patents is found in the fact that the devices described in them were all located on the grain side of the elevator, and were designed to secure parallelism in the stalks, as they mounted the main belt, and before they reached its apex. Olin proceeded upon the same theory, and located his swinging elevator or auxiliary belt upon the same side of the main elevator, and described it in his claim as pivoted at its *lower* end, with suitable devices for shifting its *upper* end.

In defendants' device, the grain is carried up upon the main belt or elevator, as in the Olin patent, without, however, any means whatever for hastening the butts or moving the stalks endwise upon the harvester elevator; but, after having been lifted or carried over the apex of the main belt, and while descending upon the stubble side to the binder, they are adjusted in position by a travelling belt or apron almost identical in principle with that of the Olin patent, but pivoted at its *upper* end and swinging at its *lower* end. This device is

shown in a patent to Bullock & Appleby of October 31, 1882, in which the prior use of the plain face deflector board or surface was recognized, but was said not to be a sufficient means for effecting the desired adjustment of the grain stalks endwise. "The butt ends of the stream of grain will lag by contact with the stationary surface of such a designed deflector or adjuster, and the grain will not be properly guided to the binder or the point at which the binding is to be done." Their invention consists, as they state, essentially in the employment of an adjuster and deflector composed of a travelling surface, mounted in an adjustable frame, and provided with suitable means for operating it, by which the cut grain, while passing from the delivery end of the conveyer to the binder, shall be perfectly adjusted lengthwise of its stalks and to an extent corresponding to the length of the grain, so as to effect a presentation of the grain always in a given relative position to the binder devices of the machine and in proper condition for binding.

The third and most important claim of that patent was for "an endless belt moving in the direction of the grain delivery and operating in contact with the stubble end of the grain on its passage from the elevator to deliver it to a binding mechanism, substantially as set forth."

The real question in this case as between these two devices is, whether the first claim of the Olin patent describing a swinging elevator located upon the *grain* or ascending side of the main belt, pivoted at its *lower* end and movable at its *upper* end, can be construed to cover a similar device located upon the *stubble* side, pivoted at its *upper* end and swinging at its *lower* end. We are of opinion that it cannot. Plaintiff claims in this connection that, by the *lower* end of the swinging elevator is in reality meant the *receiving* end, and that, as the defendants' device (which can hardly be called an elevator at all, since it facilitates the *descent* of the grain) is pivoted at its receiving end, which happens to be its upper end, it is within the spirit though not within the letter of the claim. But of whatever elasticity of construction this claim might have been susceptible, if it had been a pioneer patent, it is

clear that, in view of the prior devices, of which it was only an improvement, and of the explicit language of the specification and claims, the patentee had only in view an auxiliary belt located upon the grain or ascending side of the elevator. Indeed, from the statement in the introduction of the specification through all the description and in each of the claims, care is taken to emphasize the fact that the invention relates to the combination, with the ordinary harvester elevator, of a butt elevator which operates upon the butts of the grain while the grain is being lifted upon the main belt, so as to hasten the ascent of the butts, and move the stalks back upon the harvester elevator. In no one of the six claims of the patent is there a suggestion that the elevator or belt Q could be located upon the stubble side, although this belt is made an element in all but one of the claims.

If Olin had been the first to devise a contrivance of this description for adjusting the flow of grain upon the main elevator, it is possible that, under the cases of *Ives* v. *Hamilton*, 92 U. S. 426, and *Hoyt* v. *Horne*, 145 U. S. 302, a construction broad enough to include defendants' device might have been sustained. But in view, not only of the prior devices, but of the fact that his invention was of doubtful utility and never went into practical use, the construction claimed would operate rather to the discouragement than the promotion of inventive talent. Not only does it appear that the device described in this patent did not go into general use, but that the mechanism set forth in the patent to Bullock & Appleby of October 31, 1882, under which the defendants manufactured their machines, was extensively sold throughout the country for about eight years before any assertion of adverse right under the Olin patent, and that the plaintiff himself became a licensee under the Appleby patent, and manufactured his own machines in accordance therewith.

Another fact is deserving of consideration. While the application for the Olin patent was pending, another application was made by McGregor & Flennekin, showing a grain adjusting device similar to that used by the defendants; that is, a butt-adjuster like that of Olin's, but located upon the descend-

ing line of grain travel, and pivoted at its upper end instead of its lower end. This application was thrown into interference with that of Olin — the examiner holding the subject-matter involved in the interference to be "an endless belt moving in the direction of the grain delivery, operating in contact with the end of the grain to deliver it to a binding mechanism." This interference seems to have been decided in Olin's favor, since a patent was subsequently issued to him; but inasmuch as he thus was warned of the claim of McGregor & Flennekin, and of its extent, it is somewhat singular that he did not at least endeavor to obtain an enlargement of his claim, to cover an endless belt moving in the direction of the delivery, whether such belt were located upon the grain or stubble side of the elevator, and thus anticipate McGregor & Flennekin. His failure to make an effort in that direction indicates a consciousness on his part that he had limited himself to an endless belt upon the grain side, and the fact that the McGregor & Flennekin patent was subsequently issued, with the broad claim of the endless belt moving in the direction of the grain delivery, indicates that, notwithstanding the interference, it was not considered as anticipated by the Olin patent previously granted. In the meantime, and during the pendency of the Olin application, Bullock & Appleby applied for a patent upon the combination of the travelling apron with the table of the grain binder, as used by these defendants, and a patent was issued to them October 31, 1882. If Olin were entitled to all that plaintiff now claims, it would seem that the patent to McGregor & Flennekin, as well as that to Bullock & Appleby, are infringements upon his own. It is possible that Olin was entitled to a broader claim than that to which he limited himself; but if he described and claimed only a part of his invention, he is presumed to have abandoned the residue to the public. *McClain* v. *Ortmayer*, 141 U. S. 419. There was no error in holding that the Olin patent had not been infringed.

2. There are twenty-one claims in the Steward patent, the last two of which only are involved in this controversy. These claims are as follows:

"20. The combination, in a grain binder, of moving butt-

adjusting mechanism, and the board d^1, substantially as described.

"21. The combination of the swinging butt-adjuster, the arms d^2, d^3, and d^4, and the board d^1, pivoted to the swinging butt-adjuster, substantially as described."

The peculiar feature of this portion of the patent is in the attachment to a butt-adjuster, such as is described in the Bullock & Appleby patent — that is, upon the stubble side of the elevator, of a board pivoted to the end of the movable butt-adjuster to bear against the butts of the sheaf of grain, after it passes the butt-adjuster proper, and while it is being acted upon by the binding mechanism. This board d^1 is described in the patent as "a thin board or plate of metal, as wide as the adjusting canvas, and pivoted to the frame of the latter at its lower extremity. From this board reaches upward and inward an arm d^2. The board and frame are as one piece; but the board itself is made in two parts, so that its greater portion (which is the lower) can be removed." As the grain advances into the binding receptacle, the board bears against the butts, and holds them in an even condition, and in such a position as to insure the central binding of the bundle. In practice two forms of this extension of the butt-adjuster have been used; one consisting of a board or sheet-iron plate *rigidly* secured to the butt-adjuster at its lower end, and the other consisting of such a board or plate *pivotally* connected to the butt-adjuster at its lower end, and connected to the binder in such a way as to cause it to remain "parallel with itself" in the various positions which it assumes. In other words, when the pivotal form of extension is used the connections are such that, while the angle of the butt-adjuster with the top of the binder changes, the angle of the extension and the same board remains constant, or nearly so. Defendants' machine is provided with a moving butt-adjusting mechanism, and also with a board pivoted to the lower end of the butt-adjuster, practically identical in its construction and operation with that of the Steward patent. The defences to these claims are:

1. That claim 20 is void, in that it describes an incomplete

and inoperative invention, and if completed by reading into it the necessary specifications, the defendants do not infringe.

2. That claim 21 is not infringed by defendants' machine.

3. That both claims are void, because Steward was not the first inventor, and because substantially the same device as shown and described in the patent and referred to in the claims was in public use in the United States for more than two years before the application was filed.

As the last defence goes to both of these claims, it may properly be considered first.

The English patent to Howard & Bousfield of 1881 may be left out of consideration, because, although it antedates the Steward patent, Steward appears to have completed his invention and made a working model before the date of the English patent. His oath was accepted by the Patent Office as decisive of the fact, and a patent was issued to him upon it, and the model, which was put in evidence, was shown to have been completed as early as February, 1881.

The court below found, however, that the device in question was invented and publicly used by one Gottlieb Heller on his farm in Kansas in the harvest of 1877–78. The importance and peculiar character of the testimony upon this point will justify a somewhat extended analysis and consideration of it. Heller is a Kansas farmer, who also appears to have been for some years agent for the Beloit — later the Milwaukee Harvester Company. He testified that in 1878 he bought from an agent of the Beloit Company a combined harvester and binder, which had a travelling butt-adjuster precisely as it appears in the Bullock & Appleby patent, except that it had no construction corresponding to the board d^1 of the 20th claim. He found that when the grain was short and thin it did not work well, so that he added an extension to the butt-adjuster, to keep the straw of the bundle even at the butts. This extension, as he explained it, was first made with a piece of tin or sheet iron *nailed* on to the frame of the butt-adjuster. This arrangement proved unsatisfactory. He then says he made an extension out of sheet iron and heavy hoop iron, which would adjust and keep

straight with the butt of the bundle, and in that way it satisfied him. He illustrated this device by a rough sketch, containing much the same elements as those described in claim 21 of the Steward patent. He then produced what he claimed to be the identical device which he made in 1878, and used publicly in the harvest of that year. This device was put in evidence. He says his wife and son helped him in the harvest and drove the machine which was used to cut part of 250 acres. He also attempted to use the device the next year, 1879, but the grain was so short it proved unsatisfactory, and he took it off and elevated the grain into a wagon. In 1880 he got a new binder, which the adjustable extension did not fit, and for lack of time he put on a rigid one instead of an adjustable one, though he preferred the latter. At various times he put on rigid ones for other persons. The pivoted butt-adjuster represented in his sketch and relied upon to establish the prior use was thrown aside and lost sight of for several years, Heller never applying for a patent nor taking any steps toward the introduction of the device.

One Rubin, a neighbor of Heller's, who sold him the harvester and binder he used in 1878, went to Heller's farm in the harvest of that year to see how it worked, when Heller's son called his attention to an improvement in the butt-adjuster which he said his father had made; but he evidently did not remember whether the board extension was rigidly or pivotally attached to the adjuster, though he thought it was screwed upon the frame of the adjuster, *stiff*.

George Heller, the son, testified that his father made an extension, like the one introduced by him, for the harvest of 1878, and that the sheet-iron piece was from an old Kirby self-rake. He seemed to have put it on as a rigid extension at first, and, after using it a day or two, substituted an automatic extension, which he believes to have been the identical device put in evidence. He says his father afterwards put a stiff one on the second binder they bought.

One Edward D. Bishop saw only the rigid extension, and did not see the improved device. Rosina Heller, the wife, testified that she ran the harvester and binder in the harvest

of 1878. She testified generally to the use of the butt-adjuster, with the adjustable extension, during the year 1878.

From the testimony in reply to this it appeared that the butt-adjuster of tin or iron, said to have been first made in 1878, and which was put in evidence, bore no marks whatever of nails having been driven into it; also, that the iron extension which Heller's son swore was from a piece of a Kirby rake owned by them, and bought of a firm in Junction City, could not have been taken from a Kirby self-rake, since that pattern of rake did not contain any such sheet iron as the extension was made of. It further appeared that the extension came from a machine called the Triumph, which Heller never owned, but which belonged to another man — one Schlesener, who lived some eight or ten miles distant. It further appeared that the extension was not applied until 1880, and was then *rigidly* fastened by Heller and Schlesener to the frame of the butt-adjuster, instead of being pivotally attached as claimed by Heller. This machine was subsequently, and in 1882, bought by one Messing, whose son testified that at that time the extension was rigidly fastened to the adjuster, and so remained until the spring of 1883, when it passed out of his possession. It further appeared that Heller was an agent for the Milwaukee Harvester Company, which was making butt-adjusters with pivoted extensions, was interested in defeating the Steward patent, and took an active part in securing his testimony.

This entire evidence, taken in connection with certain damaging admissions made by Heller as to the compensation he received, both for his testimony in this case and for his concealment of certain facts in relation to another patent, throws discredit upon the whole case made by the defendant with respect to the anticipation of the Steward patent. Taking this evidence together, it falls far short of establishing an anticipation with that certainty which the law requires. As we have had occasion before to observe, oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented is, in the nature of the case, open to grave suspicion. *The Barbed Wire Patent*, 143 U. S.

275. Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more seriously impaired. This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated. The very exhibit produced by the witness Heller contradicted, so far as it could contradict, his testimony, and the witnesses who ought to have corroborated his story, gave a version which showed it to be untrue in more than one important particular.

Under the circumstances, it would be going too far to reject his entire testimony, but giving it all the weight to which it can reasonably be entitled, it shows no more than that he affixed some sort of an extension to a butt-adjuster connected with an Appleby machine. If, as he says, in 1878, he tried a rigid extension and found it unserviceable, and subsequently, in the same season, he invented a pivoted extension, and it worked well, it is improbable that he would have cast it aside altogether at the end of the season, and taken up again the theory of a rigid extension, and applied it not only to his own, but to a number of other machines. His excuse that the binder was incapable of doing satisfactory work during the season of 1879, by reason of the shortness of the grain that season, is evidence that it was inoperative. If it had been a success, he would hardly have thrown it aside permanently. Doubtless he did use a rigid extension of some sort; but if he ever used a pivoted device at all — of which we have consider-

able doubt — his efforts in that direction must be relegated to the class of unsuccessful and abandoned experiments, which, as we have repeatedly held, do not affect the validity of a subsequent patent. *Corn Planter Patent*, 23 Wall. 181, 211; *Coffin* v. *Ogden*, 18 Wall. 120, 124.

Defendants further insist that the twentieth claim of this patent is invalid, by reason of the fact that, if the board d^1 be construed, as it evidently must, as a board pivoted to the butt-adjuster, the combination is incomplete and inoperative, because the means by which it is held and controlled are not stated in the claim; and if the additional elements, namely, the arms d^2, d^3, and d^4, be read into it, it becomes the same as the twenty-first claim, and the novelty of the claim must be made to depend upon the peculiarities of the board d^1. Admitting that additional elements are necessary to render the device operative, it does not necessarily follow that the omission of these elements invalidates the claim, or that the precise elements described in the patent as rendering it operative must be read into the claim. If Steward were in fact the first to invent the pivotal extension to a butt-adjuster, he is entitled to a patent therefor, though the infringer may make use of other means than those employed by him to operate it. *Loom Company* v. *Higgins*, 105 U. S. 580, 584. In such case any appropriate means for making it operative will be understood. Otherwise the infringer might take the most important part of a new invention and, by changing the method of adapting it to the machine to which it is an improvement, avoid the charge of infringement. The invention of a needle with the eye near the point is the basis of all the sewing machines used; but the methods of operating such a needle are many, and if Howe had been obliged to make his own method a part of every claim in which the needle was an element, his patent would have been practically worthless. We think it sufficiently appears that Steward was the inventor of the pivoted extension described in the twentieth claim; that the claim is valid, and was infringed by the defendants.

We agree, however, that the defendants made use of a different method of adjusting this extension, which is neither

the same invented by Steward, nor a mechanical equivalent of the same. We hold, therefore, that the twenty-first claim was not infringed.

But for the reasons given above the decree of the court below must be

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

UNITED STATES *ex rel.* THE INTERNATIONAL CONTRACTING COMPANY *v.* LAMONT.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 689. Argued and submitted October 23, 1894. — Decided December 10, 1894.

As mandamus will only lie to enforce a ministerial duty, as distinguished from a duty that is merely discretionary, and as the duty must exist at the time when the application is made, the Secretary of War cannot be required by mandamus to sign a contract for the performance of work by a party who is already under written contract with him to perform the same work for the Government at a lower price and under different conditions.

In pursuance of an act of Congress making an appropriation for that purpose, an advertisement appeared August 6, 1892, inviting proposals for doing certain work in Gowanus Bay, New York. The work was divided into three parts, as follows: first for Bay Ridge Channel; second, for Red Hook Channel; and third, for Gowanus Creek Channel. The advertisement, moreover, stated the sums of money which were available for the work on each separate channel, and it was announced that the work must be commenced on October 1, 1892, and be completed on or before December 31, 1893. In answer to the advertisement, the relator bid upon the work. His proposition was to do it all at a uniform rate of 19.7 of a cent per cubic yard, "scow measurement," and with two dredge boats, one of which would commence work within ninety days from the awarding of the contract, and the other within

nine months thereafter. He also undertook to complete the entire work on or before June 1, 1894. In the event of an epidemic prevailing in the locality, he reserved the right to cease work until he should think it prudent to resume. The relator's bid was the lowest, and on September 22, Lieutenant-Colonel Gillespie, of the Engineer Corps, who had issued the advertisement as the Engineer and officer in charge of the work, and at whose office the bids had been opened, addressed the relator the following letter:

"NEW YORK, N. Y., *September* 22, 1892.

"Mr. Joseph Edwards, President of the International Contracting Co., 16 Exchange Place, N. Y. city.

"SIR: The proposal of the International Contracting Co., opened in this office September 14, 1892, for dredging channels in Gowanus Bay, N. Y., 19.7 cents per cubic yard, has been accepted by the Chief of Engineers, U. S. Army.

"After the contract for the work has been prepared you will be notified to call at this office to sign it.

"The regulations require that any instrument executed by an incorporated company shall be under its corporate seal, and evidence should be furnished, also under the corporate seal, as to the official character of the person by whom it is executed, and that he is duly authorized to execute the same on behalf of the corporation.

"Please furnish this office with the names and addresses of your proposed sureties, each to justify in the sum of $45,000.

"A memorandum is enclosed containing instructions for the preparation of contractors' bonds. The execution of the necessary bond, however, will be deferred until the articles of agreement have been completed in every respect.

"Very respectfully, G. L. GILLESPIE,

"*Lt. Col. of Engineers.*"

On September 23 the Secretary of War called on the Chief of Engineers for the papers relating to the matter, and they were submitted to him. On the following day the Chief of Engineers sent this telegram to Colonel Gillespie:

Statement of the Case.

"WASHINGTON, D. C., *September* 24, 1892.

"To Colonel G. L. Gillespie, Engineer, Army Buildings, Whitehall Street, New York, N. Y.:

"Do not proceed further with closing a contract with the International Dredging Company for Gowanus work until further instructions. Acknowledge receipt of this.

"TURTLE, *Engineers.*"

On October 7 the Acting Secretary of War addressed the following letter to the relator:

"*October* 7, 1892.

"GENTLEMEN: The matter of the contract for dredging in Gowanus Bay is not yet settled, and the action of the department upon the bids received has not yet been determined upon. It is respectfully suggested that if you desire to be heard upon the subject an opportunity is offered. Any representation you desire to make, either by writing or orally, by attorney or by any officer of your company, will be respectfully received and considered. It is hoped that you will be able to do this by Tuesday — certainly not later than Wednesday — of next week.

"Very respectfully, L. A. GRANT,

"*Acting Secretary of War.*

"The International Dredging Company, Post Building, 12 to 28 Exchange Place, New York city."

The Secretary of War acted upon the papers after hearing the relator, who claimed that his bid was final and could not be reconsidered, and decided that he had the power to refuse to consummate the contract upon the following grounds:

"First, that said acceptance of the bid of the relator was not properly made and was not binding on the government.

"Second, that said bid and the bid of the W. H. Beard Dredging Company, hereafter mentioned — which was the next lowest bid — were irregular and improper, and that neither should be accepted."

Accordingly he ordered the work to be readvertised. The new advertisement appeared on October 26, 1892. It called

for proposals which differed from those contemplated by the first advertisement in several important particulars — first, in striking out the clause referring to the eight hour law; second, in changing time for the commencement of the work, requiring it to be commenced on April 5, 1893, instead of October 1, 1892; and, third, by calling for its completion by August 1, 1894, instead of December 31, 1893. Pending this bid and before any adjudication on it, the relator commenced in the Supreme Court of the District of Columbia a suit to compel Mr. Elkins, then incumbent of the office of Secretary of War, to sign a contract with him for the work as covered by the first proposals and specifications, and the bid made thereunder. Before this suit was disposed of the bids under the second advertisement were opened on December 1, 1892, and it was found that the relator had again bidden for the work, this time offering to do it for 13.7 cents per cubic yard instead of 19.7 cents per cubic yard, which was his original bid. Being again the lowest bidder, he obtained the contract from the War Department for the work under the new specification. The mandamus proceeding remained pending on the docket of this court, having been brought hither from the Supreme Court of the District of Columbia. After Mr. Elkins ceased to be Secretary of War, October 23, 1893, upon suggestion by counsel for the relator that the suit had consequently abated, it was dismissed. The relator then called upon Mr. Elkins' successor, Mr. Lamont, and demanded that he should sign the contract awarding the relator the work under the first specifications. This demand the Secretary refused to comply with, in the following communication:

"War Department,

"Washington, D. C., *November* 14, 1893.

"Gentlemen: I have the honor to acknowledge the receipt of your communication of November 4, 1893, in which, on behalf of the International Contracting Company, you request me, 'as the Secretary of the Department of War for the time being, to execute and deliver to that company a contract conforming in all respects to the proposal filed by said company with Lieutenant-Colonel Gillespie on the 19th day of Septem-

ber, 1892, and the acceptance thereof by the Secretary of War through the acting Chief of Engineers.'

"Your request is respectfully declined for the same reasons that my predecessor declined to enter into such a contract, and the additional reason that the International Contracting Company are now under contract to do the work for about two-thirds the amount named in said proposal. I see no justification for entering into another contract with them or for paying them $100,000 more than their contract calls for.

"Very respectfully yours,

"(Signed) DANIEL S. LAMONT,

"*Secretary of War.*"

Upon this refusal, the relator commenced proceedings by a mandamus against Secretary Lamont in the Supreme Court of the District of Columbia, to compel him to execute and deliver to the relator the contract for the work under the specifications set forth in the first advertisement, and meeting with an adverse decision, he first took his case to the Court of Appeals of the District, where the judgment below was affirmed, and thence he brought it to this court by writ of error.

Mr. A. S. Worthington for plaintiff in error. *Mr. William N. Cromwell*, *Mr. William J. Curtis*, *Mr. W. W. Dudley*, and *Mr. L. T. Michner* were on his brief.

Mr. Solicitor General Maxwell, for defendants in error, submitted on his brief.

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

Much was said in argument at bar upon the question of when a contract is to be regarded as completed under the circumstances here presented, and the discussion concerning the authority of the Secretary of War to review the action of an officer of engineers in such a case, and to direct a new adjudication, has taken a wide range. We deem the consideration of both these points unnecessary in view of the relator's

bids under the second advertisement and specifications, and his contract to do the work at a less price and under new conditions. It is elementary law that mandamus will only lie to enforce a ministerial duty, as contra-distinguished from a duty which is merely discretionary. This doctrine was clearly and fully set forth by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch, 137, and has since been many times reasserted by this court. See *Kendall* v. *Stokes*, 3 How. 87; *Brashear* v. *Mason*, 6 How. 92; *Reeside* v. *Walker*, 11 How. 272; *Commissioner of Patents* v. *Whiteley*, 4 Wall. 522; *United States* v. *Seaman*, 17 How. 225, 231; *United States* v. *Guthrie*, 17 How. 284; *United States* v. *The Commissioner*, 5 Wall. 563; *Gaines* v. *Thompson*, 7 Wall. 347; *The Secretary* v. *McGarrahan*, 9 Wall. 298; *United States* v. *Schurz*, 102 U. S. 378; *Butterworth* v. *Hoe*, 112 U. S. 50; *United States* v. *Black*, 128 U. S. 40; *Commissioners of Taxing Dist. of Brownsville* v. *Loague*, 129 U. S. 493; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165.

The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus in the case of *Ex parte Rowland*, 104 U. S. 604, 612, this court, speaking through Mr. Chief Justice Waite, said: "It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one."

Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act, *Commonwealth* v. *Boutwell*, 13 Wall. 526, but it must *require* the act to be done. "A mandamus will not lie against the Secretary of the Treasury unless the laws require him to do what he is asked in the petition to be made to do," *Reeside* v. *Walker*, 11 How. 272; see also *Secretary* v. *McGarrahan*, 9 Wall. 298; and the duty must be "clear and indisputable." *Knox County Commissioners* v. *Aspinwall*, 24 How. 376. Now, at the time that this application was made for a mandamus against Secretary Lamont, the relator had entered into

a contract to do the work in question at a lower price than that mentioned in the first advertisement and bid, and on different terms. This contract had been entered into by him voluntarily. We cannot perceive any duty which under these circumstances rested upon the Secretary of War to sign such a contract with the relator as would be required by the mandamus which is prayed. It cannot be reasonably contended that he is under any obligation to sign two contracts with the same person for the same work at a different price and under different conditions. Nor can it be urged with any greater reason that the relator was entitled to have signed a contract to do work for 19.7 cents per cubic yard, which he had subsequently made a voluntary contract to do for 13.7 cents per cubic yard, and upon conditions different from those mentioned in his first proposal. In order to justify the issue of the writ, then, it would be necessary for us to hold that the second contract was void, and thereby to relieve the relator from obligations which he has assumed, and release him from the binding force of terms and stipulations to which he has subjected himself. Inasmuch as no such duty as that which the granting of this writ would seek to enforce exists, and no right subsists in the relator which this writ could secure him, there is no ground for issuing it. The writ of mandamus cannot be used to set aside a contract which has been voluntarily entered into. *Detroit Free Press Co.* v. *Board of Auditors*, 47 Michigan, 135.

But even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator is in no position to avail himself of such relief. He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. *Oregonian Railway* v. *Oregon Railway*, 10 Sawyer, 464. Nor does the fact that in making his second contract, the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them, he should have

abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences. In the case of *The Bank of the United States* v. *The Bank of Washington*, 6 Pet. 8, certain payments had been made to the first bank upon a decision by the court below, with notice that the payer intended to take the case to the Supreme Court of the United States, and would expect the payee, the Bank of the United States, to refund the money if that court should reverse the decision of the court below, and hold that it was not due. The court said: "No notice whatever could change the rights of the parties so as to make the Bank of the United States responsible to refund the money."

The whole case of this relator is covered by *Gilbert* v. *United States*, 8 Wall. 358, in which this court, through Mr. Justice Miller, said: "If the claimants had any objection to the provisions of the contract they signed, they should have refused to make it. Having made it and executed it, their mouths are closed against any denial that it superseded all previous arrangements." The claim that the purpose of the mandamus which is here asked is not to determine the existence of a contract, or of rights arising thereunder, but only to require the furnishing of evidence, simply changes the form of the contention without affecting its real merits. If, as we have shown, there is no duty resting upon the Secretary to enter into the contract here claimed, necessarily there can be no duty on his part to put into the hands of the relator evidence of the contract having been entered into.

Judgment affirmed.

PEARCE *v.* TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 596. Submitted November 19, 1894.—Decided December 10, 1894.

P. being arrested in Texas on a requisition from the governor of Alabama for his extradition for trial in Alabama on an indictment for embezzlement and larceny, sought his discharge through a writ of *habeas corpus* on the ground of the invalidity of the indictment under the laws of Alabama. The Court of Criminal Appeals of Texas decided that, as it appeared that P. was charged by an indictment in Alabama with the commission of an offence there, and that all the other prerequisites for his extradition had been complied with, he should be extradited, leaving the courts of Alabama to decide whether the indictment was sufficient, and whether the statute of that State was in violation of the Constitution of the United States. *Held*, that this decision did not deny to P. any right secured to him by the Constitution and laws of the United States, and did not erroneously dispose of a Federal question.

MOTION to dismiss or affirm. The case is stated in the opinion.

Mr. William L. Martin, Attorney General of the State of Alabama, for the motion.

No one opposing.

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

George A. Pearce was arrested in the State of Texas on an executive warrant issued by the governor of that State, upon the requisition of the governor of the State of Alabama, to be delivered up to the State of Alabama to answer two indictments against him in the city court of Mobile, Alabama, each charging him with embezzlement and grand larceny; and while in the custody of the agent of the State of Alabama to be transported to Mobile for trial upon said indictments he sued out a writ of *habeas corpus* before the judge of the 42d district of

the State of Texas, praying, for the reasons therein stated, to be discharged. On the hearing of the petition the district judge refused to discharge Pearce, and remanded him to the custody of the agent. Pearce thereupon appealed to the Court of Criminal Appeals of the State of Texas, the court of last resort in criminal matters, where the judgment below was affirmed. 32 Tex. Crim. App. 301.

The grounds on which the relator contended that he was entitled to be discharged were, as stated by the Court of Appeals, that the indictments were insufficient to authorize his extradition, because it was not alleged therein that the offences were committed in the State of Alabama, and in violation of her laws; that the indictments were wholly void in that no time or place were laid therein, and it did not appear where the offences were committed, nor that they were not long since barred. Relator further showed that he had been a citizen of Texas for more than three years, and that his whereabouts were known to interested parties in Alabama, this proof being made under the statute of limitations, presumably of Texas, as it did not appear how long the offences were committed prior to the February term, 1889, of the Mobile city court, at which term the indictments were found, nor what was the statute of limitations in Alabama, if any, for embezzlement and theft. The relator did not deny that he was a fugitive from justice within the rule on that subject or raise any issue thereon. The record showed the requisition made by the governor of Alabama; copies of the indictments duly certified; the warrant of the governor of Texas; and in effect the relator relied for his discharge entirely upon the invalidity of the indictments.

The District Judge certified that, on the hearing below, he had examined the laws of the State of Alabama, and found the indictments sufficient thereunder, or "at least not void."

An opinion was filed in the Court of Appeals by Simkins, J., in which it was held that any indictment which, under the laws of the demanding State, sufficiently charges the crime, will sustain a requisition even though insufficient under the laws of the asylum State; that in this case there was no question as to the nature of the crimes charged, and that they were

offences against the laws of Alabama; that indictments dispensing with the allegations of time and venue in conformity with the code of Alabama had been sustained by judicial decision in that State, *Noles* v. *State*, 24 Alabama, 672; *Thompson* v. *State*, 25 Alabama, 41; and were not necessarily fatally defective in every State of the Union, whatever its statutes or forms of proceeding. The majority of the court did not concur in all the propositions stated in the opinion, but expressed their views as follows: "We desire to modify certain propositions stated in the opinion of Judge Simkins. It is intimated, if not stated directly, that the relator would have the right to show by proper evidence that the indictment in substance was not sufficient under the laws of the demanding State. Our position upon this question is that if it reasonably appears upon the trial of the *habeas corpus* that the relator is charged by indictment in the demanding State, whether the indictment be sufficient or not under the law of that State, the court trying the *habeas corpus* case will not discharge the relator because of substantial defects in the indictment under the laws of the demanding State. To require this would entail upon the court an investigation of the sufficiency of the indictment in the demanding State, when the true rule is that if it appears to the court that he is charged by an indictment with an offence, all other prerequisites being complied with, the applicant should be extradited. We are not discussing the character of such proof; this must be made by a certified copy of the indictment, etc."

It was not disputed that the indictments were in substantial conformity with the statute of Alabama in that behalf, and their sufficiency as a matter of technical pleading would not be inquired into on *habeas corpus*. *Ex parte Reggel*, 114 U. S. 642. Nor was there any contention as to the proper demand having been made by the executive authority of the State from whence the petitioner had departed, or in respect of the discharge of the duty imposed by the Constitution and laws of the United States on the executive authority of the asylum State to cause the surrender. The question resolved itself, therefore, into one of the validity of the statute on the ground

of its repugnancy to the Constitution, and the Court of Appeals declined to decide in favor of its validity. And if it could be said upon the record that any right under the Constitution had been specially set up and claimed by plaintiff in error at the proper time and in the proper way, the state court did not decide against such right, for the denial of the right depended upon a decision in favor of the validity of the statute. What the state court did was to leave the question as to whether the statute was in violation of the Constitution of the United States, and the indictments insufficient accordingly, to the demanding State. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and if any of those rights should be denied him, which is not to be presumed, he could then seek his remedy in this court.

We cannot discover that the Court of Appeals, in declining to pass upon the question raised in advance of the courts of Alabama, denied to plaintiff in error any right secured to him by the Constitution and laws of the United States, or that the court in announcing that conclusion erroneously disposed of a Federal question.

Judgment affirmed.

WEHRMAN *v.* CONKLIN.

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

No. 45. Argued October 31, 1894. — Decided December 10, 1894.

The general principles of equity jurisprudence, as administered in this country and in England, permit a bill to quiet title to be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law.

The statutes of Iowa, (Code, § 3273,) having enlarged the jurisdiction of the courts of equity of that State by providing that " an action to determine and quiet title to real property may be brought by any one having or

Syllabus.

claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," such enlarged jurisdiction, if sought to be enforced in a Federal court, sitting within the State, can only be exercised subject to the constitutional provision entitling parties to a trial by jury, and to the provision in Rev. Stat., § 723, prohibiting suits in equity where a plain, complete and adequate remedy may be had at law.

In December, 1859, the land, the subject of controversy in this suit, was patented to A. W. In the same month it was conveyed by A. W. and his wife to F. W. In January, 1861, G. caused it to be attached as the property of A. W. in an action founded upon a judgment obtained against him in a court in Wisconsin, which case proceeded to judgment against A. W. in September, 1861. Prior to levy of execution in that case, G., in a suit in equity against A. W. and F. W., obtained a decree declaring the deed to be void and ordering the land to be sold in satisfaction of the judgment at law. Levy was made, the land was sold, and the sheriff made a deed conveying the property to G., who entered into possession, paid taxes, and in 1881, 1882, and 1884 conveyed the lands to C., who entered into possession and made valuable improvements upon them. For thirty years the taxes have been paid by C. and his privies in estate. F. W. having set up a claim to the property by reason of alleged irregularities in the proceedings by which G. acquired title, and having commenced an action in ejectment to enforce that claim, C. filed this bill in equity setting up the foregoing facts, averring that the deed by A. W. to F. W. was a cloud upon his title, and praying for a stay of the action of ejectment, for an injunction against further proceedings at law, and for a decree that C. held the lands free and clear from all claims of F. W. A demurrer was interposed setting up among other things that the writ of attachment was not attested by the seal of the court; that no service of summons or notice was had upon A. W. in the State of Iowa; and other matters named in the opinion. The demurrer being overruled, answer was made, and a final decree was made in plaintiff's favor. *Held,*

(1) That the plaintiff had no adequate remedy at law, and the Circuit Court consequently had jurisdiction in equity;

(2) That if no action in ejectment had been begun at law, the long continued adverse possession of the plaintiff, and the equitable title set up in the bill would have been a sufficient basis for the maintenance of the suit;

(3) That, where title to real property is concerned, equity has a concurrent jurisdiction, which affords more complete relief than can be obtained in a court of law;

(4) That the bill was in the nature of a judgment creditor's bill, setting up defects of title, against which they had a right to ask relief from a court of equity;

(5) That it was immaterial whether the defects in the title of G. were well founded or not;

(6) That the absence of the seal did not invalidate the writ.

Statement of the Case.

THIS was a bill in equity brought by the appellees, Conklin and wife, to enjoin the plaintiff, Wehrman, from prosecuting an action of ejectment in the court below, against the appellees, to recover possession of the lands in controversy.

The bill, which was filed by T. B. Conklin and E. F. Conklin, whose Christian names are not given, but who appear from subsequent allegations to be husband and wife, set forth that they were the "absolute owners" of the property, which had been purchased of the United States on June 9, 1857, by one Adolph Wehrman, who received a patent therefor on December 1, 1859. Afterwards, and on December 17, 1859, Adolph Wehrman and wife conveyed the land in controversy with other lands — about 2060 acres in all — by deed of warranty, to the defendant Frederick Wehrman for an expressed consideration of $3000. This deed was recorded in the proper office for the county of Woodbury, to which the county of O'Brien, wherein the lands were situated, was then attached for judicial purposes.

The bill further alleged that on January 14, 1861, a copartnership known as Greeley, Gale & Co. began an action at law, aided by an attachment in the District Court of O'Brien County, upon a judgment rendered by the Circuit Court of Pierce County in the State of Wisconsin, against Adolph Wehrman, which judgment was based upon notes given prior to the date of the conveyance of said lands to the defendant by Adolph Wehrman. Such judgment was rendered after personal service upon Adolph Wehrman in the State of Wisconsin. A writ of attachment was issued by the clerk of the District Court of O'Brien County, and levied upon the lands in question, and notice personally served upon the defendant in the State of Wisconsin, although no service of summons or notice appears to have been had in the State of Iowa. At the time the writ of attachment was issued there was no time fixed by law for holding the term of the District Court in O'Brien County, though subsequently the judge appointed a term to be held on the 3d day of June, 1861, to which day the writ of attachment was actually made returnable. The venue of the cause having been changed to the county of

Woodbury, on September 17, 1861, a judgment was rendered by the District Court of that county against the defendant Wehrman for $1809.40 damages and costs, and the lands "described in the writ of attachment" were ordered to be sold in satisfaction thereof. A certified copy of this judgment was filed in the District Court of O'Brien County.

Afterwards, and prior to the June term of 1862, Greeley, Gale & Co. commenced a suit in equity in the District Court of O'Brien County, against Adolph Wehrman and wife and Frederick Wehrman, for the purpose of setting aside and cancelling the deed from Adolph Wehrman and wife to Frederick Wehrman, as fraudulent and void against the creditors of the former, and subjecting the lands described in this deed to the payment and satisfaction of their judgment against Wehrman. The plaintiffs averred that they were unable to set out the proceedings in such suit for the reason that they had become lost and destroyed, but that there was personal service upon the defendants in the State of Wisconsin; that, subsequently, and at the June term of 1862, a decree was rendered by default declaring the deed to be fraudulent and void, and ordering the lands to be sold in satisfaction of the judgment rendered by the District Court of Woodbury County, and the proceeds to be applied to the payment of such judgment; that an execution was subsequently, and on June 16, 1862, issued from the District Court of Woodbury County, directed to the sheriff of O'Brien County, by virtue of which the sheriff levied upon the lands described in the writ of attachment, and sold the same on July 31, 1862, to Carlos S. Greeley, one of the members of the firm of Greeley, Gale & Co., who thereupon acknowledged satisfaction of the judgment; and that on December 31, 1864, the land not being redeemed, the sheriff executed to Greeley a sheriff's deed, which was filed, whereby Carlos S. Greeley became the absolute owner of the land.

That he subsequently acquired a tax title to such lands for the taxes of 1858 and 1859, and that said lands by conveyances from Greeley in 1881, 1882, and 1884, became the property of Conklin, who took immediate possession and has since been in

full, open, notorious, and adverse possession of the same. That the plaintiffs and their grantors paid all the taxes upon such lands for thirty years, and have made valuable improvements by putting some six hundred acres under cultivation, by the erection of substantial buildings and fences, digging wells and otherwise improving the premises. That such improvements have been made at an expense of $1000 and in full reliance upon their title being good and valid. That in the meantime defendant has never asserted any right or title to the premises, or notified plaintiff of his interest in the same. That Wehrman never asserted any claim to the premises, until the land became valuable by reason of the plaintiffs' expenditures; had never paid any taxes upon the property, and, though having actual knowledge of the proceedings taken by Greeley, Gale & Co. to subject the land to the payment of their judgment, for more than twenty-seven years took no steps to have the records corrected, or asserted any claim, or notified purchasers of such claim, until his action at law was commenced.

The bill further averred the conveyance by Adolph Wehrman to be a cloud upon their title, and, being in actual possession and occupancy of the land, they prayed that the action in ejectment be stayed until the determination as to their rights to the land, and that Wehrman be enjoined from further proceedings at law.

Defendant interposed a demurrer to the bill for the want of jurisdiction and of equity, which was overruled; and he thereupon answered setting up certain defects in the proceedings under which Greeley, Gale & Co. sold the land upon execution, and by virtue of which proceedings plaintiffs claimed to have acquired a title, viz.: (1) that the writ of attachment was not attested by the seal of the court in which the action was brought; (2) that no service of summons or notice was had upon the defendant Adolph Wehrman in the State of Iowa; (3) that such notice as was given described the action as having been brought upon a judgment rendered May 12, 1860, when in fact the judgment was rendered September 12, 1860, and judgment was taken upon the attachment proceedings upon a judgment so rendered September 12, 1860;

(4) that the writ of attachment was made returnable at a term commencing on June 3, 1861, when in fact the commencement of that term was not fixed until more than a month after the writ was issued; (5) that a change of venue was ordered from O'Brien County to Woodbury County, and the papers sent there without having been in any manner certified or verified by the seal of the court in which the suit was brought; (6) that the judgment was *in personam*, and ordered the property "described in the writ of attachment" to be sold to satisfy the same, when in fact no property was described in the writ, but only in the return of the officer endorsed thereon; (7) that in the subsequent equity suit to subject the lands to the payment of this judgment, there was no personal service or notice of process upon the appellant, Frederick Wehrman, in the State of Wisconsin; (8) that the tax deed was defective, inasmuch as the taxes on the lands for 1858 and 1859 were payable by law to the treasurer of Woodbury County, whereas the tax deed shows that the treasurer of O'Brien County attempted to sell the lands for taxes and give a tax deed.

The case was argued upon pleadings and proofs, and the court made a final decree in which the adverse claims of the defendant Wehrman were adjudged to be invalid and groundless, the complainants decreed to be the true and lawful owners of the land, and their title to be quieted against the claims of the defendant, who was perpetually enjoined from setting up the same; and further, that defendant be enjoined from further proceedings at law.

From this decree defendant appealed to this court. The opinion of the court upon demurrer is found in 38 Fed. Rep. 874, and upon final hearing in 43 Fed. Rep. 12.

Mr. Charles A. Clark for appellant, to the question of equitable jurisdiction, said:

Wehrman brought his action at law, to recover possession of the lands in controversy. He claims by a strictly legal title. Conklin claims by a strictly legal title. Appellant was entitled to a trial by jury to determine the validity of his title

and that of Conklin. Equity has no jurisdiction to deprive him of this right. *Lewis* v. *Cocks*, 23 Wall. 466; *Fussell* v. *Gregg*, 113 U. S. 550; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Hipp* v. *Babin*, 19 How. 271; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Whitehead* v. *Shattuck*, 138 U. S. 146.

It will be observed that these decisions proceed upon the ground that *both* parties have a constitutional right to trial by jury. The party out of possession, who brings his action at law to eject his adversary and try the question of legal title to the real estate, is as much entitled to the right of trial by jury as the party in possession, who also claims under a legal title.

Both parties to this controversy claim that they hold the legal title to the land. If Conklin holds such legal title by virtue of the sheriff's deed or his tax deed, under which he claims, he has an adequate and complete remedy at law, by asserting and maintaining such legal title in the action at law brought against him by Wehrman.

If, however, the pretended equitable estoppel which he sets up is requisite to the establishment of his title or right to possession of the land, he can prove and establish that equitable estoppel as a defence in the action at law, as well as he can assert it as a foundation for his suit in equity. Such is the established doctrine of this court. *Dickerson* v. *Colgrove*, 100 U. S. 578; *Kirk* v. *Hamilton*, 102 U. S. 68; *Bacon* v. *Northwestern Ins. Co.*, 131 U. S. 258.

So far as any question of equitable estoppel is concerned, therefore, Conklin had an adequate and complete remedy at law, by asserting and proving such estoppel as a defence to the action in ejectment.

It is also settled law that the equitable jurisdiction of Federal courts can be neither enlarged nor diminished by state legislation. Such was the decision of this court in a case cited *supra*, where the statutes of Iowa authorized a suit in equity on a legal title against a party in the possession of real estate. *Whitehead* v. *Shattuck*, 138 U. S. 146. See also *Mississippi Mills* v. *Cohn*, 150 U. S. 202; *Payne* v. *Hook*, 7 Wall. 425; *McConahy* v. *Wright*, 121 U. S. 205; *Scott* v. *Neely*, 140 U. S.

106; *Gates* v. *Allen*, 149 U. S. 451; *Swan Land & Cattle Co.* v. *Frank*, 148 U. S. 612.

Mr. Ernest C. Herrick for appellees.

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

This is a bill in equity not only to stay an action in ejectment at law, but to remove a cloud cast upon Conklin's title to the lands in question, created by a deed from Adolph Wehrman to Frederick Wehrman, appellant and defendant in the bill, and to quiet their own title thereto.

1. Defendant's principal contention is that equity has no jurisdiction of the case, for the reason that the contest concerns the legal title only, and that plaintiffs have a plain, adequate, and complete remedy at law. It is undisputed that Carlos S. Greeley, a member of the firm of Greeley, Gale & Co., bought the lands in question at a sheriff's sale which took place on July 31, 1862, and that for about twenty years thereafter, when the lands were sold to Conklin, he paid the taxes upon the land. That the Conklins upon their purchase of the several parcels took immediate possession, and that they have since been in full, open, and adverse possession and occupancy of the same; have made large and valuable improvements thereon by putting some six hundred acres under cultivation, and by erecting substantial buildings and fences, digging wells and otherwise improving the premises, making the same more valuable, and have expended a thousand dollars in such improvements in good faith, and full reliance upon such title being good and valid. That the defendant during such time, and for more than twenty-seven years, had never done any act or taken any step to have the records corrected or to assert any claim on his part to such lands, or to notify purchasers of his interest in the same until he began his action of ejectment.

The general principles of equity jurisprudence, as administered both in this country and in England, permit a bill to quiet title to be filed only by a party in possession against a

defendant, who has been ineffectually seeking to establish a legal title by repeated actions of ejectment, and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. Pomeroy's Equity Jurisprudence, sections 253, 1394, and 1396. At common law a party might by successive fictitious demises bring as many actions of ejectment as he chose, and a bill to quiet title was only permitted for the purpose of preventing the party in possession being annoyed by repeated and vexatious actions. The jurisdiction was in fact only another exercise of the familiar power of a court of equity to prevent a multiplicity of suits by bills of peace. A statement of the underlying principles of such bills is found in the opinion of this court in *Holland* v. *Challen*, 110 U. S. 15, 19, in which it is said: "To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property; he must have been disturbed in its possession by repeated actions at law; and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed."

This method of adjusting titles by bill in equity proved so convenient, that in many of the States statutes have been passed extending the jurisdiction of a court of equity to all cases where a party in possession, and sometimes out of possession, seeks to clear up his title and remove any cloud caused by an outstanding deed or lien which he claims to be invalid, and the existence of which is a threat against his peaceable occupation of the land, and an obstacle to its sale. The inability of a court of law to afford relief was a strong argument in favor of extending the jurisdiction of a court of equity to this class of cases.

The statute of Iowa, upon which this bill is based, is an example of this legislation, and provides (sec. 3273) that "an

action to determine and quiet title to real property may be brought by any one having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession."

It will be observed that this statute enlarges the jurisdiction of courts of equity in the following particulars:

1. It does not require that plaintiff should have been annoyed or threatened by repeated actions of ejectment.

2. It dispenses with the necessity of his title having been previously established at law.

3. The bill may be filed by a party having an equitable as well as a legal title. *Grissom* v. *Moore*, 106 Indiana, 296; *Stanley* v. *Holliday*, 30 N. E. Rep. 634; *Echols* v. *Hubbard*, 7 South. Rep. 817.

4. In some States it is not even necessary that plaintiff should be in possession of the land at the time of filing the bill.

These statutes have generally been held to be within the constitutional power of the legislature; but the question still remains, to what extent will they be enforced in the Federal courts, and how far are they subservient to the constitutional provision entitling parties to a trial by jury, and to the express provision of Revised Statutes, section 723, inhibiting suits in equity in any case where a plain, complete, and adequate remedy may be had at law. These provisions are obligatory at all times and under all circumstances, and are applicable to every form of action, the laws of the several States to the contrary notwithstanding. Section 723 has never been regarded, however, as anything more than declaratory of the existing law, *Boyce* v. *Grundy*, 3 Pet. 210, and as was said in *N. Y. Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 210, "was intended to emphasize the rule, and to impress it upon the attention of the courts." It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction had been previously upheld.

The question of enforcing these state statutes was first con-

sidered in *Clark* v. *Smith*, 13 Pet. 195, in which a bill was filed by a party in possession to compel the defendant to release a pretended title to certain lands claimed by him under patents from the State of Kentucky. The conveyance asked by the bill was sought to be in conformity with the provisions of an act of the assembly of Kentucky giving jurisdiction to courts of equity in such cases. It was held that the legislature "having created a right, and having at the same time prescribed the remedy to enforce it, if the remedy prescribed is consistent with the ordinary modes of procedure on the chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as in the state courts. On the contrary, propriety and convenience suggest that the practice should not materially differ, where titles to land are the subjects of investigation." This case was cited and approved in *Parker* v. *Overman*, 18 How. 137, where a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff, was held to be enforceable in the Federal courts. In *Holland* v. *Challen*, 110 U. S. 15, the principle of this case was extended to one of wild land, of which neither plaintiff nor defendant was in possession. Plaintiff claimed under a tax title, and the property was described in the bill as unoccupied, wild, and uncultivated land. The question was elaborately examined, and the jurisdiction sustained upon the ground that an enlargement of equitable rights by state statutes may be administered in the Federal courts as well as in the courts of the State, citing *Clark* v. *Smith*, and the case of *Broderick's Will*, 21 Wall. 503, 520. The case was treated as one where the plaintiff had no remedy at law against the defendant, who claimed an adverse interest in the premises. In delivering the opinion, however, it was intimated, page 25, that if a suit were brought in the Federal court under the Nebraska statute, against a party in possession, "there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such case we are speaking." Another step in the same direction was taken in *Reynolds* v. *Crawfordsville Bank*, 112

U. S. 405, in which a bill was sustained upon an equitable title, although it would appear from the report of the case that such title was not fortified by an actual possession; and in *Chapman* v. *Brewer*, 114 U. S. 158, a similar suit was upheld under a statute of Michigan permitting bills to quiet title to be filed by any person in possession.

Subsequent cases, however, denied the power of the Federal courts to afford relief under such statutes where the complainant was not in possession of the land, and in *Whitehead* v. *Shattuck*, 138 U. S. 146, particularly, it was held that, where the proceeding is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. "The right which in this case the plaintiff wishes to assert is his title to certain real property; and the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury." The case of *Holland* v. *Challen* was distinguished as one where neither party was in possession of the property, and it was further said that in the case of *Reynolds* v. *Crawfordsville Bank* the question did not arise as to whether the plaintiff had a remedy at law, but whether a suit to remove the cloud mentioned would lie in a Federal court. The case of *United States* v. *Wilson*, 118 U. S. 86, was really to the same effect, though not cited in *Whitehead* v. *Shattuck*. See also *Frost* v. *Spitley*, 121 U. S. 552. But nothing was said in either of these to disturb the harmony of the previous cases.

The real question, then, to be determined in this case is, whether the plaintiffs have an adequate remedy at law. If they have, then section 723 is controlling, and, notwithstanding a local practice under the code, where no discrimination is made between actions at law and in equity, may authorize such suit, the Federal courts will not entertain the bill, but will remit the parties to their remedy at law. The bill under consideration alleges the plaintiffs to be the "absolute owners" of the premises, and then sets forth certain proceedings by which it is alleged they became such; but it is claimed and substantially admitted in the bill that, by reason of certain

irregularities in these proceedings, it is doubtful whether the legal title ever became vested in the plaintiffs. The bill then sets up the long possession of the plaintiffs and their grantors, large outlays by them in improvements upon the land, the practical adandonment of the same by the defendant, all of which, it is claimed, constitute an estoppel *in pais*. Plaintiffs also rely upon the laches of Wehrman in bringing the action in ejectment, and allege a failure to bring his suit within the period prescribed by the statute of limitations. It is entirely clear that, if no action in ejectment had been begun at law, the long-continued adverse possession of the plaintiffs, and the equitable title set up in the bill, would have been a sufficient basis for the maintenance of the suit; and it is not easy to see why the commencement of such action should place them in a worse position than they were in before or oust them of their remedy in equity.

If the only contest in this case were as to whether the legal title to these lands was in the plaintiffs or defendant, it may be that a court of law would be the only proper forum for the settlement of this dispute; but the plaintiffs further claim that, by reason of certain defects in the proceedings by which they acquired title, such title is doubtful at law; but that the long delay of the plaintiff at law in the assertion of his rights, establishes a defence of laches, and his failure to set up his title, and his long acquiescence in the Conklins' possession of the lands, estop him from proceeding either at law or in equity to oust them.

It is scarcely necessary to say that complainants cannot avail themselves *as a matter of law* of the laches of the plaintiff in the ejectment suit. Though a good defence in equity, laches is no defence at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed. If the statute limits him to twenty years, and he brings his action after the lapse of nineteen years and eleven months, he is as much entitled as matter of law to maintain it, as though he had brought it the day after his cause of action accrued, though such delay may properly be considered by the jury in connec-

tion with other facts tending to show an estoppel. As was said by Chancellor Green in *Horner* v. *Jobs*, 2 Beasley, (13 N. J. Eq.,) 19, 23: "Nor can the staleness of the claim, or the lapse of time, or the statute of limitations, avail the complainant. The *defendant* is asking no relief at the hands of this court. He was seeking to enforce his legal rights in a court of law. The complainant is here asking the aid of this court. It is the claim of the complainant, not the title of the defendant, to which the equitable defence of a stale claim is applicable. No lapse of time can avail the complainant, unless it be a part of the defendant's title under the statute of limitations. This defence will avail the defendant at law as well as in equity, and constitutes no ground for enjoining proceedings at law." Had Wehrman seen fit to resort to a court of equity in assertion of his rights, undoubtedly the defendants to such suit might have interposed the defence of laches, but it is quite a different question whether it could be made the basis of a bill. It may, however, be considered as one of the facts of the case tending to show an estoppel.

Undoubtedly the facts set forth in this bill are such as tend to show an equitable estoppel on the part of Wehrman, and this court did hold in a very carefully considered opinion in *Dickerson* v. *Colgrove*, 100 U. S. 578, that an estoppel *in pais* was an available defence to an action at law. This case was cited and applied in *Baker* v. *Humphrey*, 101 U. S. 494; in *Kirk* v. *Hamilton*, 102 U. S. 68; and in *Drexel* v. *Berney*, 122 U. S. 241; although, in the last case, the bill was supported upon the ground that a resort to a court of equity in the particular case was necessary in order to make the estoppel available. As was said by Mr. Justice Matthews: "All that can properly be said is, that in order to justify a resort to a court of equity, it is necessary to show some ground of equity other than the estoppel itself, whereby the party entitled to the benefit of it is prevented from making it available in a court of law." To the same effect is *Gable* v. *Wetherholt*, 116 Illinois, 313.

But even if it be assumed that the facts relied upon as constituting an equitable estoppel in this case might be laid before

a jury in a common law action, and if established operate as a defence, yet it does not necessarily follow that a bill in equity will not also lie to cancel the outstanding deed from Adolph to Frederick Wehrman as fraudulent, or at least as unavailable under the peculiar circumstances of the case. There is a class of cases which hold that where there is actual fraud no remedy at law is complete and adequate, except that which removes the fraudulent title. As early as 1750, it was held by Lord Chancellor Hardwicke, in *Bennet* v. *Musgrove*, 2 Ves. Sen. 51, that a bill would lie by an execution creditor to set aside a fraudulent conveyance, whether he could recover at law or not. Objection having been made to the bill upon the ground that the remedy at law was complete, the Lord Chancellor observed: "But be it as it may, whether he could recover or not, he is entitled to come into this court; the distinction in this court being, where a subsequent purchaser for valuable consideration would recover the estate, and set aside or get the better of a precedent voluntary conveyance, if that conveyance was fairly made without actual fraud, the court will say, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment, and recover the possession, they may come into this court to set aside that conveyance; which is a distinction between actual and presumed fraud from its being merely a conveyance." This is still the law in England. *Blenkinsopp* v. *Blenkinsopp*, 1 De G., M. & G. 495. The leading case in the Federal courts upon this point is *Bean* v. *Smith*, 2 Mason, 252, in which Mr. Justice Story held that, notwithstanding the restrictive clause of the judiciary act, Rev. Stat. § 723, a judgment creditor might file a bill in equity against his debtor to set aside a fraudulent conveyance, since there is not, in the proper sense of the term, a plain, adequate, and complete remedy at law.

While, in view of our decisions in *Insurance Company* v. *Bailey*, 13 Wall. 616, and *Buzard* v. *Houston*, 119 U. S. 347, there may be a doubt whether this remedy is available in personal actions, the law is well settled that where title to real property is concerned, equity has a concurrent jurisdiction,

because it may not only enjoin an action at law, but may order a cancellation of the fraudulent conveyance, and prohibit the bringing of further suits at law upon the fraudulent title, and thus afford a more complete relief than is possible in a court of law. *Dodge* v. *Griswold*, 8 N. H. 425; *Tappan* v. *Evans*, 11 N. H. 311; *Sheafe* v. *Sheafe*, 40 N. H. 516; *Miller* v. *Scammon*, 52 N. H. 609; *Traip* v. *Gould*, 15 Maine, (3 Shepley,) 82; *Cox* v. *Dunham*, 4 Halst. Ch., (8 N. J. Eq.,) 594; *Sheppard* v. *Iverson*, 12 Alabama, 97; *Planters' &c. Bank* v. *Walker*, 7 Alabama, 926; *Murphy* v. *Blair*, 12 Indiana, 184; *Mohawk Bank* v. *Atwater*, 2 Paige, 54; 2 Pom. Eq. Juris. § 1415.

When analyzed, the bill under consideration is really in the nature of a judgment creditor's bill filed by the plaintiffs, who claim that they have acquired, by successive assignments from the original creditors, a lien upon certain lands which the debtor has conveyed in fraud of the original creditors. There are also, it is true, the additional reasons that the plaintiffs have long been in possession of the land; that the records of the case, through which the original purchaser at the execution sale claimed to have acquired the legal title to the lands, have been lost, and that their title, though perfectly good in equity, may be technically insufficient at law. In such case they have a right to call upon a court of equity for relief against such defects. *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 449; *Stone* v. *Anderson*, 6 Foster, (26 N. H.,) 506; *Conroy* v. *Woods*, 13 California, 626; *Robert* v. *Hodges*, 16 N. J. Eq. (1 C. E. Green) 299.

2. Upon the merits, the case presents no difficulty whatever. We do not find it necessary to examine in detail the several defects, which are claimed to invalidate the proceedings under which Greeley finally became the purchaser of the land in question, since we are all of the opinion that the plaintiffs are entitled to a decree, whether these proceedings vested a legal title in Greeley or not. Greeley, Gale & Co. had a legal claim against Adolph Wehrman upon a judgment lawfully obtained against him in Wisconsin. Upon the basis of this judgment they brought suit against him in Iowa, sued out a writ of attachment, and levied it upon the lands in question.

Admitting that the writ was not impressed with such a seal as the law required, it was not, under the circumstances, void upon that ground. O'Brien County was not organized as an independent county until February 6, 1860. The writ was issued January 14, 1861. The county offices being evidently not yet in a complete working condition, the clerk affixed an ordinary private seal or scroll to the writ, with a statement that no seal had yet been procured. Granting that a failure to use an engraved seal actually provided would avoid the writ, certainly the clerk was entitled to a reasonable time to procure such seal. In the meantime, however, the rights of suitors and of the public ought not to be prejudiced by the lack of one. The whole civil and criminal business of the county ought not to come to a stop simply through the failure of its officers to provide it with a seal. As was justly observed by the learned judge of the Circuit Court: "The only purpose of the seal is to authenticate the issuance of the writ. May not such authentication be furnished in other ways, if for any reason the court is without an engraved seal for a time? Suppose that to-day the engraved seal of O'Brien County should be destroyed or stolen, must all the judicial proceedings therein be brought to a standstill, awaiting the procurement of another engraved seal? Would not this be subverting substance to mere form? Would it not be permissible for the court to continue the issuance of writs of attachment and execution, having attached thereto a scroll as a seal, the writ on its face showing the reason thereof?"

While the clerk does not seem to have used any great diligence in procuring a seal, his laches in that particular cannot be made the subject of inquiry here. The fact that no engraved seal had been procured is a sufficient excuse for the purpose of the case. The sheriff, by virtue of this writ, made a levy upon the lands in question, endorsed such levy upon the writ, and caused personal notice to be served upon the defendant Wehrman in the State of Wisconsin, January 25, 1861.

It is also true that the petition for the attachment described the judgment sued upon as having been rendered on May 12,

1860, when in fact it was not rendered until September 12; that the writ was made returnable upon a day which had not been fixed as the first day of the next term of the court, though it was subsequently fixed upon that day; and that, in changing the venue of the action to Woodbury County, the transcript of the record was sent to such county without being certified by the seal of the court in which the suit was brought. While these might have been good defences to the action, if seasonably interposed, they do not render the writ and all the proceedings thereunder void. Indeed, it is at least doubtful whether, if no notice at all had been served upon Wehrman, the lien of the attachment would have thereby been lost. The object of the notice is to apprise the defendant of the commencement of the suit, and to call him in to defend and prevent the plaintiff from obtaining judgment if he can. The object of the writ, which is issued *ex parte*, is to enable the plaintiff to obtain a lien upon the land, which may be subsequently enforced by a sale upon execution, if judgment be obtained. If notice were actually served upon the defendant in Wisconsin, as claimed, it is difficult to see why the judgment subsequently entered up was not valid as against the land attached, though of course not against the defendant *in personam*.

Whether the subsequent proceeding by bill to set aside the deed from Adolph to Frederick Wehrman was invalid or not, it is unnecessary to inquire. The attachment and subsequent long continued possession thereunder vested an interest in the present plaintiffs which was amply sufficient as a basis for this bill. If, as is claimed, the decree in the chancery court was void because no personal service was obtained upon defendant Wehrman within the State of Iowa, there is greater reason why jurisdiction of the present bill should not be declined, since the object of this bill is practically the same as the other, viz., to obtain the benefit of the attachment proceedings. If personal service were obtained in the State of Wisconsin, we see no objection to the decree as rendered, since the Code of Iowa, sections 2831 and 2835, permit personal service or service by publication upon defendants out of the jurisdiction "in an action for the sale of real property under

a mortgage lien or other incumbrance or charge;" and such statutes have been upheld by this court. *Arndt* v. *Griggs*, 134 U. S. 316. If no proper service were obtained, then we are able to do in this suit what was ineffectually attempted there.

The salient and decisive facts of this case are that Greeley, Gale & Co. obtained, or at least attempted to obtain, a lien upon this land by virtue of their attachment; that personal service of such proceeding was made upon Adolph Wehrman in the State of Wisconsin, January 25, 1861; that they went through the form of obtaining a judgment against these lands, and selling them upon execution; that Greeley purchased these lands upon such sale, paid taxes thereon, acquired tax titles thereto, and subsequently sold the same, and that plaintiffs in this suit became the purchasers; that they immediately took possession of the same; and that they and their grantors have been in open, notorious, and undisturbed possession for twenty-seven years; have built a house and other buildings, and made other improvements thereon; that Frederick Wehrman, the defendant herein, took title to these lands December 17, 1859, the very day that suit was originally begun against Adolph; that the deed was made to him under circumstances tending strongly to show that it was intended as a fraud upon the creditors of Adolph Wehrman; that he took no steps to assert his title or right of possession to these lands, but practically abandoned the same until, by the increase of population and the settlement of the country, they had become of material value. Whether he had actual notice of the chancery suit or not, it is highly improbable that if he had been a *bona fide* purchaser of these lands, lying in another State, for which he had paid, or agreed to pay, $3000, (almost double their actual value,) he would have taken no steps for nearly thirty years to assert his right thereto. Particularly is this so in view of the fact that he was only an ordinary day laborer at the time he took the deed, having only a few farming implements and a meagre supply of household goods, and, as one of the witnesses expressed it, could not have borrowed without security one-tenth of the sum he was purported to have paid for the property.

Syllabus.

Evidently he was not a man to invest $3000 in wild lands and turn his back upon them for twenty-seven years. As was said by this court in *Underwood* v. *Dugan*, 139 U. S. 380, 384, "ownership of property implies two things — first, attention to it; second, a discharge of all obligations, of taxation or otherwise, to the State which protects it. When it appears that one who now asserts a title to property, arising more than the lifetime of a generation ago, has during all these years neglected the property, and made no claim of title thereto, a reasonable presumption is that, whatever may be apparent on the face of the instrument supposed to create the title, were the full facts known, facts which cannot now be known by reason of the death of the parties to the transaction, it would be disclosed that no title was in fact obtained; or, if that be not true, that he considered the property of such little value that he abandoned it to the State which was protecting it." Considering all the facts of this case, it is not a matter of surprise that, when charged in this bill with having received his deed without consideration, and with intent to defraud the creditors of his brother Adolph, the defendant should not have been called to testify in relation to the transaction. In short, it would be difficult to conceive of a clearer case of estoppel *in pais*.

The decree of the court is therefore

Affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* JONES.

PENNSYLVANIA RAILROAD COMPANY *v.* STEWART.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 40, 41. Argued October 26, 29, 1894.— Decided December 10, 1894.

It is the duty of a railroad company, running its trains in connection with other lines, and taking passengers and freight for transportation to points upon connecting lines, to carry them safely to the end of its own

Counsel for Parties.

line, and there deliver them to the next carrier in the route beyond, and, in the absence of a special agreement to extend its liability beyond its own lines, such liability will not attach; and such agreement will not be inferred from doubtful expressions or loose language, but it must be established by clear and satisfactory evidence.

The evidence in this case is reviewed, and it is *held* not to establish a special undertaking by the Pennsylvania Railroad Company that the plaintiffs should be safely carried in the train of the Virginia Midland Railway Company, while proceeding along the road of the Alexandria and Washington Railroad Company, between the cities of Alexandria and Washington; but that there was evidence which would warrant a jury in finding that the Baltimore and Potomac Railroad Company, the Alexandria and Washington Railroad Company, and the Alexandria and Fredericksburg Railway Company had made such a special undertaking, and were jointly liable to the plaintiffs under it.

An advertisement by a railroad company that it runs or connects with trains of another company, so as to form through lines, without breaking bulk or transferring passengers, does not tend to show a contract between the companies to share profits and losses.

When a railroad for which a receiver has been appointed is practically managed and controlled by the agents and employés of the company, and the receiver's function as to business with connecting lines is restricted to the receipt of its share of the net earnings, and a passenger who receives an injury while being transported upon it to a connecting line, brings an action against the company and other connecting lines to recover damages therefor, there is no error in instructing the jury that if they shall find the company guilty of negligence their verdict will be against it.

In this case the Alexandria and Fredericksburg Railway Company further set up that at the time of the happening of the injury causing the damages sued for, the road was in the hands of mortgage trustees, and that it therefore was not then a common carrier. *Held*, there was evidence which justified the court in submitting the question of the exclusive possession by the trustees to the jury, and that there was no error in instructing the jury that in order to acquit the company from responsibility, it should be shown that the management and operation of the road was conducted by the trustees, to the entire exclusion of the company, its officers and board of directors, and that this fact was notorious and could be presumed to be known to the public.

THE case is stated in the opinion.

Mr. Enoch Totten for plaintiffs in error.

Mr. W. L. Cole and *Mr. William A. Cook* for defendants in error.

Opinion of the Court.

MR. JUSTICE SHIRAS delivered the opinion of the court.

These were suits brought in the Supreme Court of the District of Columbia, and tried at special term, in July, 1885, based upon allegations of personal injuries received by the plaintiffs while in the performance of their duties as railway postal clerks on the mail route which extended from Charlotte, N. C., to Washington, D. C.

The cases were tried together, and each of the plaintiffs obtained a verdict and judgment, entered May 3, 1890, against all of the defendants except the Virginia Midland Railway Company. The other defendants, namely, the Pennsylvania Railroad Company, the Baltimore and Potomac Railroad Company, the Alexandria and Fredericksburg Railway Company, and the Alexandria and Washington Railroad Company, appealed to said court in general term, where the judgment of the special term was affirmed, and afterwards they caused the cases to be brought here on writs of error.

The undisputed facts in the cases are substantially as follows: About four miles from Washington, at a place known as Four-mile Run, the tracks of the Alexandria and Washington railroad were laid through a short tunnel or culvert under a canal. This culvert was not of sufficient width to permit trains to pass each other therein, and the double tracks, which extended over the whole line, closely interlaced in the culvert, and for a short distance from each end thereof, but each track remained practically unbroken and independent, so that in passing this point it was not necessary that a train on either track should stop, provided no other train was upon or about to be upon this portion of the road where the tracks converged. In or near this culvert, at about 10 o'clock on the night of the 19th of February, 1885, while the plaintiffs were engaged in the performance of their duties as postal clerks in a car attached to a north-bound passenger train of the Virginia Midland Railway Company, a collision occurred upon the interlaced tracks, between that train and a fast-freight train of the Alexandria and Fredericksburg Railway Company, bound south, which resulted in the death of four persons and in serious injuries to each of the plaintiffs.

The essential allegations of both declarations filed by the plaintiffs were that all of the defendant companies were engaged, as common carriers, in the transportation of passengers, persons, and freight upon and along the several lines of the railroads belonging to them, and along the line, among others, of the Alexandria and Washington Railroad Company, under an arrangement or contract for their common benefit, by which they were interested jointly in the running and management of their roads, and that through the negligence of the defendant companies the collision occurred which caused the injuries complained of.

The defendants all appeared to the action and severally put in pleas of not guilty, and afterwards, upon leave granted by the court, each company filed an additional plea averring that "it was not at the time of the alleged injury and never was a common carrier of passengers and freight in manner and form as in said declaration alleged."

A large amount of evidence was put in on behalf of the plaintiffs for the purpose of sustaining their allegations of negligence on the part of employés of one or more of the defendant companies, and to show that the roads owned by those companies were operated in connection with each other on joint account, or that there was such community of interests among them as would make all of them liable for the acts of agents or employés of one.

The Virginia Midland Railway Company introduced evidence which tended to prove that its road extended no farther north than Alexandria, and that its trains were run over the roads of the other companies under an arrangement by which it paid certain prices per passenger and per ton of freight for the running privileges given it, and by which it was required to admit on board its north-bound trains at Alexandria an agent of the company or companies which controlled the road north of that place, who had therefrom the exclusive direction of the trains. It appeared, however, that although such agent was on the passenger train in question, employés of the Virginia Midland Railway Company performed the actual work of controlling the train.

The evidence on the part of the other defendants was directed mainly to showing that at the time of the collision the road of the Alexandria and Washington Railroad Company and the franchises necessary for its operation were in the hands of a receiver, appointed by the Circuit Court of the United States for the Eastern District of Virginia; that the company had no rolling stock, but that the receiver permitted other roads to use its tracks under certain agreements which had been made between that company and other companies before his appointment; and that the business of the Alexandria and Fredericksburg Railway Company was being carried on by trustees who were possessed of the property and franchises of this company by virtue of a deed of trust executed by it on June 1, 1866, to secure the payment of the principal and interest of certain of its first-mortgage bonds.

Many exceptions were taken by the defendants during the trial to the admission and rejection of evidence, to the refusal of the court to give the jury certain instructions proposed by them, and to the giving of other instructions against their objections. These exceptions constitute the grounds of the assignments of error.

The suits were brought against the Pennsylvania Railroad Company, a corporation organized under the laws of the State of Pennsylvania; the Baltimore and Potomac Railroad Company, a corporation organized under the laws of the State of Maryland and acts of the Congress of the United States; the Alexandria and Washington Railroad Company, the Virginia Midland Railway Company, and the Alexandria and Fredericksburg Railway Company, which three last-mentioned companies were corporations organized under the laws of the State of Virginia.

The theory upon which the plaintiffs proceeded, in including these five companies in the actions, was thus expressed in the declarations:

"For that heretofore, to wit, on the 19th day of February, 1885, and prior thereto, the said defendants were engaged as common carriers in the transportation of passengers, persons, and freight upon and along the several lines of railroad be-

longing to said companies, and, among others, along the line of the road of the said Alexandria and Washington Railroad Company, running between the cities of Alexandria and Washington, under an arrangement or contract for their common benefit, the full and exact terms of which are unknown to this plaintiff, and by which they were jointly interested in the running and management of the said railroads."

The Pennsylvania Railroad Company filed a plea of not guilty, and a special plea that said company "was not, at the time of the alleged injury, and never was, a common carrier of passengers and freight, in manner and form as in said declaration alleged."

After the testimony was closed on both sides the counsel of the Pennsylvania Railroad Company moved the court to instruct the jury that, upon the pleadings and evidence, the said company was entitled to a verdict in its favor. To the refusal of the court to grant such instruction, exception was duly taken, and that action of the court is here assigned for error.

As it is not pretended that there was not evidence sufficient to warrant the jury in finding that the plaintiffs' injuries were caused by carelessness in the management of one or both of the trains, our inquiry must be directed to the other issue, that is, whether it was shown, by competent evidence, that the Pennsylvania Railroad Company was engaged, at the time of the accident, as a common carrier in the transportation of freight and passengers along the line of the road of the Alexandria and Washington Railroad Company, running between the cities of Alexandria and Washington, under an arrangement or contract with the other companies defendant for their common benefit, and by which they were jointly interested in the running and management of said railroad.

It is conceded, or sufficiently appears in the evidence, that the running and management of the road of the Alexandria and Washington Railroad Company were not within the scope of the ordinary powers of the Pennsylvania Railroad Company as a corporation of the State of Pennsylvania. To render the latter company responsible for what might take place on a

railroad in another State some contract or arrangement to that effect must be made to appear.

It is also disclosed by the evidence that neither of the trains, by whose mismanagement the accident was caused, was a train belonging to the Pennsylvania Railroad Company, and that the men in charge were not in the immediate employ of that company.

The general principles applicable to the present inquiry are well settled, and have frequently been declared by this court. In *Railroad Co.* v. *Manufacturing Co.*, 16 Wall. 318, 324, it was said: "It is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted generally by the courts in this country," and "is in itself so just and reasonable that we do not hesitate to give it our sanction." And in *Railroad Co.* v. *Pratt*, 22 Wall. 123, 129, it was said: "The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line." These cases were followed in *Myrick* v. *Michigan Central Railroad Co.*, 107 U. S. 102, 107, and it was there said: "In the absence of a special agreement to extend the carrier's liability beyond his own route, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Was there shown, then, in the present case, a special contract or undertaking by the Pennsylvania Railroad Company that the plaintiffs should be safely carried in the train of the Virginia Midland Railway Company, while proceeding along the road of the Alexandria and Washington Railroad Company, between the cities of Alexandria and Washington?

There was no attempt to show any such contract or agreement between these plaintiffs and the Pennsylvania Railroad Company. The liability of the latter is sought to be found in an alleged existing agreement between that company and the other companies defendant, whereby the said companies were "jointly interested in the running and management of said railroads."

Moreover, it was not claimed that this alleged agreement was in writing or was to be found in any resolution of the board of the Pennsylvania Railroad Company. Indeed, the averment of the declaration was that "the full and exact terms of the alleged contract were unknown to the plaintiffs."

The right of recovery in this case against the Pennsylvania Railroad Company was rested by the plaintiffs entirely upon supposed business relations existing, at the time of the accident, between the railroad companies defendant. It is necessary, therefore, that they should point to evidence satisfactorily establishing the existence and nature of those business relations. A careful consideration of the evidence appearing in the record has failed to satisfy us that there existed a contract or agreement between these railroad companies upon which liability on the part of the Pennsylvania Railroad Company can be based. Let us briefly consider the particulars of the evidence relied on by the plaintiffs.

The annual reports to the stockholders of the Pennsylvania Railroad Company were put in evidence. That of March 2, 1885, contained the following statement:

"The board herewith submit their report for 1884, with such data relating to the lines controlled by your company as will give you a clear understanding of their physical and financial condition."

Also the following:

"The Baltimore and Potomac Railroad connects your line with Washington and the South."

And from the report of March, 1886, the following quotation was cited:

"The board herewith submits its report for the year 1885, with such data as relate to the lines embraced in your system as will give you a clear understanding of their physical and financial condition."

It was also shown by said report that the Pennsylvania Railroad Company owned, on December 31, 1885, $1,000,000 of the bonds of the Alexandria and Fredericksburg Railway Company, and $2,000,000 of the bonds of the Baltimore and Potomac Railroad Company, and 60,852 shares of the Balti-

more and Potomac Railroad Company's stock, and 217,819 shares of the stock of the Philadelphia, Wilmington and Baltimore Railroad Company.

A railroad map showing a continuous line of railroad between Philadelphia and Quantico, with letters signifying that the roads embraced therein were the Philadelphia, Wilmington and Baltimore, the Baltimore and Potomac, the Alexandria and Washington, and the Alexandria and Fredericksburg Companies, was put in evidence.

It was also proved that a ticket issued by the Pennsylvania Railroad Company was sold in Baltimore, at the office of the Northern Central Railroad Company, on account of the Alexandria and Fredericksburg Railway Company, and it was likewise proved that the Pennsylvania Railroad Company owned stock in the Alexandria and Washington and the Alexandria and Fredericksburg Railway Companies, and that some persons who were officers of the Pennsylvania Railroad Company were likewise officers of these companies. It was also shown that the employés of the Baltimore and Potomac, the Alexandria and Washington, and the Alexandria and Fredericksburg roads were paid from a pay-car, whose brakeman and conductor wore a blue uniform with silver buttons, which was said to be the uniform of the Pennsylvania Railroad Company.

Newspaper advertisements were put in evidence, calling the attention of the travelling public to the Great Pennsylvania Route to the Northwest and the Southwest, and it was shown that James R. Wood was general passenger agent, and Charles E. Pugh general manager, of the Pennsylvania Railroad Company, stationed at Washington; and it likewise appeared that they occupied similar positions in the Philadelphia, Wilmington and Baltimore, the Baltimore and Potomac, Alexandria and Washington, and the Alexandria and Fredericksburg companies.

John S. Barbour testified that he had acted for some years as president and receiver of the Virginia Midland Railway Company, his official relations with that company ceasing in the latter part of 1884. His testimony was to the effect that he had made arrangements for the running of the trains of the

Midland Railway Company over the road between Alexandria and Washington. He says that there was no contract ever signed, but that his conversations were with officers of the Pennsylvania Railroad Company, particularly naming Mr. Scott and Mr. Roberts, the latter being president of both the Pennsylvania Railroad Company and the Alexandria and Fredericksburg Railway Company; that the Pennsylvania authorities were running the Baltimore and Potomac, and a through line from New York to Quantico; that the Midland Railway Company was to pay 35 cents for each passenger and so much on freight for each carload or by the ton; that the Midland Railway Company used their own rolling stock and crews. He further stated that he would not say to whom or to what companies his company paid compensation for the use of the road, and that his recollection of the details of the agreement was indistinct, as it was made in 1876. On cross-examination he stated that his company settled accounts with the officers of the Baltimore and Potomac Railroad Company or those of the Alexandria and Fredericksburg Railway Company.

The plaintiffs further gave evidence to show that on the arrivals of the trains of the Virginia Midland Railway Company at Alexandria they were turned over to the authorities operating said roads between that place and Washington, and run between those two points both ways under the absolute control of the last-named parties, who had the right to and did place a pilot in charge of said trains to run the same between those points; that said pilots were sometimes employés of the Baltimore and Potomac Railroad Company, and sometimes of the Alexandria and Fredericksburg Railway Company; that all other persons engaged in running said Virginia Midland trains were employés of the last-named company; that the pilot who took charge of the Virginia Midland train on which plaintiffs were, on the 19th day of February, 1885, when it arrived at Alexandria, and under whose direction and control it was at the time and place of the accident, was Charles F. Bennett, whose uniform was such as is worn by the employés of the Pennsylvania Railroad Company, except that on the buttons were the letters "B & P," and whose name

was on the pay-rolls of, and he was paid by, the Alexandria and Fredericksburg Railway Company.

In connection with the foregoing there was evidence, proceeding partly from both parties, tending to show that the mails over said route between Alexandria and Washington were carried, not under any express contract, but under the general statutes, and the arrangement of the government for carrying all mails, either through or local, between Washington and Alexandria, was with the Alexandria and Washington Railroad Company, and that road was paid for transporting for the quarter beginning January 1 and ending March 31, 1885, by drafts or checks, and that no other railroad was paid by the United States for conveying mails between said points; that said sum so paid was divided among the Alexandria and Washington, Alexandria and Fredericksburg, and the Baltimore and Potomac Railroad Companies; that about the time of said collision, and for some time prior thereto, both freight and passenger trains passed over the road between Alexandria and Washington, some of them hauled by engines marked B. and P., some of them marked A. and F., and some passenger trains marked B. and P.; that the compensation paid by the Virginia Midland Railway Company for the privilege of running its trains between Washington and Alexandria was 35 cents per passenger and $4 per carload of freight, which was paid by it periodically to J. S. Lieb, the treasurer of the Alexandria and Washington, Alexandria and Fredericksburg, and Baltimore and Potomac Railroad Companies.

The plaintiffs further showed that the Pennsylvania Railroad Company paid consignees for goods destroyed in the collision, and then made demand upon Wilkins, the receiver of the Alexandria and Washington Railroad Company, for reimbursement, and claimed this fact as admission that the Pennsylvania Railroad Company was a common carrier of these goods at the time and place of destruction.

The foregoing is a condensed statement of the evidence relied on as establishing such a relation between the railroad companies, owning the roads and managing the trains at the

time and place of collision, and the Pennsylvania Railroad Company, as to make the latter responsible to the plaintiffs for their injuries.

Some of this evidence was objected to by the counsel of the Pennsylvania Railroad Company as incompetent for the purpose for which it was offered. But we do not deem it necessary to critically examine these objections. Taking the plaintiffs' evidence as a whole, and supplementing it with such facts, favorable to them, as appear in the defendants' evidence, we are unable to see that a case was made out as against the Pennsylvania Railroad Company.

That the Pennsylvania Railroad Company owned stock and bonds of some of the other companies defendant did not tend to show a partnership or agreement to run the roads of the latter on common account. Such ownership rather went to explain why some of the officers of the Pennsylvania Railroad Company held official positions in the other companies, and to show why their officers were consulted about the arrangement made between the Alexandria and Washington, the Alexandria and Fredericksburg, the Baltimore and Potomac Railroad Companies, and the Virginia Midland Railway Company, for the use by the latter of the roads of the former between the cities of Alexandria and Washington, as testified to by J. S. Barbour, and also explains the references made in the reports of the Pennsylvania Railroad Company to these roads as connecting with their system.

That the Pennsylvania Railroad Company paid consignees for goods destroyed in the collision, may justify an inference that there was some agreement between the owners of the goods and the Pennsylvania Railroad Company that the latter should be responsible for the goods beyond their own line, but, in that event, the responsibility arose out of such contract, and not out of a contract between the railroad companies. It was, indeed, contended that the act of the Pennsylvania Railroad Company in demanding reimbursement from the Alexandria and Washington Railroad Company for a proportion of such payment is indicative of an existing arrangement between the companies for dividing such losses.

But an examination of the evidence, in this particular, plainly shows that, though the words "proportion due" appear at the head of the column stating the amount demanded, yet that the actual demand was for the entire loss, and not for a part or proportion thereof. Such a demand, therefore, is evidence that no agreement existed for a participation in losses.

That the Pennsylvania Railroad Company advertised that it ran trains, or connected with trains of other companies, so as to form through lines, without breaking bulk or transferring passengers, did not tend to show any contract or agreement between the companies to share profits and losses. Nor was there evidence, in the present case, that there was any actual participation by the Pennsylvania Railroad Company in the earnings of the other companies which used the road between the cities of Alexandria and Washington. On the contrary, the evidence affirmatively showed that such earnings, including what was paid by the United States for the transportation of mails, were divided between the other companies, and went, none of them, to the Pennsylvania Railroad Company.

Without dwelling longer on this feature of the case, our conclusion is, that the Pennsylvania Railroad Company was entitled to the peremptory instruction asked for in its favor.

Our views respecting the exceptions urged on behalf of the other plaintiffs in error are briefly expressed as follows: There was evidence from which the jury might properly infer that the railroad between the cities of Alexandria and Washington was managed and controlled for the common use of the Baltimore and Potomac Railroad Company, (owning that portion of the route that lies between Washington and the south end of the Long Bridge,) the Alexandria and Washington Railroad Company, (owning that portion between the south end of the Long Bridge and St. Asaph's Junction,) and the Alexandria and Fredericksburg Railway Company (owning the line between St. Asaph's Junction and Alexandria); that the gross earnings of these companies, derived from this line between Alexandria and Washington, including what the Virginia Midland Railway Company paid for the privilege of running its trains over these tracks and what was received for transportation of mails,

went into the hands of a common treasurer, and were by him, after paying operating expenses, divided among the three companies, according to some rule, not very definitely shown, but apparently in proportion to the miles of track of each road; that the operating and accounting officers of the three companies were the same; that the freight train in question was, at the time of the collision, on that portion of the road which belonged to the Alexandria and Washington Railroad Company; that the engineer and fireman were employés of the Baltimore and Potomac Railroad Company; that the engine was that of the Alexandria and Fredericksburg Railway Company; that the conductor and brakemen were employés of that company; and that the passenger train was in charge of a pilot employed and paid by the three companies, in pursuance of an arrangement to that effect.

Such a state of facts would, we think, warrant a finding of joint liability of these three companies to the plaintiffs, unless certain facts put in evidence by the Alexandria and Washington Railroad Company and by the Alexandria and Fredericksburg Railway Company exonerate them respectively from such liability.

The Alexandria and Washington Railroad Company filed a plea of not guilty, and likewise a plea denying that said company was, at the time of the alleged injury, a common carrier of passengers and freight in manner and form as in the declaration alleged.

In support of the issues thus formed, the Alexandria and Washington Railroad Company put in evidence a record of the Circuit Court of the United States for the Eastern District of Virginia, showing that in a suit of Alexander Hay against said company, on January 19, 1882, George C. Wilkins was appointed receiver of said company, and was directed, after giving bond, to take possession of the railroad, tracks, engines, and property, real and personal, to the company belonging, and to run and operate said railroad for the carriage of freight and passengers, and to make from time to time all needful and proper traffic arrangements with other roads for the exchange of business; and it was further thereby ordered that

said receiver should, as soon as may be, make and file with the clerk of the court an inventory of all the real and personal property that came into his possession as receiver. The said defendant further gave evidence tending to show that said receiver, on the 19th day of June, 1882, took possession of said railroad in pursuance of said decree, and had exclusively held possession and operated and maintained said railroad until after the 19th day of February, 1885; that the inventory of property received by him, which was put in evidence, disclosed, among other things, a single track from Duke Street in Alexandria to St. Asaph's Junction, and a double track from the said junction to the south end of the Long Bridge, with sidings, bridges, etc. The evidence further tended to show that said company had no cars, engines, or rolling stock when the receiver took possession, and that none was acquired afterwards; that the receiver made all his returns of money received to the said Circuit Court, and that such moneys were carried through certain arrangements existing with the Baltimore and Potomac Railroad Company, the Virginia Midland Railway Company, and with DuBarry and Green, trustees of the Alexandria and Fredericksburg Railway Company; that under this arrangement the gross receipts of the operation of the route between Alexandria and Washington went into the hands of J. S. Lieb, treasurer, and through a common auditor the net proceeds were distributed *pro rata*, and to the receiver was paid the *pro rata* share of the Alexandria and Washington road.

Thereupon the Alexandria and Washington Railroad Company moved the court to instruct the jury that said company was, upon the pleadings and evidence, entitled to a verdict in its favor, and also moved the court to instruct the jury that if they were satisfied from the evidence that all the property of the Alexandria and Washington Railroad Company was, at the time of the accident, in the exclusive control of George C. Wilkins, the receiver thereof, appointed by the Circuit Court of the United States, the verdict must be in favor of the Alexandria and Washington Railroad Company.

Both these prayers for instructions were refused by the court,

and the case was submitted to the jury under instructions, whose validity is brought before us by the bills of exception. The plaintiffs, to overcome this evidence on behalf of the Alexandria and Washington Railroad Company, put in evidence a report made to the board of public works of the State of Virginia, signed and sworn to by John S. Lieb, treasurer, and H. H. Carter, superintendent of the Alexandria and Washington Railroad Company, for the year 1885. In this report nothing is said about an existing receivership, and there are statements of expenses in repairing engines and tenders, and in paying conductors, engineers, and firemen. It was also shown that at a meeting of the board of directors of the Alexandria and Washington Railroad Company, held in Philadelphia on November 27, 1876, John S. Lieb was appointed agent to receive and receipt for moneys due or to become due the company for transportation of mails between Washington and Alexandria; and that the warrants on the United States Treasury, in payment for carrying the mail between Alexandria and Washington for the quarter ending March 31, 1885, were made payable to the order of John S. Lieb, agent of the Alexandria and Washington Railroad Company. It also was made to appear, by the testimony of Wilkins, the receiver, that he did not make the arrangement by which the trains of the Virginia Midland Railway Company, of the Alexandria and Fredericksburg Railway Company, and of the Baltimore and Potomac Railroad Company ran over the road of the Alexandria and Washington Railroad Company, but that he found an arrangement under which this was done when he was appointed, and he permitted it to continue; that he sold no tickets over the Alexandria and Washington railroad; that the Alexandria and Washington railroad had no rolling stock or employés in his employment or control as receiver; that he did not know which of the said companies, the Alexandria and Fredericksburg, furnished the rolling stock and employés to run the local trains over the Alexandria and Washington railroad while he was receiver.

Upon the issue thus formed by the pleadings and evidence, the court below instructed the jury as follows:

"The Alexandria and Washington Railroad Company makes the plea that it was not a common carrier on the road at the time and place of the accident in question, because, they say, the road between Alexandria and Washington was at the time under the control of a receiver theretofore duly appointed. It is not disputed that Mr. Wilkins had been appointed receiver, and held his office at the time of the accident. The question now is whether he alone is liable for injuries received on the road by reason of negligence, or whether the Alexandria and Washington Railroad Company is not liable, notwithstanding the receivership.

"If you find from the evidence that the Alexandria and Washington Railroad Company was carrying the United States mail between Alexandria and Washington, and the plaintiffs were in charge thereof as postal clerks, duly commissioned and designated by the United States for that duty, and the Alexandria and Washington Railroad Company was paid by the United States by drafts payable to the order of the agent of that company appointed by its board of directors to receive the same, and that the freight and passenger trains, which collided and caused the injury to the plaintiffs, were running over said road under an arrangement made by the parties in control of said road prior to the appointment of the receiver of said road, and if when the receiver was appointed he continued in office as superintendent, general manager, and treasurer, the same persons as had heretofore discharged the duties of these positions, and if the business of this railroad, so far as was known to the public, was continued in the same way, so far as the general public could know, as before, and was so conducted at the time of the accident, and the only substantial duty that the receiver discharged was to receive the net earnings of the road from the treasurer and to account therefor to the court by which he was appointed, then if you shall find that the Alexandria and Washington Railroad Company was guilty of negligence, from the evidence and under the instructions of the court, your verdict will be against it, and for the plaintiffs.

"But if you are satisfied that the business on the Alex-

andria and Washington Railroad, so far as the interests of the Alexandria and Washington Railroad Company were concerned, was conducted by the receiver after his appointment, and to the time of the collision, in his own name and in such manner that it could be generally known by the public that he and not the company conducted the business and controlled the road and its management, and that he did so to the entire exclusion of any control or participation by the Alexandria and Washington Railroad Company, its officers and board of directors, then your verdict should be for the Washington and Alexandria Railroad Company."

We do not think that the court erred in admitting evidence tending to show that, practically, the road was managed and controlled by the agents and employés of the company, and that the receiver's functions were restricted to the receipt of its share of the net earnings, and, with such evidence before the jury, we do not perceive any substantial error in the instructions given to the jury. It could not be safely said that, in no case, evidence should be received to show that a receiver contented himself with receiving a share of the net earnings of a railroad which he permitted to be managed by the officers and employés of the company owning the road, in connection with those of other companies having a common interest.

A similar question was decided by this court in the case of *Railroad Company* v. *Brown*, 17 Wall. 445, 450. There a railroad was run on the joint account of lessees on the Virginia end of the road, and of the receiver on the end in the District. A suit was brought against the railroad company by a passenger, who recovered a verdict and judgment. It was urged in this court, in pursuance of exceptions duly taken, that the railroad company was not liable for anything done while the road was operated by the lessees and the receiver, and it was said through Mr. Justice Davis:

"It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of

lessees. The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not, we are not called upon to decide, because it has never been held that the company is relieved from liability unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and the receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver."

Nor is it apparent that, in the present case, it is at all important to the receiver or to the company whether the one or the other was made nominal defendant. Upon the theory of the plaintiffs' case that there was a joint liability on the part of the companies defendant for losses incurred in the management of the road, it would seem to make no difference whether the share or proportion of the loss chargeable to the Alexandria and Washington railroad is deducted by the common treasurer from the share of the net earnings coming to the receiver, as is now the case, or should be deducted by the latter as part of his expenses, as would have been the case if he, as receiver, had been sued, instead of the company.

A special plea was likewise filed by the Alexandria and Fredericksburg Railway Company, claiming immunity, because their railroad was, at the time of the collision, in the possession and control of trustees.

Under this plea it was shown that the company, on June 1, 1886, executed a deed of trust to secure payment of the principal and interest of bonds to the amount of one million of

dollars, and that DuBarry and Green were trustees, under the provisions of said deed and of certain orders of the county court of Alexandria County, in the State of Virginia. There was also evidence given tending to show that the said trustees took possession of said road on December 6, 1872, and all of its property, and held, used, and operated the same up to and beyond the time of the said collision, and that, at the time of said collision, the said Alexandria and Fredericksburg Railway Company had in its possession no cars, engines, or rolling stock, and that the trustees in possession under said deed of trust, as aforesaid, did, in January, 1875, appoint George C. Wilkins superintendent of said Alexandria and Fredericksburg railway and property, and that said Wilkins had exclusive possession and management of the road.

On the part of the plaintiffs it was shown that the Alexandria and Fredericksburg Railway Company made a report to the board of public works of the State of Virginia for the year of 1885, sworn to by the president and general superintendent of the company, in which there is no reference to the alleged possession by trustees, but it does contain detailed statements of the property of the company, including cars and engines, and of the number of passengers and tons of freight carried, and of the various expenditures on account of repairs.

It was further shown that the engine that hauled the freight train that figured in the collision belonged to the Alexandria and Fredericksburg Railway Company.

The Alexandria and Fredericksburg Railway Company requested the court to charge the jury that if they should find that the property of the company was in the exclusive possession and control of the trustees, and that the company did not, by its servants, agents, or otherwise, exercise any authority or control over the road between St. Asaph's Junction and Alexandria, after the receiver of the Alexandria and Washington Railroad Company took possession of that line, the verdict must be for the Alexandria and Fredericksburg Railway Company.

The court instructed the jury as follows:

"The Alexandria and Fredericksburg Railway Company also pleads that it was not a common carrier on the road when the accident occurred, in addition to the plea of not guilty, and upon this trial it supports this plea by showing that its road, at the time of the accident and for some time before, had been in the possession of trustees, by virtue of the provisions of a deed of trust executed by the company to secure its indebtedness, the condition of which had been broken by the maturity and non-payment of the debt so secured.

"In order that the Alexandria and Fredericksburg Company be acquitted from responsibility for this reason, it should, in any event, appear that, in fact, the business of management and operation of the road was conducted by the trustees to the entire exclusion of the company, its officers, and board of directors, and that this was so notoriously so that the fact may well be presumed to be known to the public. Besides, it should appear that the trustees were not appointed by the procuration or assent of the railroad company, for, if so, the trustees would be as much the agents of the company as of the grantees in the trust deed. The Supreme Court of Appeals of the State of Virginia, in an action brought against the Alexandria and Fredericksburg Railway Company for personal injuries resulting from negligence on the road while in the possession of trustees by virtue of a deed of trust, under conditions precisely similar to those shown in this case, held that 'no provision is found in the charter of the defendant company, or the general railroad law of Virginia, which will authorize the company to transfer to trustees or to mortgagees, under the deed of trust given as a mere incumbrance and security, the right and legal capacity to step into the shoes of the company, and assume and exercise indefinitely the franchises, rights, and privileges of the company, so as to give the company exemption and immunity from responsibility for all injuries inflicted by the operation of the road by trustees.' I quote this language for convenience and accuracy, and adopt it, and give it to you as the law in this case. It follows that the Alexandria and

Fredericksburg Company cannot be excused from liability because of any possession shown in trustees."

An examination of the trust deed discloses a provision that the trustees, in case of default for a period of ninety days, and on the request in writing of the holders of the bonds, might take possession of the railroad and appoint agents to conduct its affairs; and it was claimed that the court might presume that the possession of the trustees, relied on to defeat the suit against the company, was in pursuance of that provision.

However this may be, we think that there was evidence which justified the court in submitting the question of the exclusive possession by the trustees to the jury, and that the instructions given were not erroneous in any substantial particular. The observations already made respecting the similar claim on behalf of the receiver of the Alexandria and Washington Railroad Company are applicable here, but need not be repeated.

Judgment of the general term of the Supreme Court of the District of Columbia reversed, and case remanded to that court with directions to set aside the judgment of the special term, and to permit the plaintiffs to elect to become nonsuit as against the Pennsylvania Railroad Company, and take judgment on the verdict against the other defendants, and, if they do not so elect, then to set aside the verdict and order a new trial generally.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *v.* CUNNINGHAM.

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

No. 49. Argued November 2, 5, 1894. — Decided December 10, 1894.

The grant of public lands to Michigan in the act of June 3, 1856, c. 44, 11 Stat. 21, to aid in the construction of "railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin state line," was a grant *in præsenti*, which upon the filing of the map of definite location, November 30, 1857,

operated to withdraw the lands from public domain open to settlement by individuals; and the provision in the act for forfeiture of the grant if the road should not be completed within ten years was a condition subsequent, which could only be enforced by the United States.

That act contemplated separate railroads from Ontonagon to the state line and from Marquette to the state line, and was so regarded and treated by the State of Michigan.

Prior to the act of March 2, 1889, c. 414, 25 Stat. 1008, no legislative or judicial proceeding was taken by the United States, looking to a forfeiture of the Ontonagon grant; no act or resolution was passed by the legislature of Michigan retransferring it to the United States; and the conveyance executed by the Governor of Michigan, August 14, 1870, assuming to formally release it to the United States, was beyond the scope of his powers and void.

As general terms in a subsequent Congressional grant are always held not to include lands embraced within the terms of a prior grant, and as by the filing of the map of definite location of the railroad, and the certification of the lands to the State, the lands granted by the act of June 3, 1856, had become identified and separated from the public domain before the passage of the act of March 3, 1865, c. 202, 13 Stat. 519, granting lands to Michigan to aid in the construction of a ship canal, the State acquired no title to such lands through the latter act, and whether they were or were not returned to the United States was not a question of fact, but one of law, depending upon the construction to be given to the resolution of the legislature of Michigan of February 21, 1867.

At the time of the passage of the act of March 2, 1889, c. 414, 25 Stat. 1008, forfeiting to the United States the title to the lands granted to Michigan by the act of June 3, 1856, neither the plaintiff nor the defendant had any title to the tract in controversy in this action, but, like other lands within the Ontonagon grant, it belonged to the State of Michigan, subject to forfeiture by the United States; and, construing that act, it is *Held*,

(1) That § 1 grants nothing to and withdraws nothing from the parties;

(2) That the provision in § 2 as to the rights of the Portage Lake Canal Company and the Ontonagon and Brule River Railroad Company means simply that neither forfeiture nor confirmation nor any other provision in the act shall be construed as a final settlement of all the claims of those companies or their grantees;

(3) That the provision in § 2 as to prejudicing any right of forfeiture or recovery of the United States should not be construed as denying the confirmation granted by § 3;

(4) That the provision in § 2 touching the rights of persons claiming adversely to those companies or their assigns under the laws of the United States means that the confirmation to them shall not be taken as an attempt to invalidate any legal or equitable rights as against such companies;

(5) That the term "public land laws" in § 3 refers to any laws of Congress, special or general, by which public land was disposed of;

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(6) That the phrase "where the consideration received therefor is still retained by the government" is satisfied whenever the conditions of the attempted conveyance have been fully complied with, and apply to a homestead claim as well as to a preëmption claim;

(7) That the proviso as to "original cash purchasers" is not to be taken as implying that the confirmation only extends to cash purchasers, but as also making further limitations as to some of those in whose behalf the confirmation was proposed;

(8) That it was the evident intent of Congress that in all cases of conflict between a selection in aid of the canal grant and the claims of a settler, the confirmation should depend upon the state of things on the 1st of May, 1888;

(9) That the words "homestead claim," as used in this act, include cases in which the claimant was, on the 1st of May, 1888, in the actual occupation of the land with a view of making a homestead of it, whether he had or had not made a formal application at the local land office;

(10) That the defendant in error Cunningham in No. 49, who was on the 1st of May, 1888, in the occupation of the tract claimed by him, was, within the terms of the confirmatory act, a *bona fide* claimant of a homestead; but the defendant in error Finan in No. 50, not being in such occupation at that date, was not entitled to the benefit of the act.

This was an action commenced by the plaintiff in error, plaintiff below, in the Circuit Court of the United States for the Western District of Michigan, on July 17, 1888, to recover the possession of the southwest quarter of section 25, township 44 north, range 36 west. Upon the first trial a verdict was returned in favor of the plaintiff. In conformity with the opinion of Mr. Justice Jackson, then Circuit Judge, 44 Fed. Rep. 819, a new trial was granted, which, on July 26, 1890, resulted in a verdict under instructions of the court in favor of the defendant, upon which verdict judgment was rendered.

To reverse that judgment this writ of error was brought. The plaintiff claimed title by virtue of certain land grants made by Congress, to the State of Michigan, to aid in the construction of a canal, and a confirmation by an act of Congress of March 2, 1889. The defendant insisted that no title passed by the canal grants because the land had theretofore been granted by Congress to aid in the construction of a railroad; that he entered upon the land with a view of preëmption, and that his right of preëmption was confirmed by the same

act of Congress of March 2, 1889. The facts in respect to the respective railroad and canal grants are as follows:

On June 3, 1856, Congress passed an act, c. 43, 11 Stat. 20, granting to the State of Wisconsin to aid in the construction of a railroad "from Fond du Lac on Lake Winnebago northerly to the state line" every alternate section of land designated by odd numbers for six sections in width on each side of the road; and on the same date it passed another act, c. 44, 11 Stat. 21, making a similar grant to the State of Michigan to aid in the construction of several railroads, among them being "railroads from Little Bay de Noquet to Marquette, and thence to Ontonagon, and from the two last named places to the Wisconsin state line." This grant was in the ordinary form of a grant *in præsenti*, the language being: "That there be and hereby is granted to the State of Michigan, to aid," etc. The act also provided in section 1, "that the lands hereby granted shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever;" in section 3, "that the said lands hereby granted to the said State, shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other;" and in section 4, that "if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States." Apparently, Congress contemplated among other things the construction of a railroad northerly from Fond du Lac to the line between Wisconsin and the northern peninsula of Michigan, and thence in two branches to Marquette and Ontonagon, on the Lake Superior shore. On February 14, 1857, an act passed the Michigan legislature (Laws of 1857, 346, No. 126) accepting this grant, and transferring to the Marquette and State Line Railroad Company (hereinafter called the Marquette Company) and the Ontonagon and State Line Railroad Company, (hereinafter called the Ontonagon Company,) two corporations created under the laws of the State of Michigan, so much respectively of said grant as was intended to aid in the construction of the road

between Marquette and the state line and that between Ontonagon and the state line. The language of the act making the transfer is emphatic as to the division between the two companies. It reads:

"In like manner all the lands, franchises, rights, powers, and privileges which are or may be granted and conferred, in pursuance of said act of Congress, to aid in the construction of a railroad from Marquette to the Wisconsin state line, be, and the same are hereby vested fully and completely in the Marquette and State Line Railroad Company; in like manner all the lands, franchises, rights, powers, and privileges, which are or may be granted and conferred in pursuance of said act of Congress, to aid in the construction of a railroad from Ontonagon to the Wisconsin state line, are hereby vested fully and completely in the Ontonagon and State Line Railroad Company."

By the same act a board of control was created to supervise the disposition of the granted lands, and in section 11 it was provided that on the failure by the respective companies to construct their lines of road, or any part thereof, in the time and manner required, the "said board of control shall have the power, and it is hereby made their duty, to declare said lands, so far as they have not been sold in good faith, forfeited to the State, and said board of control are hereby required to confer said lands upon some other competent party, under the general regulations and restrictions of this act."

The grant to the State of Wisconsin was conferred by its legislature upon the Chicago, St. Paul and Fond du Lac Railroad Company, an Illinois and Wisconsin corporation, and on March 27, 1857, that corporation was consolidated with the Marquette Company and the Ontonagon Company, the consolidated company taking the name of the Chicago, St. Paul and Fond du Lac Railroad Company. No question is made as to the validity of this consolidation. Neither the Ontonagon nor the Marquette Company filed any map of location, but the consolidated company (hereinafter called the Fond du Lac Company) on November 30, 1857, filed in the General Land Office two maps of definite location, one of the Wiscon-

sin part of its road, and the other of the Michigan portion. On the latter the roads from Marquette and Ontonagon were located so as to unite some five or six miles above the Wisconsin state line, so that the two maps together showed a single continuous line from Fond du Lac through Wisconsin and to a point in Michigan five or six miles above the state line, where it separated into two branches, one going to Marquette and the other to Ontonagon. The Fond du Lac Company built no road — at least none in Michigan. On April 6, 1857, it executed a mortgage covering all its property, including the land grants in Michigan and Wisconsin. Subsequently, foreclosure proceedings were had, and by proper conveyances all the title of the Fond du Lac Company passed to the Chicago and Northwestern Railway Company, the last conveyance being executed on July 1, 1859. On December 12, 1861, the Interior Department certified to the State of Michigan certain lands along the lines of these roads in satisfaction of the grants made by the act of June 3, 1856. These lands were certified in four lists: one, of lands within the six-mile limits of the Ontonagon and State Line branch, (clear). This list included $142{,}430\frac{23}{100}$ acres, and among the lands so certified was the tract in controversy in this case.

On March 4, 1861, the legislature of the State of Michigan, contemplating a change of route from Marquette to the Wisconsin state line, passed an act, (Laws of Mich. 1861, 123, No. 90,) the preamble and first section of which are as follows:

"Whereas, the Marquette and State line railroad company have heretofore consolidated with the Chicago, St. Paul and Fond du Lac railroad company, of Wisconsin, and said company having become insolvent, and all its property in Wisconsin transferred to another company: *And whereas*, The most practicable route for a railroad connecting Lake Superior with the system of railroads in Wisconsin, should be located on a different route from the one heretofore partially selected, namely: from Marquette to the mouth of the Menominee River; therefore,

"Sec. 1. *The People of the State of Michigan enact*, That for the purpose of placing the aforesaid lands, franchises, rights,

powers and privileges, which are or may be granted in pursuance of said act of Congress, approved June third, eighteen hundred and fifty-six, to aid in the construction of a railroad from Marquette to the Wisconsin state line, near the mouth of the Menominee River, in a position to encourage the early construction of said road, do hereby repeal so much of section two of 'An act to repeal section twenty of an act disposing of certain lands for railroad purposes, approved February fourteenth, eighteen hundred and fifty-seven,' approved February fifteenth, eighteen hundred and fifty-nine, as relates to the extension of the time to complete the first section of twenty miles of the Marquette and state line railroad, or any other act amendatory thereto, and do hereby place the same in charge of the board of control, who shall have power, and [it] is hereby made their duty, to confer said lands, franchises, rights, powers and privileges upon some other competent party or company under the general regulation and restrictions of an act disposing of certain grants of land made to the State of Michigan for railroad purposes by an act of Congress, approved June third, eighteen hundred and fifty-six, and approved February fourteenth, eighteen hundred and fifty-seven, and all acts amendatory thereto."

Nothing was said in this act about the Ontonagon Company or the road from Ontonagon to the state line. In order to carry into effect this contemplated change of route, the Chicago and Northwestern Railway Company promoted the formation of the Peninsula Railroad Company, a corporation organized under the laws of the State of Michigan, and on April 24, 1862, the Peninsula Company applied to the Michigan board of control to transfer to it the land grant theretofore bestowed by the State upon the Marquette Company, which application was endorsed by the Chicago and Northwestern Railway Company, whereupon the board of control made the following order:

"It is now ordered by this board that all the lands, franchises, rights, powers, and privileges which are or may be granted in pursuance of said act of Congress approved June 3, 1856, to aid in the construction of a railroad from Marquette to the Wisconsin state line, be, and the same are hereby, conferred

upon the said Peninsula Railroad Company, under the regulations and restrictions of an act approved February 14, 1857, entitled 'An act disposing of certain grants of land made to the State of Michigan for railroad purposes by act of Congress approved June 3, 1856,' and of all acts amendatory thereto."

And at the same time it passed a resolution, the material portion of which is as follows:

"*Resolved*, That this board of control of railroad land grants for the State of Michigan do hereby recommend and request that Congress do authorize the relocation of the lands granted for the purposes of the line of road from Marquette to the Wisconsin state line so as to conform to the new line that shall be surveyed and adopted by the said Peninsula Railroad Company, terminating at the mouth of the Menominee River, and to the same effect and extent as if such grant had been originally intended to embrace the route so designated and the same had been originally conferred upon said Peninsula Railroad Company."

On July 5, 1862, evidently with a view to carry out the wish of the State of Michigan, as expressed in the act of March 4, 1861, and the resolution of the board of control, Congress passed a joint resolution, No. 38, 12 Stat. 620, whose first section is in these words:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the words 'Wisconsin state line,' in the first section of an act entitled 'An act making a grant of lands to the State of Michigan, in alternate sections, to aid in the construction of railroads in said State,' approved June third, eighteen hundred and fifty-six, shall, without forfeiture to said State or its assigns of any rights or benefits under said act, or exemption from any of the conditions or obligations imposed thereby, be construed to authorize the location of the line of railroad provided for in said act from Marquette, on Lake Superior, to the Wisconsin state line, upon any eligible route, from the township of Marquette aforesaid, to a point on the Wisconsin state line, near the mouth of the Menominee River, and touching at favorable points on Green Bay, with a view of

securing a railroad available for military purposes from Green Bay to the waters of Lake Superior. And the line of railroad as now located in pursuance of said act from Marquette to the Wisconsin state line, according to the records of the General Land Office, is hereby authorized to be changed so as to conform to the route above indicated; which line, when surveyed and the maps and plans thereof filed in the proper office, as required under said act of June third, eighteen hundred and fifty-six, shall confer the same rights upon and benefits to the State of Michigan and its assigns in said new line, as though the same had been originally located under said act."

Sections 4 and 5, so far as they bear upon any question in this case, are as follows:

"SEC. 4. *And be it further resolved*, That the even sections of public lands reserved to the United States by the aforesaid act of June third, eighteen hundred and fifty-six, along the originally located route of the Marquette and Wisconsin State Line Railroad Company, except where such sections shall fall within six miles of the new line of road so as aforesaid proposed to be located, and along which no railroad has been constructed, shall hereafter be subject to sale at one dollar and twenty-five cents per acre.

"SEC. 5. *And be it further resolved*, That upon the filing in the General Land Office of the lists of said railroad lands, in whole or in part, as now selected and certified in the General Land Office, with the certificate of the governor of the State of Michigan, under the seal of the State, that said State and its assigns surrender all claims to the lands, as aforesaid, set forth and described in the lists thereof thus certified, and that the same have never been pledged or sold or in anywise encumbered, then the State of Michigan or its assigns shall be entitled to receive a like quantity of land, selected in like manner, upon the new line of road as thus surrendered upon the first line, and to the extent of six sections per mile in the aggregate for every mile of the new line, according to the general provisions of the act of June third, eighteen hundred and fifty-six."

Prior to this time, and on April 25, 1862, Congress had authorized a relocation of the line in the State of Wisconsin so as to connect with the proposed line from Marquette southward, contemplated by the act of March 4, 1861, of the State of Michigan. 12 Stat. 618, No. 30. On March 18, 1863, in the legislation of the State of Michigan, appears an act, (Laws of Mich. 1863, 186, No. 127,) the first section of which is as follows:

"SEC. 1. *The People of the State of Michigan enact*, That the grant of lands conferred by the board of control upon the Peninsula railroad company, under authority of an act approved March fourth, eighteen hundred and sixty-one, and upon the relocated route authorized for military purposes by resolution of Congress approved July fifth, eighteen hundred and sixty-two, is hereby confirmed unto the said Peninsula railroad company: *Provided*, It shall construct the railroad referred to according to the requirements of the act and resolution of Congress herein referred to."

On May 3, 1863, the Peninsula Company executed a relinquishment to the United States. This relinquishment, after reciting the forfeiture of the grant to the Marquette Company and its bestowal on the Peninsula Company, and the contemplated change of route, reads:

"Now, therefore, the said Peninsula Railroad Company, in consideration of the premises and in consideration that the United States will cause or permit the relocation of said land grant so as to conform to said new line under the provisions of said resolution and the acts aforesaid, do hereby release and surrender to the United States of America all right, claim, and interest in and to so much of the lands heretofore located on the original proposed line of the Marquette and State Line Railroad, from Marquette to the Brule River, in township forty-two (42) north of range thirty-five (35) west, sufficient to cover one hundred and sixty-one thousand one hundred and four and thirty-eight one-hundredths acres (161,104.38) of land as approved by certificate thereof filed in the General Land Office of the United States on the 12th day of December, 1861, which the said Peninsula Railroad Company may

have acquired under the grant and location aforesaid and the transfer thereof to said company as lie between the mouth of the Brule River and the township line, between ranges numbers twenty-eight and twenty-nine west of the meridian of Michigan."

On February 21, 1867, the legislature of Michigan passed a joint resolution (1 Laws of Michigan, 1867, 317) in words following:

"*Whereas*, By act of Congress, approved June third, eighteen hundred and fifty-six, there was made, among other grants to this State, a grant of land to aid in the construction of a railroad from Marquette to the Wisconsin state line; *and whereas*, by joint resolution of Congress, approved July fifth, eighteen hundred and sixty-two, a change of the route of said road was authorized, and in fact has been made; *and whereas*, the company have executed a release of said land to the governor; therefore,

"*Resolved by the Senate and House of Representatives of the State of Michigan*, That the governor be and he is hereby authorized to execute and file the certificate of non-incumbrance and surrender to the United States of the land on the original line of said railroad, required by said joint resolution."

On January 31, 1868, a further release was executed by the Chicago and Northwestern Railway Company, with which the Peninsula Company had theretofore consolidated, which release commences with this recital:

"Whereas by act of Congress of the United States, approved on the third day of June, A.D. 1856, entitled 'A bill making a grant of lands to the State of Michigan in alternate sections to aid in the construction of railroads in said State,' every alternate section of land designated by odd numbers for six sections in width on each side of said roads, was granted to said State of Michigan to aid in the construction of railroads from Marquette to the Wisconsin state line."

And then, after reciting various acts and resolutions of Congress and the State of Michigan, hereinbefore referred to, proceeds as follows:

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"And whereas lists of said railroad lands granted by said act of 1856 to aid in the construction of said railroad from Marquette to the Wisconsin state line, as the same was originally located, have been filed in the General Land Office:

"Now, therefore, the said Chicago and Northwestern Railway Company, in consideration of the premises, does hereby remise, release, and forever quitclaim unto the said State of Michigan, and its assigns forever all the right, title, and interest it now has or has ever had in and to the following pieces or parcels of land situate, lying, and being in the said State of Michigan, and conveyed and certified to said State in accordance with the several acts of Congress hereinbefore specifically referred to — that is to say: (Here follow the descriptions of lands embraced in three of the lists hereinbefore mentioned, to wit: First, the lands within the six-miles clear limits of the railroad from Marquette to the Wisconsin state line, containing 112,145.38 acres; second, lists of lands within the six-miles limits of the lines of railroad from Ontonagon to the state line, and from Marquette to the state line, where they intersect and cross each other, containing 41,649.25 acres; third, list of lands within the six-miles limits of the line of railroad from Ontonagon to the Wisconsin state line, and the Marquette and Ontonagon railroad, where they intersect and cross each other, containing 32,305.93 acres.)"

None of the lands within the "clear" limits of the road from Ontonagon to the state line were included in this release. On May 1, 1868, the governor of the State of Michigan executed to the United States a release of the same lands by an instrument containing substantially the same recitals. These releases seem to have been forwarded by the solicitor of the Chicago and Northwestern Railway Company to the Commissioner of the General Land Office at Washington, who answered on July 13, 1868, acknowledging the receipt and approving the releases as good for the lands described therein, but adding this reference to the lands within the "clear" limits of the Ontonagon road: "I have to invite your attention to a list of lands, embracing 142,430.23 acres, certified to the State December 21, 1861, for the branch line to Ontonagon, which

are omitted in the aforesaid release. The state and railroad company are requested to execute a similar release for said lands, which will complete the whole matter for both branches."

Some correspondence followed between the commissioner and the solicitor, and, the list having been furnished by the former to the latter, the Chicago and Northwestern Railway Company, on June 17, 1870, executed a formal release of these lands to the State of Michigan. This instrument in its recitals referred to the various acts and resolutions of the State of Michigan and the United States mentioned in the former releases, and recited that this was also made in consideration thereof. Thereafter, and on August 14, 1870, the governor of the State of Michigan likewise executed a formal release of the same lands to the United States. On May 29, 1873, the Commissioner of the General Land Office gave notice to the officers of the local land office that these last-named lands were restored to the public domain, but on July 30 following countermanded by telegraph such order of restoration. The telegram was sent upon the receipt of a letter from the then governor of the State of Michigan, notifying the Land Department that the release executed by the former governor of the lands within the "clear" limits of the Ontonagon and State Line road was unauthorized and void, because not within the scope of the resolution passed by the legislature, and also claiming that the lands still belonged to the State. On March 11, 1878, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior, which was by him referred to Congress, calling attention to the condition of this grant. After stating the facts in the case, the commissioner closes his letter in these words:

"Upon an examination of the case it appears, in my opinion, that my predecessor erred in demanding deeds of relinquishment of the lands granted for the Ontonagon and State Line Railroad Company from the Chicago and Northwestern Railroad Company and the governor of Michigan, as there does not appear to have been any action taken either by the board of control or the state legislature to transfer the grant originally made for the Ontonagon and State Line railroad to

the said Chicago and Northwestern Railroad Company or to authorize the governor of Michigan to make such a deed, and the title to said lands appears to be in the State of Michigan, under the original grant per act of June 3, 1856, and the subsequent approval made thereunder, as stated in the enclosed letter of Governor Bagley, except such portion thereof as has since been granted to the Marquette and Ontonagon Railroad Company.

"In view of the fact that the railroad from Ontonagon to the Wisconsin state line has not been built, and of the terms of the granting act of 1856, and the confirmatory act of the Michigan legislature of February 14, 1857, the grant originally made for said road became liable to reversion more than ten years since, and in view of the further fact that neither the state legislature nor the board of control have ever conferred the said grant upon any other party or parties, and that at present there is no party or corporation *in esse* proposing to build a railroad upon this line, I would respectfully recommend that the attention of Congress be called to the present status of these lands with a view to such action as may be necessary to restore the same to market."

On September 10, 1880, the Ontonagon and Brule River Railroad Company was organized under the laws of the State of Michigan, and on September 17, 1880, the board of control of the State passed a resolution declaring the grant to the Ontonagon Company forfeited, and bestowing it upon the Ontonagon and Brule River Railroad Company, which grant was accepted by the directors of that company on October 25. It appears that this company built about twenty miles of road from Ontonagon south, but never completed the road to the state line, nor opposite the land in controversy, nor did it ever receive any of the lands embraced in the grant.

The narration thus far develops the title of the land in controversy so far as it is determined by the railroad grant legislation, and action taken thereunder. Turning now to the canal land grant legislation, the following is its history: On March 3, 1865, Congress passed an act, c. 202, 13 Stat. 519, giving to the State of Michigan authority to locate and con-

struct a ship canal through the neck of land between Lake Superior and Portage Lake, and granting in aid thereof "two hundred thousand acres of public lands, to be selected in subdivisions agreeably to the United States survey, by an agent or agents appointed by the governor of said State, subject to the approval of the Secretary of the Interior, from any lands in the upper peninsula of said State, subject to private entry: *Provided*, That said selections shall be made from alternate and odd-numbered sections of land nearest the location of said canal in said upper peninsula, not otherwise appropriated, and not from lands designated by the United States as 'mineral' before the passage of this act, nor from lands to which the rights of preëmption or homestead have attached."

This was a grant *in præsenti*, the language being: "That there be, and hereby is, granted to the said State of Michigan." The fifth section of the act provided that if the work was not completed within two years, the lands granted should revert to the United States. On March 18, 1865, the legislature of the State of Michigan accepted this grant, and conferred it upon the Portage Lake and Lake Superior Ship Canal Company. Laws of Michigan, 1865, No. 216, 474. On July 3, 1866, Congress passed another act, making an additional grant of 200,000 acres, 14 Stat. 81, the language of which act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Michigan, to aid in the building of a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior, in addition to a former grant for that purpose, approved March the third, eighteen hundred and sixty-five, two hundred thousand acres of land in the upper peninsula of the State of Michigan, and from land to which the right of homestead or preëmption has not attached: *Provided*, That one hundred and fifty thousand acres of said lands shall be selected from alternate odd-numbered sections, and fifty thousand acres from even-numbered sections of the lands of the United States. Said grant of lands shall inure to the use and benefit of the Portage Lake and Lake Superior

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Ship Canal Company, in accordance with an act of the legislature of the State of Michigan, conferring the land granted to the said State, by the act herein referred to, on said company: *And provided further*, That the time allowed for the completion of said work and the right of reversion to the United States, under the said act of Congress, approved March the third, eighteen hundred and sixty-five, be extended three additional years: *And provided further*, That no lands designated by the United States as 'mineral' before the passage of this act shall be included within this grant."

The canal was completed and the final certificate of completion given by the governor on June 25, 1875. Prior thereto, and on July 1, 1865, the canal company executed a mortgage of the lands embraced in the first grant; on July 1, 1868, a second mortgage, covering the lands included within the second grant; and on July 1, 1870, a third mortgage, covering all defendant's property. By foreclosure proceedings the title to all this property became vested in the plaintiff in error. An agent on the part of the State was duly appointed to make the selection of lands covered by these two grants. Among the lands selected by him was the tract in controversy, which was, in 1871 and after the second release executed by the governor of the State of Michigan, certified by the Land Department to the State in part satisfaction of the canal grant. This tract was from 1880 to 1888 assessed to the plaintiff for state, county, township and other taxes, and such taxes, amounting in the aggregate to $187.26, paid by it.

On March 12, 1888, the defendant settled upon the tract in controversy, and has ever since continued in possession. On May 25, 1888, he applied to the local land office to enter the lands under the preëmption law, stating in his application that he had lived with his family on the land since the 28th of March prior. This application was rejected on the ground that the land had been selected and certified to the State of Michigan in satisfaction of the canal grant. On March 2, 1889, Congress passed an act, c. 414, 25 Stat. 1008, the material portions of which are as follows:

"SEC. 1. That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan by virtue of an act entitled 'An act making a grant of alternate sections of the public lands to the State of Michigan to aid in the construction of certain railroads in said State and for other purposes,' which took effect June third, eighteen hundred and fifty-six, which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain. . . .

"SEC. 2. That nothing . . . *And provided further*, That this act shall not be construed to prejudice any right of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person claiming under them, to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled, nor to prejudice any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies, nor to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States.

"SEC. 3. That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under state selections in Michigan, confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing

herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such state selection, upon which there were *bona fide* preëmption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such preëmption and homestead claims are hereby confirmed.

"SEC. 4. That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States now existing to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line."

Mr. John F. Dillon, (with whom was *Mr. Daniel H. Ball* on the brief,) for plaintiff in error.

Mr. Don M. Dickinson for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The act of June 3, 1856, was a grant *in præsenti*, and when by the filing of the map of definite location the particular tracts were identified, the title to those lands was vested in the State of Michigan, to be disposed of by it in aid of the construction of a railroad between Ontonagon and the Wisconsin state line. The lands were withdrawn from the public domain, and no longer open to settlement by individuals for preëmp-

tion or other purposes. Although there was a provision for the forfeiture of the lands if the road was not completed within ten years, such provision was a condition subsequent, which could be enforced only by the original grantor, the United States. And until, in some appropriate method, it asserted its right of forfeiture, the title remained in the State of Michigan or the corporations upon which, from time to time, it conferred the benefit of the grant. *Schulenberg* v. *Harriman*, 21 Wall. 44; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570; *United States* v. *Northern Pacific Railroad*, 152 U. S. 284. The case of *Schulenberg* v. *Harriman* is exactly in point. In that case was considered a land grant to the State of Wisconsin — a grant with a provision for forfeiture of the lands on a failure to construct the road. After a full consideration of the question, Mr. Justice Field, delivering the opinion of the court, summed up the result in these words: "In the present case no action has been taken either by legislation or judicial proceedings to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the State as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining alternate sections."

Again, the grant made by the act of June 3, 1856, to the State of Michigan contemplated separate railroads from Ontonagon to the state line, and from Marquette to the state line. This is obvious from the language of the act. The legislature of the State of Michigan treated it as such, and conferred the grant on two separate corporations. And this distinction has since been recognized again and again, both by the State and United States, down to and including the confirmatory act of Congress of March 2, 1889, in which the "Ontonagon and Brule River Railroad Company" is mentioned as one of the companies whose rights were not to be prejudiced by the forfeiture.

Prior to the act of Congress of March 2, 1889, there was on the part of the United States no legislative or judicial proceeding looking to a forfeiture of these lands, or a retransfer

of them to the United States. Up to that time, therefore, they remained the property of the State of Michigan, to be used by it in aid of the construction of a railroad between Ontonagon and the Wisconsin state line. Whatever changes were made by the State as to the beneficiary of such grant, whatever releases may have been executed by any such beneficiary to the State, they in no manner operated to retransfer the lands to the United States. It is true that the governor of the State at one time executed a formal release of them to the United States, but such release was beyond his power. The only authority which he had in the matter was that conferred by the resolution of the legislature of the State of Michigan of February 21, 1867, which described other lands. Indeed, the instrument which the governor executed, in terms referred to that legislation as his authority, so that no one, after examination, could have been misled.

Further, the grant to the State of Michigan was to aid in the construction of a railroad. Affirmatively, it was declared in the acts of Congress that the lands should be applied by the State to no other purpose. Even if there had been no such express declaration, such a limitation would be implied from the declaration of Congress that it was granted for the given purpose. As the State of Michigan had no power to appropriate these lands to any other purposes, certainly no act of any executive officer of the State could accomplish that which the State itself had no power to do.

The railroad grant, the filing of the map of definite location, and the certification of the lands to the State were all before the canal grant, so that at that time these lands were identified, separated from the public domain, appropriated to a particular purpose, and not to be considered as within the scope of any subsequent grant by Congress, unless in terms made so. General terms in a subsequent grant are always held to not include lands embraced within the terms of the prior grant. Even a patent may be declared void if issued for lands theretofore reserved from sale. This is the settled rule of this court. *Wilcox* v. *Jackson*, 13 Pet. 498; *Stoddard* v. *Chambers*, 2 How. 284; *Bissell* v. *Penrose*, 8 How.

317; *Minter* v. *Crommelin*, 18 How. 87; *Easton* v. *Salisbury*, 21 How. 426; *Reichart* v. *Felps*, 6 Wall. 160; *Morton* v. *Nebraska*, 21 Wall. 660; *Shepley* v. *Cowan*, 91 U. S. 330; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Sherman* v. *Buick*, 93 U. S. 209; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687; *Wright* v. *Roseberry*, 121 U. S. 488; *Doolan* v. *Carr*, 125 U. S. 618.

From these cases we make these two quotations, as clearly setting forth the law applicable to this question. In *Smelting Company* v. *Kemp* (*supra*) it was said, p. 641:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed."

And in *Doolan* v. *Carr*, p. 624:

"There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void — void for want of power in them to act on the subject-matter of the patent, not merely voidable."

Counsel for plaintiff in error cite several cases in which, power having been given to the Secretary of the Interior to determine a question of fact, his determination thereof, as expressed by the issue of a patent, was held conclusive. The latest of those cases is *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288, in which the rule was thus stated, p. 327:

"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."

That case fully illustrates the extent to which the rule goes. The grant to the Northern Pacific was of lands "non-mineral," and it was held that it was a question of fact whether lands were mineral or non-mineral, and that question of fact was for the determination of the Land Department, and when determined by it, conclusively settled. But those cases are not pertinent, for here there was no question of fact to be determined. Long prior to any legislation respecting the canal grant the lands granted to the Ontonagon Company had been identified and set apart. The record thereof was in the office of the Land Department. By that identification and certification those lands were absolutely separated from the public domain, and as fully removed from the control of the Land Department as though they had been already patented to the State. And whether those lands were or were not returned to the United States, and released from the burden of that grant, was not a question of fact, but one of law, and depended upon the construction to be given to the resolution of the State of Michigan of February 21, 1867.

Much reliance is placed by counsel in brief and argument upon the "obvious intent" and the "general understanding." It is said that, as indicated by the provisions of the two acts of June 3, 1856, the original plan was the construction of a

main line from Fond du Lac northerly to the state line, and thence in two branches to Marquette and Ontonagon, on Lake Superior; that when this plan was changed, and the route from Fond du Lac to the state line abandoned and a new route farther eastward substituted in its place, it was to be expected that the original branches would likewise be changed to something to connect with the new main line; that it cannot be supposed that Congress would contemplate the building of a road from Ontonagon southerly to the Wisconsin state line, with no connections at that place with any other road, and that hence, although only the Marquette line is mentioned in the resolutions of Congress and of the state legislature as abandoned, etc., both the Marquette and Ontonagon branches must have been intended. It is insisted that all parties, the railroad companies, the State, and the Land Department of the United States, so understood the scope of the resolutions, and acted upon that understanding. But it does not follow, because the main line in Wisconsin was moved eastward, that Congress deemed it unwise or unnecessary to attempt to reach the waters of Lake Superior at Ontonagon. It may have supposed that the aid already granted to the Ontonagon line, and which it did not in terms disturb, was sufficient to insure its construction to a junction with the new main line; or, it may have thought that a line simply opening that part of the State of Michigan to the waters of Lake Superior deserved Congressional aid. In the original act granting aid to the State of Michigan four lines or roads are named in a single sentence. When Congress, by subsequent legislation, selects one only of those lines, and relocates that, it is going very far to say that Congress must have intended to abandon one or all of the other three, and to withdraw the aid which it had granted for their construction. Neither can it be said that there has been any "general understanding." True, the Northwestern Railway Company, when called upon, executed to the State a release of its interest in the lands granted to aid in the building of the Ontonagon line, but that might well be because it had no thought of constructing any such line, and had no desire to hold on to a grant which it did

not intend to use. It may be conceded that there has been some confusion in the rulings of the department, and in the action of the state officials. Nevertheless there has been no uniform interpretation of the condition of things as is claimed by counsel. On the contrary, there were frequent assertions of right by the State; efforts by it to utilize the grant to the Ontonagon Company in the construction of the proposed road. It cannot be said that there has been general acquiescence in one interpretation. So, after all, as there is no pretence of any proceeding in the way of forfeiture by the United States prior to the act of March 2, 1889, the question must depend upon the scope and effect of the action of the legislature of the State of Michigan; and that, as we have seen, only contemplated a release of the grant so far as it was to aid in the construction of the Marquette and State Line road.

It follows from these considerations that at the time of the passage of the act of March 2, 1889, neither the plaintiff nor defendant had any right or title to the tract in controversy. It, like other lands within the Ontonagon grant, belonged to the State of Michigan, to be disposed of by that State only in aid of the construction of a railroad, and subject to forfeiture by the United States for failure to construct the road.

We come, therefore, to the final question, and that is, the true construction of the act of March 2, 1889.

The first section simply declares a forfeiture of the lands opposite to and coterminous with the uncompleted portion of any railroad in aid of which the grant of 1856 was made. So far as the parties to this controversy are concerned, that is the whole significance of the section. As to them it grants nothing and withdraws nothing. And as at the time of the passage of the act neither settler nor company had any right or title to the lands, if this were the only section it would operate simply to resume the title to the United States, clear the lands of all pretence of adverse claims, and add them to the public domain, to be thereafter disposed of as other public lands are disposed of. The second and third sections are the troublesome parts of the act, and it must be conceded that the true construction is not altogether obvious, and yet when

the situation as it existed and as it was known to Congress is considered, the meaning can be satisfactorily discerned. Some of the lands had been selected and certified to the State of Michigan by the officers of the Land Department in part satisfaction of the canal grant. Some were occupied by settlers claiming the right of preëmption and homestead, and of these some were lands which had been selected and certified to the State. Possibly some were claimed by the State, or individuals under the Swamp Land Act, or other acts of Congress. Congress knew that these lands, the title to which it was purposing to resume discharged of all right on the part of the State of Michigan to use them in aid of the construction of a railroad, were already subject to other and conflicting claims, of no legal validity, yet of a character justifying consideration. Under those circumstances, with the view of securing an equitable adjustment of these conflicting claims, it enacted the second and third sections of this act. It will be more convenient to consider the third section first. That recognizes that certain of these lands had "heretofore been disposed of by the proper officers of the United States or under state selections in Michigan confirmed by the Secretary of the Interior, under color of the public land laws," and declares that if the "consideration received therefor is still retained by the government," the title of the lands thus disposed of "shall be and is hereby confirmed." Now, there had been, as appears, state selections in Michigan of a portion of these lands for the canal company, which selections had been confirmed by the Secretary of the Interior, and such selections were made under color of the acts of Congress making the canal grant. This makes a case apparently within the scope of the confirmation. But this is denied, because, first, the selections were under color of special grants to aid in the construction of the canal, and not under color of the general laws in respect to the disposal of public lands; and, secondly, because the government received no consideration therefor, and of course cannot be said to still retain that which it never received. This view is, as is claimed, also supported by the proviso immediately following, to wit, "that

where the original cash purchasers are the present owners," etc., as though the confirmation was intended to apply to those only who had paid money to the government, and in that way had obtained a claim of title to the lands. There is some force to this contention, but we think it places too narrow a construction upon the language. It does not appear from this record, except inferentially from a letter of the Commissioner of the General Land Office, that there were any selections of lands within the railroad grant made by the State otherwise than in attempted satisfaction of the canal grant, and we are not aware of any act of Congress granting lands to the State of Michigan for any purpose, cash considerations for which were to be paid by the State, or received by the general government; while it does appear that the attention of Congress was called to the fact that selections had been made by the State and confirmed by the Secretary of the Interior of lands within this railroad grant for the purpose of satisfying the canal grant. The language must be understood as intended by Congress to be applicable to the state of facts as it existed and was known to exist, and not to a state of facts which did not and could not exist. Hence the term "public land laws," fairly construed, refers not simply to the statutes making general disposition of the public domain, but to any laws of Congress, special or general, by which public lands were disposed of. So the phrase, "where the consideration received therefor is still retained by the government," is satisfied whenever the conditions of the attempted conveyances have been fully complied with. Thus, if any of the lands had been disposed of by the proper officers of the government to individuals under the homestead laws, it could properly be held that the consideration received for such conveyances was still retained by the government, although, in fact, no money had been paid; for the consideration which the government had provided for the conveyance of such lands was the actual occupation by the homesteader for the specified period. It will be difficult to discover any equitable reason why a preëmption claim should be confirmed and a homestead claim disallowed. In like manner, where a

grant was made to the State in aid of the construction of some work of a public or quasi-public character, the construction of the work is the consideration of the grant, and when that is accomplished the consideration is received and retained by the government. Here it appears from the testimony that the canal was completed, and, therefore, the consideration of the grant was received and retained by the government. Any other construction than this would leave the provision as to state selections in Michigan, confirmed by the Secretary of the Interior, without significance. So, also, the proviso as to original cash purchasers is not to be taken as implying that the confirmation only extends to cash purchases, but, as making a further limitation as to some of those in whose behalf the confirmation is proposed, to wit, those who were cash purchasers and are still owners, the limitation being that as to them the act shall be operative only when, as is said, the Secretary of the Interior shall be satisfied that they purchased without fraud, and in the belief that they were obtaining valuable title from the United States. In other words, the rule of *bona fides* was applied to lands still held by the original cash purchaser. This, by implication, excluded from its operation lands held by proper conveyances without notice from the original purchasers. And this is the ordinary limit of the application of the rule of *bona fides*. It was, doubtless, deemed unnecessary to make a like provision as to state selections because fraud could not be imputed to the State. This construction, and this alone, gives operative force to all the clauses of this confirmatory clause as applied to the actual facts of the case, and should be received as the true construction. By this confirmatory clause, therefore, the title of the canal company was confirmed as to the lands selected and certified, with the approval of the Secretary of the Interior, in satisfaction of the canal grant.

The only limitation upon this confirmation is found in the closing sentence of that section. That provides that this confirmation shall not extend to any tracts "upon which there were *bona fide* preëmption or homestead claims on the first day of May, 1888, arising or asserted by actual occupation of

the land under color of the laws of the United States, and all such preëmption and homestead claims are hereby confirmed." Evidently, the intent of Congress was that in all cases of a conflict between a selection in aid of the canal grant and the claims of any settler, the confirmation should depend upon the state of things existing at a named date, to wit, May 1, 1888, that date being about ten months prior to the passage of the act. If at that time there were no *bona fide* preëmption or homestead claims upon any particular tract the title of the canal company was confirmed. If, on the other hand, there was then a *bona fide* preëmption or homestead claim, arising or asserted by actual occupation of the land under color of the laws of the United States, such preëmption or homestead claim was to have preference, and was confirmed. It was the purpose to not leave open to dispute between the parties any question as to the relative equities of their claims, but to fix a precise time, and to describe with particularity the conditions which must exist at that time in order to give the one priority over the other. As there could be no valid transfer of a pre-emption or homestead claim, it was unnecessary to distinguish between such claimants and their grantees as was previously done in respect to cash purchasers. The claim of any settler coming within the scope of this clause was declared by it prior to the claim of the canal company, and was also as against the United States confirmed. So that, in any dispute which in this case arises, we must look to the condition of things on the 1st of May, 1888, in order to determine whether the defendant's homestead claim or the certification to the canal company was confirmed.

Before passing to an inquiry as to this question of fact, it is necessary to refer to those provisions of section 2 which, it is insisted, are inconsistent with that confirmation of the canal selections which we have seen was the purpose of the fore part of section 3. Section 2, after clauses which have no bearing upon this question, names three distinct matters, which it is said are not to be construed as prejudiced by "this act." First, "any right of the Portage Lake Canal Company, or the Ontonagon and Brule River Railroad Company, or any person

claiming under them to apply hereafter to the courts or to Congress for any legal or equitable relief to which they may now be entitled." It will be borne in mind that it is "this act" — not the forfeiture, not the confirmation, nor any separate provision of the act, but the act as a whole, including therein both forfeiture and confirmation, which is not to work any prejudice. Obviously the clause quoted does not exclude the idea of some confirmation, but means simply that neither forfeiture nor confirmation, nor any other provision in the act, shall be construed as a final settlement of all the claims, legal and equitable, of the companies or their grantees. If, for instance, the canal company, accepting the confirmation provided by section 3, should fail of getting all the lands selected and certified to it, and so receiving the full amount of the grant, (as from the conclusion we have reached in this particular case it seems that it does,) then its acceptance is not to be taken as an estoppel against any subsequent claim to Congress for the deficiency caused thereby. So if, between any of the parties affected by this confirmation, there should be controversies in which on the part of one or the other there were any legal or equitable claims not arising out of this confirmatory legislation of Congress, they were not to be precluded from litigating such claims in the courts. In other words, the confirmation is in such a case to be regarded as nothing but a confirmation, and without further effect or significance.

The second matter which the act was not to prejudice was "any right of forfeiture, as hereby declared, or recovery of the United States in respect of any of the lands claimed by said companies." The meaning of this clause is not so clear. A reasonable construction is that all the provisions in the act, including both the forfeiture and the special confirmation named in section three, are not to prejudice any right of recovery which the United States may have as against any lands claimed by the companies. That is, if there be any lands within the scope of the original railroad grant of 1856, to which any or either of these companies make any claims, and which are not clearly protected by the confirmation men-

tioned in the third section, the full rights of the government in respect to such lands may be enforced irrespective of such section. While the language is a little obscure, it ought not to be construed as denying the confirmation which seems to be granted by the third section, and those words in that, which are reasonably clear in their meaning, should not be overthrown by language of doubtful import like this. The only other construction would exclude the companies named from any benefit of the confirmatory provisions. This construction would, of course, compel an affirmance of this judgment as showing that the plaintiff had no title to the land, and was, therefore, in no position to question the defendant's possession.

The third matter is that the act shall not be construed "to the prejudice of the right of any person claiming adversely to said companies or their assigns, under the laws of the United States." This means that the confirmation to the companies shall not be taken as an attempt to invalidate any legal or equitable rights of any one as against such companies. If anything had happened through contract, or otherwise, giving to the individual a legal or an equitable claim as against the companies, such legal or equitable right was not to be affected by anything in this act. But that, so far from conflicting with the idea of a confirmation, rather assumes that there is one, and aims to determine its effect rather than deny its existence. There is, therefore, nothing in any of these provisions to overthrow the construction given to the third section, or which conflicts with the confirmation therein provided.

We pass, therefore, finally to the question of fact in respect to the defendant's homestead claim. It appears that he entered upon the lands in March, 1888, but did not attempt to make an entry in the land office until May 25, 1888. While the term "homestead claim" is sometimes used to denote the mere formal application at the local land office, obviously this is not the purport of the term as used in this section, for it is defined by the succeeding words, "arising or asserted by actual occupation of the land." This obviously includes cases in which the party was, on the 1st of May, 1888, in the actual

occupation of the land, with a view of making a homestead of it under the laws of the United States.

But it is said by the counsel for the company that it was not a *bona fide* homestead claim because at the time the defendant entered upon the land he understood that it was a part of a railroad grant. The testimony of the defendant is all that there is bearing upon the question of *bona fides*. And while it appears from his testimony that he understood at the time of his entry that it was land embraced within a railroad land grant, he also testifies that he expected that the grant would be removed and that he could then enter the land, and that he went there for the purpose of making it a home. Now, it may be true as a general proposition that a man cannot move upon land which he knows belongs to another and establish a *bona fide* claim by such wrongful entry, but we do not think that that rule is applicable to the case at bar. The sense in which "*bona fide*" is used in this clause is indicated by the provision in the one preceding as to cash purchasers. Their purchases were to be protected if made "without fraud and in the belief that they were thereby obtaining valid title from the United States." It does not appear that he knew the exact condition of the outstanding claims. If he did, he knew that this railroad grant had been outstanding thirty-two years, that the land was to be restored to the government if the road was not completed within ten years, and that twenty-two years had passed since the time fixed by Congress for the completion of the road, and nothing had been done. His expectation was (and under the circumstances not an unreasonable one) that Congress would at some near time interfere to remove all this outstanding claim. Under those circumstances, and in expectation of such removal, he enters upon the land. Can it be said that this entry and occupation was with a view of depriving anybody of title, or that it was, as against the company, a wrongful entry? If the construction contended for were accepted, it would exclude from the benefit of the act any settler upon these lands who knew that the land he entered upon was within the railroad grant. But legislation respecting public

lands is to be construed favorably to the actual settler, and the construction contended for by the canal company seems to us too narrow. If a party entering upon a tract, although he knew that it was within the limits of an old railroad grant, did so under the honest belief and expectation that that grant, if not technically extinguished by lapse of time, had remained so long unappropriated by any beneficiary that Congress would shortly resume it, and in that belief determined to make for himself a home thereon, with a view of perfecting his title under the land laws of the United States when the forfeiture should be finally declared, it must be held, we think, that he is, within the terms of this confirmatory act, a *bona fide* claimant of a homestead. The ruling of the Circuit Court was correct, and the judgment in favor of the defendant is

Affirmed.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY *v.* FINAN. Error to the Circuit Court of the United States for the Western District of Michigan. No. 50. Argued November 2, 5, 1894. Decided December 10, 1894. MR. JUSTICE BREWER. This case differs from the preceding, in that the action was commenced March 21, 1889, and that Finan, the defendant, did not enter upon the tract in controversy until after the 1st of May, 1888. His entry and occupation gave him no rights to the land, because it was embraced within the railroad grant of 1856. He took nothing under the confirmatory act of 1889, because he was not a *bona fide* claimant or in actual occupation on the 1st of May, 1888. The land was selected and certified to the State for the benefit of the canal company, and was within the scope of the confirmation to the company by the act of 1889. The title of the company was, therefore, perfect as against him. The judgment of the Circuit Court must, therefore, be

Reversed, and the case remanded for a new trial.

Mr. John F. Dillon for plaintiff in error.

Mr. Don M. Dickinson for defendant in error.

DONAHUE *v.* LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

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

No. 51. Argued November 2, 5, 1894. — Decided December 10, 1894.

This case is governed by the rule laid down in *Lake Superior Canal &c. Co.* v. *Cunningham*, *ante*, 354; but, as the land in controversy is near the crossing of two lines that had received separate grants, it is further subject to the rule that where two lines of road are aided by land grants made by the same act, and the lines of those roads cross or intersect, the lands within the "place" limits of both at the crossing or intersection do not pass to either company in preference to the other, no matter which line may be first located, or built, but pass in equal undivided moieties to each.

THE case is stated in the opinion.

Mr. Don M. Dickinson for plaintiff in error.

Mr. John F. Dillon, (with whom was *Mr. Daniel H. Ball* on the brief,) for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

The land in controversy in this case, as that in controversy in the two prior cases, is a tract which was certified to the State of Michigan on December 12, 1861, as part of the railroad grant, and afterwards, in 1871, again certified to the State in part satisfaction of the canal grant. Donahue, the plaintiff in error, entered upon the land in February, 1883, and has ever since remained in possession. He entered with the view of preëmpting, and made his first application under the preëmption laws on April 11, 1883. His application was rejected by the local office, from which rejection he appealed to the Commissioner of the General Land Office, and the appeal is still pending in the department. His entry and occupation were such as within the opinion in the *Cunningham*

case made him a *bona fide* claimant, and entitled to the benefit of the confirmation granted by the closing sentence in section three of the act of March 2, 1889.

The tract was not, however, within the "clear" six-miles limits of the Ontonagon and State Line road, but was near the crossing of the Ontonagon and the Marquette lines, and within six miles of each, and was part of the 41,649.25 acres certified on December 10, 1861, by the Land Office, in a separate list to the State, which list was, as appears from the statement of facts in the *Cunningham case*, included in the release, made on January 31, 1868, by the Chicago and Northwestern Railway Company to the State, and that, on May 1, 1868, by the governor of the State to the United States. On that ground it was held by the Circuit Court that the lands at the time of the second certification to the State, to wit, that in satisfaction of the canal grant, were wholly released from the operation of the railroad grant, and were subject to selection and certification for the benefit of the canal company, and that such selection and certification operated to pass to it a full title — a title which could not be defeated by any subsequent entry by the defendant for either homestead or preëmption. The case turns, therefore, on the effect of the releases to the State and by it to the United States.

By the original act of June 3, 1856, grants of land were made in aid of the construction of two roads, one from Marquette to the state line, and one from Ontonagon to the state line. These grants were bestowed by the State of Michigan, separately, on the Marquette and Ontonagon Companies. The rule is that where two lines of road are aided by land grants made by the same act, and the lines of those roads cross or intersect, the lands within the "place" limits of both at the crossing or intersection do not pass to either company in preference to the other, no matter which line may be first located, or road built, but pass in equal undivided moieties to each. *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720; *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406. This rule was evidently in the mind of Congress when it passed the con-

firmatory act of 1889, for in the last sentence of section four there is a provision that a moiety forfeited on account of the non-completion of one main or branch line should not inure to the benefit of the completed line. When, therefore, the roads from Marquette and Ontonagon respectively to the state line were duly located, the lands within six miles of both at the intersection became appropriated in equal undivided moieties to aid in the construction of each. The fact of the consolidation of the Marquette and the Ontonagon Companies with the Fond du Lac Company, and the further fact that the map of definite location was prepared and filed by the consolidated company, in no manner affect this rule of appropriation. The lands were granted by the United States to the State for the accomplishment of specified purposes, and those purposes could not be defeated by the State, or by any corporations, beneficiaries under the State.

It may be that the release of the Chicago and Northwestern Railway Company, at that time the beneficial owner of both the Marquette and the Ontonagon grants, operated to relinquish to the State of Michigan the title to all the lands within such grants; but the only release authorized by the legislature of the State of Michigan was of the lands granted to aid in the construction of the road from Marquette to the Wisconsin state line. This authorized no giving up of the grant in aid of the construction of the road from Ontonagon to the state line, and as that held an undivided moiety of the lands at the crossing, to that extent at least, it still remained after all the releases. It may be a novel condition which resulted, in that it left the State and the United States joint owners, each holding the title to an undivided moiety of this body of lands, and it may be that further evidence may place the case in a different attitude; but on the record as it now stands, it would seem that the plaintiff and the defendant were each the owners of an undivided half of the land in controversy. Inasmuch, therefore, as the Circuit Court erred in adjudging to the canal company the full title to the land, its judgment must be

Reversed, and the case remanded for a new trial.

UNITED STATES *v.* GUNNISON.

APPEAL FROM THE COURT OF CLAIMS.

No. 484. Submitted December 3, 1894. — Decided December 17, 1894.

G. was a shipping commissioner at Mobile from June, 1889, to February, 1890. In November, 1889, the Secretary of the Treasury notified him that his compensation would thereafter be at a sum not exceeding $100 in any one month, and that no pay additional to that compensation would be allowed him for his services. In December, 1889, January, 1890, and February, 1890, each, he rendered an account claiming $25 in each month for salary of a clerk, payment of which being refused, he brought this action. *Held*, that he was not entitled to recover.

The appellee sued in the court below to recover certain fees and clerk hire which he claimed to be due for services rendered as shipping commissioner at the port of Mobile from June 18, 1889, to February, 1890. The claim was for $1607 and costs. There was judgment below in his favor for $75, being $25 a month for clerk hire during the months of December, 1889, and January and February, 1890. From this judgment the United States appealed.

Mr. Assistant Attorney General Dodge and *Mr. Samuel A. Putnam* for appellants.

Mr. George A. King for appellee.

Mr. Justice White delivered the opinion of the court.

The findings of fact in the court below were as follows:

"I. The claimant was a shipping commissioner at the port of Mobile, Ala.

"During the term of his service he made a detailed report monthly to the Secretary of the Treasury of his services and the fees provided by law, with a full, exact, and itemized account of receipts and expenditures.

"For the months of December, 1889, and January and February, 1890, his returns were as follows:

	Fees provided by law.
December, 1889, paid salary of clerk, $25.....	$262 75
January, 1890, paid salary of clerk, $25.....	311 75
February, 1890, paid salary of clerk, $25.....	284 50

"On each of said accounts the Secretary made and signed the following endorsement:

"'Approved in the sum of one hundred dollars, ($100,) and respectfully referred to the First Auditor, who will please state an account in favor of the U. S. shipping commissioner for the amount found due, payable from the appropriation for "Salaries, shipping service."

"'The services enumerated within appear to have been necessarily rendered.'

"The account was stated by the Auditor, admitted and certified by the Comptroller, and paid to claimant in accordance therewith, except that the services of the clerk were wholly omitted from the account.

"II. Previously to that time the Secretary of the Treasury had fixed the compensation of said claimant not to exceed the sum of $100 a month by a letter addressed to him, as follows:

"'WASHINGTON, D. C., *November* 23, 1889.

"'*U. S. Shipping Commissioner, Mobile, Ala.*

"'SIR: From and after the 1st proximo the compensation allowed you under section 1 of the act of June 19, 1886, will not exceed the sum of one hundred dollars ($100) in any one month. If the services performed by you in any month do not warrant the payment of one hundred dollars under the existing regulations, your compensation for that month will remain as heretofore fixed. No pay additional to the monthly compensation herein mentioned will be allowed for your services as shipping commissioner.

"'Respectfully yours,

"'C. S. FAIRCHILD, *Secretary.*'"

The law governing the compensation of shipping commissioners is found in the Act of June 26, 1884, c. 121, § 27, 23 Stat. 53, 59, and of June 19, 1886, c. 421, § 1, 24 Stat. 79. By

the first of these statutes (that of June, 1884) it is provided that —

"Shipping commissioners shall monthly render a full, exact, and itemized account of their receipts and expenditures to the Secretary of the Treasury, who shall determine their compensation, and shall, from time to time, determine the number and compensation of the clerks appointed by such commissioner, with the approval of the Secretary of the Treasury, subject to the limitations now fixed by law."

And also that —

"All fees of shipping commissioners shall be paid into the Treasury of the United States, and shall constitute a fund which shall be used under the direction of the Secretary of the Treasury to pay the compensation of said commissioners and their clerks, and such other expenses as he may find necessary to insure the proper administration of their duties."

By the second statute (June 19, 1886) it is provided that —

"Shipping commissioners who are paid wholly or partly by fees shall make a detailed report of such services and the fees provided by law to the Secretary of the Treasury, under such regulations as that officer may prescribe; and the Secretary of the Treasury shall allow and pay from any money in the Treasury, not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of this act; also such compensation to clerks of shipping commissioners as would have been paid them had this act not passed: *Provided*, That such services have, in the opinion of the Secretary of the Treasury, been necessarily rendered."

We think it clear that the right of a shipping commissioner to employ clerks under these provisions depends on the sanction of the Secretary of the Treasury. Indeed, the act of 1884 expressly so says. The act of 1886, while making some changes as to the method of compensating the commissioners, specifically provides that the clerks of such commissioners shall receive such compensation as would have been paid to them if that act had not passed. If the last act did not repeal the act of 1884, the plaintiff could not recover without

the endorsement of the Secretary of the Treasury, since that act gives him the right to determine the number and the compensation of clerks to be appointed by the commissioner. If the act of 1884 was repealed by the act of 1886, the plaintiff was equally without the right to recover clerk hire, because under the act of 1886 the amount of compensation to be paid to the commissioner or his clerk depends altogether on the judgment of the Secretary of the Treasury, who is required by that act to certify that such services appeared to have been necessarily rendered.

The Secretary formally notified the shipping commissioner in November, 1889, previous to the month for which clerk hire was claimed, that his compensation would be limited to $100 per month, and that no additional compensation would be allowed. When the vouchers were presented, including the items of clerk hire, the Secretary approved them only for $100 per month. This allowance necessarily excluded the clerk hire.

The court below based its ruling upon the fact that, in approving the vouchers up to the amount of $100, the Secretary made the statement that "the services enumerated appear to have been necessarily rendered." But this language of the Secretary was that which the statute required him to use in affixing his approval. As he only approved up to $100, which excluded the clerk's pay, the language must necessarily be applied only to the services which he approved, and not to those which he disapproved. To hold otherwise would be to say that, although the Secretary rejected the items for clerk hire, he yet approved them. The error below results from considering the Secretary's certificate as referring to other services than those which he approved.

Judgment reversed, and case remanded with directions to render judgment for the United States.

HORNE v. GEORGE H. HAMMOND COMPANY.

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

No. 86. Argued November 20, 21, 1894. — Decided December 17, 1894.

When the transcript of the record does not show that the Circuit Court had jurisdiction of a suit, where jurisdiction depends upon citizenship, and counsel, upon their attention being called to the matter, furnish nothing of record to supply the defect, the judgment must be reversed at the costs of the plaintiff in error, and the cause remanded to the Circuit Court for further proceedings.

THE case is stated in the opinion.

Mr. Eugene P. Carver, (with whom was *Mr. Robert M. Morse* on the brief,) for plaintiff in error.

Mr. George Putnam for defendant in error.

THE CHIEF JUSTICE: The title of this cause describes plaintiff in error as "of Chelsea in said district," and the decedent as "late of Chelsea," and the defendant as "a corporation organized under the laws of the State of Michigan." The writ and the original declaration do not appear in the record. The amended declaration commences thus: "Plaintiff says that she is the widow of the late Granville P. Horne of Chelsea, Suffolk County, Commonwealth of Massachusetts, and that she was duly appointed by the probate court of Suffolk County administratrix of his estate."

As the transcript of the record does not show that the Circuit Court had jurisdiction of the suit, which depended upon the citizenship of the parties, and as counsel, upon having their attention called to the matter, have furnished nothing of record which would supply the defect, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the Circuit Court for further proceedings. *Rob-*

ertson v. *Cease*, 97 U. S. 646, 649; *Anderson* v. *Watt*, 138 U. S. 694, 702; *Timmons* v. *Elyton Land Co.*, 139 U. S. 378; *Denny* v. *Pironi*, 141 U. S. 121.

Reversed and ordered accordingly.

SWAN *v.* HILL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 101. Submitted December 4, 1894. — Decided December 17, 1894.

It was not error in the Supreme Court of the Territory of Arizona to dismiss an appeal when the appeal bond was without obligees, and not conditioned according to law.

This was an action brought by John Hill, A. B. Wild, S. B. Curtis and Samuel Summers, in the District Court of Cochise County, against H. C. Herrick and others, including the Boston Mining and Reduction Company, to establish plaintiff's alleged prior right to the use of the waters of the San Pedro River for irrigation purposes, and to restrain defendants in respect thereof. The defendant company having, previously to the commencement of the action, conveyed its property to Swan, trustee, the latter was made a defendant, as were numerous others averred to be interested in the use of the waters of the river. The case was tried by the court, a jury being waived, and resulted in certain findings of fact and a decree adjudging priority of right to the waters of the river; first, to two of the defendants; second, to plaintiffs; third, fourth and fifth, to various named defendants, respectively; and that the defendant company, and those claiming under it, or the trustee, were entitled to none of the waters for purposes of irrigation as against any of the parties until the other rights as established were satisfied. The cause was dismissed as against many defendants without prejudice. Motion for new trial was made and overruled, and Swan, trustee, appealed to the Supreme Court of the Territory, and tendered a paper as and

for a bond which was approved and filed by the clerk of the court, and was, omitting the signatures, as follows:

"In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Cochise.

"John Hill *et al.*, Plaintiffs,
v.
H. C. Herrick *et al.*, Defendants. } Undertaking for costs and damages on appeal.

"Whereas, Robert T. Swan, trustee, one of the defendants in the above-entitled action, is about to appeal to the Supreme Court of the Territory of Arizona from a judgment and decree rendered against him in said action, in the said District Court, and in favor of the plaintiff, to the effect that he, the said defendant, represents a corporation which, under its charter, cannot take the waters of the San Pedro River for the irrigation and cultivation of its lands, and for costs of suit, taxed at $——, and entered on the 21st day of October, A.D. 1889:

"Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned residents of the county of Cochise and Territory of Arizona, do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound. Witness our hands and seals this 16th day of November, 1889."

The appeal was docketed in the Supreme Court and continued to an adjourned term, when a motion to dismiss it, because, among other reasons, the appeal bond did not comply with the statute of Arizona in that behalf, was made.

Section 859 of the Revised Statutes of Arizona provided: "The appellant or plaintiff in error, as the case may be, shall execute a bond, with two or more good and sufficient sureties, to be approved by the clerk, payable to the appellee or defendant in error, in a sum at least double the probable amount of the costs of the suit of both the appellate court and the court below, to be fixed by the clerk, conditioned that such appel-

lant or plaintiff in error shall prosecute his appeal or writ of error with effect, and shall pay all the costs which have accrued in the court below, or which may accrue in the appellate court." Rev. Stat. Arizona, 1887, c. 20.

The motion was sustained upon that ground, the appeal dismissed with costs, and Swan, trustee, brought the case to this court.

Mr. A. T. Britton and *Mr. A. B. Browne* for appellant.

No appearance for appellees.

THE CHIEF JUSTICE: The alleged bond had no obligees, and was not conditioned according to law. No application to file a sufficient bond was made. The Supreme Court of Arizona did not err in dismissing the appeal, and its judgment is

Affirmed.

In re RICE, Petitioner.

ORIGINAL.

No number. Submitted December 3, 1894. — Decided December 17, 1894.

A party is entitled to a writ of prohibition as a matter of right where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, and that he objected to the jurisdiction at the outset, and has no other remedy.

But where there is another remedy, by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary; and it is not obligatory where the case has gone to sentence, and the want of jurisdiction does not appear on the face of the proceedings.

A writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judical action had in the exercise of legitimate jurisdiction.

A writ of mandamus cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law.

The fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does

Statement of the Case.

not, in itself, affect the jurisdiction of the Circuit Court, as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by mandamus.

Receivers of the Philadelphia and Reading Railroad and Philadelphia and Reading Coal and Iron Companies were appointed February 20, 1893, by the Circuit Court for the Eastern District of Pennsylvania, upon a bill for foreclosure filed by a holder of third preference income bonds of those companies.

Leave was subsequently granted the receivers to issue certificates for the purpose of paying wages and other preferred claims. The receivers and the railroad company filed a petition September 25, 1894, for authority to enter into an agreement for the partial readjustment of the affairs of the Philadelphia and Reading Railroad and Coal and Iron Companies, and to make the payments therein provided, if the plan were carried into effect. The Circuit Court ordered that the petition should be heard on October 15, 1894, at ten o'clock A.M., and that notice of the hearing should be given by advertisement in newspapers published in New York, Philadelphia, and in the London Times. At the time appointed the hearing was begun, but could not be completed by reason of the pressure of trial business, and the court suggested that, to avoid delay and in relief of counsel, some of whom were not residents of Philadelphia, the petition might be referred to a special master, and that the arguments in the master's office might be stenographically reported, and would be considered on the coming in of the master's report as if they had been made in court. This suggestion was accepted, and thereupon the order of reference was made, and the master subsequently filed his report, including the arguments as taken down at length. Application was made for a further hearing which was denied, the report of the master confirmed, and the order prayed for in the petition entered.

The report of the master stated that the companies "have outstanding prior general mortgage bonds, amounting to $44,491,188.77, bearing four per cent interest, maturing semi-annually, January and July 1st, which for the past eighteen months is in arrear and unpaid. The receivers, under an order

made July 6th, 1893, authorizing them to issue receivers' certificates, have issued them to the amount of $3,640,000. The Philadelphia and Reading Railroad Company also owe other general, well-secured indebtedness to the amount of $3,843,000, and further indebtedness, with interest, aggregating $7,533,000, for necessary equipment, for which a large part of the value thereof has been paid, leaving a valuable equity of the company therein over the said debt therefor. The receivers, upon the payment of the said secured general indebtedness, will have $10,000,000 of 5 per cent collateral trust gold bonds of the Philadelphia and Reading Railroad Company, secured by stocks and bonds of its associated companies, which are a valuable and necessary part of its system, to dispose of for payment of the said classes of indebtedness, which, by reason of priority of liens, or value of securities pledged therefor, are entitled to a preference in the disposition of the proceeds of the said collateral trust bonds, over other indebtedness of the company. Some of the said general mortgage bondholders have combined to enforce foreclosure of their mortgage, under due legal proceedings."

The report then set forth the proposed plan of readjustment which, in brief, provided for the purchase of the overdue and maturing coupons of the general mortgage bonds of the Philadelphia and Reading Railroad Company and an extension of the time of payment for ten years from the date of each purchase, and for the sale of ten million five per cent collateral trust bonds to the stockholders and junior bondholders of the company at par. Such stockholders and bondholders as were unable or unwilling to purchase the bonds at par were given the privilege of making a cash contribution, by way of a gift, of three million dollars, and in that event a syndicate had been formed to take and pay for the bonds the sum of seven million dollars. In case the plan should become effective, and only upon that condition, the receivers were to pay the purchasers of the coupons, who were to extend them for ten years, a commission of two and one-half per cent, and to the purchasers of the collateral trust bonds a like commission of two and one-half per cent. If the plan

were carried into effect, the company would obtain an extension upon its general mortgage bonds of ten years, and sell ten million of its collateral trust bonds at par, for whether the stockholders and junior security holders purchased and paid for the bonds themselves at par, or the syndicate should take them at seventy per cent and the stockholders and junior bondholders paid the remaining thirty per cent as a cash donation, the result would be the same.

The plan also provided for the creation of a voting trust whereby the right of the stockholders to elect six managers and the president under the charter of the company was distributed among the general mortgage bondholders, the income bondholders, and the stockholders, under a system of registration of the bonds.

The readjustment agreement was to be taken in connection with a previous agreement between the general mortgage bondholders in respect of foreclosure, and it is averred that since the order complained of was entered, sufficient of the general mortgage bonds have been deposited to enable foreclosure to go forward if the readjustment plan should fail, and reorganization to be reached in that way.

The master said: "In any event, whether of success of the scheme, or of foreclosure, because of the priority of the lien of the coupons and interest of the general mortgage bonds, and the receivers' certificates and the salvage of the securities pledged for the secured indebtedness and of the equipment, the debts which are proposed to be paid out of the said moneys to be raised, would be payable out of the proceeds of the collateral trust bonds and their security, in preference to the income mortgage bondholders, unsecured general indebtedness and stockholders. The coupons of the general mortgage bonds carry 6 per cent interest from their maturity. Too small a part of those bonds are registered to warrant a discrimination against the small amount of interest thereon, which will not carry interest from maturity. The counsel for the receivers state that the equipment and the other well-secured obligations proposed to be paid also carry 6 per cent interest. The collateral trust bonds proposed to

be sold carry 5 per cent interest. No substantial offer of better prices for the assets proposed to be sold in this plan was made, much less in the mode required by courts from parties opposing the consummation of judicial sales, in security for a substantial better price."

The master found that the commissions provided for were not unreasonable; that it was not probable that, under a foreclosure, the collateral trust bonds or their security would produce more; that it was the duty of the receivers to pay or provide for the interest upon the general mortgage bonds to avoid foreclosure; that an investigation of the causes of the fact that the receivers had not the means to pay the present default upon the general mortgage interest, or the other pressing indebtedness, would not aid in the consideration of the present duty of the court and receivers; that the action asked of the court was entirely for the administration of certain assets in the receivers' hands for the payment of pressing debts, and the authority to the receivers and company was to be granted contingently upon the subsequent approval of the security holders and stockholders, all the parties in interest; that under the petition there was no question of rival plans of organization; that there was no other scheme pending to avoid the impending foreclosure; and that the receivers were not acting or asking for authority otherwise than with strict impartiality to the several interests involved, while the refusal of the prayer of the petition "would aid its opponents in depriving the whole body of the rest of the security holders and stockholders, of the opportunity of approving and consummating the scheme." He concluded that the granting of the prayer of the petition would not probably be misunderstood by the parties in interest, and even if it were, that fact, or that they would thereby authorize foreclosure, if the plan proved unsuccessful, should not prevent the action of the court otherwise proper; that although the plan disposed of a large amount of the assets, this was not unadvisable, as it also disposed of a commercially equal amount of indebtedness, which would in any event absorb the proceeds of those, or an equal amount of other assets; that any lien not before the

court or charter rights would not be affected without the consent of those interested, "unless of a very small minority, whose rights would be necessarily entirely protected in the usual manner in such cases;" "that the provisions for commissions are only an element of the net price to be obtained for the assets to be disposed of, and do not impair the obligation of the income mortgages;" that certain provisions of the plan for a voting trust were not invalid and furnished no ground of objection to the granting of the prayer; and that a full accounting or statement of all the affairs of the company was not necessary for the proper consideration of the questions involved.

The Circuit Court, in granting the application and entering the order prayed for, observed: "The order now to be made does not approve the proposed plan of reorganization, nor is either approval or disapproval thereof to be implied from it. The question of the wisdom and expediency of adopting any such scheme is for solution and determination by the persons interested, and no attempt to coerce their judgment or control their action should be made either by the court or the receivers. But nothing of that sort is involved in the authority now asked and given. It imposes no constraint, but leaves those who have the right to accept or to reject the plan referred to wholly free to do the one or the other, as they may see fit. It sanctions the raising of money by rightful means upon reasonable terms and for proper objects, and it is not a valid ground of objection to it that it also renders feasible, in case of due acceptance, the only reorganization project which is known to exist. The receivers should not enlist on either side in conflicts amongst those interested in the property they have in charge, but the neutrality, which it is their duty to observe, is not departed from by facilitating any plan which may be proposed for the general benefit, provided, that to all alike, and with regard to every plan advanced in good faith, the same facilities be indifferently accorded; and the court, whilst it will not pass upon the comparative merits of rival schemes of reorganization, will regard with satisfaction any and every legitimate effort to terminate this receivership."

The petitioner subsequently made application to the Circuit Court to set aside the decretal order upon the receivers' and companies' petition, and for leave to file a demurrer, plea, and answer to that petition; and that if the demurrer or plea should be overruled, a reference be had, and evidence adduced for and against the proposed action, and for a stay in the meantime; and, in the alternative, that the decretal order be opened with leave to petitioner to file, *nunc pro tunc*, such demurrer, plea, or answer, and with leave to file, *nunc pro tunc*, exceptions to the master's report upon the ground that such proceedings had been had and decree made without regard to the rules and regulations of practice; and for general relief; which application the Circuit Court denied.

Petitioner thereupon applied to this court for leave to file a petition for a writ of prohibition to prohibit the Circuit Judge from further proceeding upon the petition of the receivers, and from enforcing or carrying out the decree thereunder; and for a writ of mandamus directing the Circuit Judge to cause securities, deposited under the proposed plan, to be returned to their owners, and to restore the parties to their original positions, or to vacate the decree and require the parties in interest to be brought in, and thereafter to proceed according to the rules and forms of law for such cases made and provided.

Mr. Nathan Bijur for petitioner.

Mr. Thomas Hart, Jr., and *Mr. Samuel Dickson*, opposing.

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

Without discussing the various matters urged upon our attention by counsel for the petitioner, it is sufficient to say that we are of opinion that the leave asked for cannot be granted.

1. Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter

of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495. Tested by these rules, we are clear that a proper case is not made for awarding the writ of prohibition.

2. The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, 379.

The Circuit Court has proceeded to judgment in the premises, and we cannot revise and reverse its decision by resort to this writ in the manner proposed, nor can we command it to adjudicate upon the rights of parties not before it, by directing it to cause securities which may have been deposited to be returned to their owners, and to restore the parties to their original positions. Still less can we direct the hearing of further argument, because counsel may consider that the opportunity for the expression of his views and the presentation of objections has not been as ample as in his opinion should have been afforded. The mere fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does not in itself affect the jurisdiction of the Circuit Court as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by mandamus. *Ex parte Parsons*, 150 U. S. 150.

We perceive no ground for the extraordinary interposition of this court by the issue of either of the writs applied for.

Leave denied.

DICK *v.* FORAKER.

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

No. 89. Submitted November 15, 1894. — Decided December 17, 1894.

The Circuit Court of the United States for the Eastern District of Arkansas has jurisdiction of a suit in equity, brought by a citizen of Ohio against a citizen of Illinois, to remove a cloud from the title to real estate situated in that district.

Without the statutory notice required by the Arkansas statute of March 12, 1881, No. 39, in proceedings for the fixing of tax liens for unpaid taxes upon lands in the State, and the sale of the lands for the non-payment thereof, the court can take no jurisdiction, and all proceedings therein are void; and the fact that the State appeared in such a suit where that notice had not been given, did not give the court jurisdiction, or render the sale valid.

THE appellee, a citizen of the State of Ohio, brought his complaint in the Circuit Court of the United States for the Eastern District of Arkansas against the appellant, a citizen of the State of Illinois. The bill sought to remove a cloud from a title held by complainant, and charged, in substance, that under an act of the legislature of Arkansas, approved March 12, 1881, and an act amendatory thereof, approved March 22, 1881, a decree was rendered in the Ashley County circuit court, directing the sale of certain lands, for the purpose of realizing taxes due upon them. That under this decree a sale was made on September 15, 1884, by a commissioner of the court; that at said sale the complainant became a purchaser of the property, a description of which was given in the bill. That the proceedings, as well as the sale, were in accordance with the statute. That the lands thus purchased were not redeemed as prescribed by law, and accordingly the court ordered the commissioner to execute a deed therefor, which the commissioner did on May 15, 1887, and the deed was recorded in the proper office. That after this purchase the defendant (appellant here) purchased through the commis-

sioner of lands of the State of Arkansas the said lands from the State, as forfeited for the non-payment of taxes; that the commissioner wrongfully and without authority of law, and in disregard of the rights of complainant, executed deeds for the lands to the defendant, which deeds were recorded, and, taken all together, purport to convey all of the land purchased by the complainant under the previous sale to him; that the deeds thus executed to the defendant, while they convey no title, constitute a cloud upon the complainant's title, and their appearance upon the record impairs the value of his property. The bill, moreover, averred that the land was vacant and in the actual possession of neither complainant nor defendant. The prayer of the bill was that the deeds made to the defendant be cancelled, and that the complainant's title to said land be quieted as against the defendant and all claimants under him. The defendant demurred to the jurisdiction of the court, and upon the overruling of his demurrer answered, averring the validity of the sale made him by the commissioner of lands, and claiming that the sales to the complainant under the proceedings in the Ashley County court were absolutely void, because there was no law authorizing them, because the court had no jurisdiction of the subject-matter, and because of fatal irregularities in the proceedings themselves. The court below decreed in favor of the complainant. From this decree the cause was brought here on appeal.

The defendant's title is derived from a sale made by the commissioner of lands of the State of Arkansas, treating the lands as forfeited to the State, this sale having been made subsequent to the proceedings upon which the complainant relied as his muniment of title.

The statutory provisions authorizing the proceedings upon which complainant's title rests are found in the Laws of Arkansas of 1881, page 89, Act of March 12, 1881, No. 39, and read as follows:

"SEC. 1. That hereafter any citizen of this State, who shall give security for cost, may file a complaint in equity in the name of the State in the court having equity jurisdiction in the county in which the lands lie, setting forth that taxes are

due on lands to be therein described, or that for any reason lands lying in the county have not been assessed for any one or more years, and praying that a lien may be fixed on such lands, by a decree of the court, for such unpaid taxes, and that the lands may be sold for the non-payment thereof. The county court of any county may direct such complaint to be filed in the name of the county ; and when it shall be filed in pursuance of such direction, it shall be prosecuted by the attorney for the county, or by some attorney to be retained for that purpose. . . .

"SEC. 2. On filing of such complaint, the clerk of the court shall enter on the record an order, which may be in the following form:

"'State of Arkansas on relation of ———, plaintiff, *v.* Certain lands on which taxes are alleged to be due, defendant.

"'Now, on this day came said plaintiff, and files here in court his complaint, in which he sets forth that there are certain taxes due on the following lands:

[Here insert description of the lands.]

"'Now, therefore, all persons having any right or interest in said lands, or any of them, are required to appear in this court within forty days from this date, then and there to show cause, if any they can, why a lien shall not be declared on said lands for unpaid taxes, and why said lands shall not be sold for non-payment thereof.'

"SEC. 3. The clerk of said court shall at once cause a copy of said order to be published for two insertions in some newspaper published in the county, and, if there is no newspaper published in the county, he shall cause a copy of said order to be posted at the door of the court-house of the county, or of the room in which the court is held, and such publication shall be taken to be notice to all the world of the contents of the complaint filed as aforesaid, and of the proceedings had under it."

"SEC. 5. At the end of the forty days mentioned in section 2 of this act, the clerk shall enter upon the record a decree *pro confesso*, covering all lands named in the complaint, regarding which no answer has been filed, which order may be in the following form:

Statement of the Case.

"'State of Arkansas on the relation of ———, plaintiff, *v.* Certain lands on which taxes are alleged to be due, defendant.

"'It appearing that the order herein made, requiring the owners of the lands in this suit to appear and show cause, if any they could, why a lien should not be declared on certain lands, named in the complaint herein, has been duly published in the manner required by statute, and that no answer has been put in as to the following tracts or parcels of land, that is to say:

[Here describe the lands.]

"'It is now, therefore, ordered that the complaint be taken as true and confessed as to said lands above described.'"

In order to make out his case, the complainant offered the record of the proceedings in the Ashley County circuit court, from which his title took its origin. The record as offered is in a very imperfect state, but it appears therefrom that on May 4, 1884, on the relation of W. H. Arnold, a bill was filed, which, after setting out the above provisions of Arkansas law, substantially averred that upon certain lands described in an exhibit annexed, certain taxes had been extended which were past due, and other taxes had been extended which were unauthorized by law; that in pursuance of a warrant for the collection of taxes on these lands, the collector had demanded both the lawful and the unlawful taxes, and neither were paid, and the lands were returned as delinquent, and were forfeited and sold to the State for the taxes for which they had been respectively so returned; that the forfeiture and sale to the State were void, because unlawful taxes had been extended against the land, and also on account of many other irregularities; that hence the State of Arkansas had no valid title to any of the tracts, but, notwithstanding this fact, the state land commissioner had conveyed part of the land standing in the name of the State to such persons as had applied to purchase, and would convey the balance thereof unless the forfeiture was annulled.

This complaint as printed in the record is not complete. It contains no prayer, but the following memorandum is at the foot thereof:

"(Here the lower part of the complaint having become worn out and destroyed, it is impossible to furnish a copy of the same or the signature to the same.) The complaint was regularly filed, but it is also worn too much to be copied. — Clerk."

Annexed to the bill is a list of lands, containing among others, those which are claimed by the complainant. There is also the following entry in the record:

"No order appointing G. W. Norman and J. W. Van Gilder masters in chancery found on record, and below will be found the docket entry of the same made on the judge's docket, to wit:

"Made 9th day of February, 1884, to wit:

"George W. Norman and J. W. Van Gilder appointed masters in chancery to extend the taxes on said land before the next term of the court.

"Report of Masters in Chancery.

"JUNE 2, 1884.

"To the Honorable Circuit Court of Ashley County:

"The undersigned, masters in chancery, appointed to extend the taxes in the case now pending in said court on the relation of W. H. Arnold *vs.* Certain Lands upon which it is alleged taxes are due, beg leave to report that they have discharged said duty as follows, by consent of parties representing the State, the county, and the attorneys who brought the suit against said lands:

"The taxes, penalties, and costs were fixed at 15 cents per acre. Of this amount four cents is to be paid to the county, two cents to the State, and the balance appropriated to expenses as follows: The attorneys, 3200 dollars; to clerk, 2500 dollars; to printer, 1250 dollars; to com'r, 1000; to masters in chancery, 1000, and the excess that may be realized above these amounts be distributed to the State and county in proportion to two to one in favor of the county.

"In making the extension aforesaid, we were of the opinion that the said six cents per acre about covered the average of taxes due on said lands, as the alleged forfeitures occurred at different periods of time.

Statement of the Case.

"We further report that we are fully satisfied that a sale of the lands embraced in this report thus returned to the tax books, the settling of disputed titles, etc., will inure to the benefit of the entire community; and we further report that we find certain lands marked on the bill were claimed by parties who have made to us satisfactory showing that the said lands were improperly thereon, and that said parties claimed that the taxes thereon had been paid, and that the title of the State to certain other lands was good.

"In each of said cases we have dismissed said lands, and we desire the record in this case should show said fact of dismissal.

"JOHN W. VAN GILDER.
"GEO. W. NORMAN.

"Filed June 2, 1884.

"E. L. THOMSON, *Clk*,
"By JACKSON, *D. C.*"

It is to be inferred, of course, that the masters here named were regularly appointed. On June 2, 1894, the following was entered of record:

"It appearing that the order herein made requiring the owners of the lands in this suit to appear and show cause, if any they could, why a lien should not be declared on certain lands named in the complaint herein, has been duly published in the manner required by statute, and that no answer has been put in as to the following tracts or parcels of land — that is to say:

[Here follows a description of the land.]

"And it further appearing that the creditor of the State, the relator, the prosecuting attorney of the 10th judicial district, and the judge of the county of Ashley have appeared and consented that a decree should go against the above-described lands for the taxes, penalty, and costs assessed against them as fixed by the master's report filed herein, it is therefore ordered, adjudged, and decreed that the amount of taxes, penalty, and costs above set forth are due on said lands, and that a lien for said taxes, penalty, and costs on said lands be fixed

by this decree; and it is further ordered that, if said sum of money so adjudged against said lands shall not be paid within twenty days from the 3d day of June, 1884, the said lands shall be sold by a commissioner to be appointed by the chancellor, on the notice and at the place prescribed by law; and it is further ordered that Thos. S. Stilwell be, and he is hereby, appointed as special commissioner of this court, and that, having made the publication required by law, said commissioner proceed to expose the said lands for sale on Monday the 21st day of July, 1884, at the court-house door, in the town of Hamburg, and that said sale continue from day to day till all of said lands be sold: *Provided*, That said lands are not to be sold for an amount less than the taxes, penalty, and costs herein assessed against each of said tracts of said lands, and that he report his action herein to the next term of this court. It is further ordered that upon sale aforesaid said commissioner pay the fees and costs as follows, viz.:

"To the attorneys, thirty-two hundred and fifty (3250) dollars; to the clerk, twenty-five hundred (2500) dollars; to the printer, twelve hundred and fifty (1250) dollars; to commissioner, one thousand (1000) dollars, and to the masters, one thousand (1000) dollars; and if enough of said — are not sold to pay the above sums, that the commissioner pay *pro rata*."

The execution of this order was postponed by direction of the court, but on September 14, 1884, the lands claimed by complainant were adjudicated to him, and on May 14, 1887, upon the expiration of the period allowed for the redemption, the commissioner made to complainant a deed, which was approved by the court.

Mr. W. L. Terry for appellant.

Mr. D. W. Jones for appellee.

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

The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought.

The defendant was a citizen of another State. The case was obviously within the jurisdiction of the court. Revised Statutes, § 738; Act of March 3, 1875, c. 137, § 8, 18 Stat. 470; Act of August 13, 1888, c. 866, § 5, 25 Stat. 433; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352; *Arndt* v. *Griggs*, 134 U. S. 316; *Greeley* v. *Lowe*, *ante*, 58.

The contention is that the law giving jurisdiction, as against a person not a citizen of the district where suit is brought to remove a cloud from the title to real estate, situated therein, applies only to cases where there are two or more defendants, at least one of whom must be found in the district where the suit is brought; that the jurisdiction exists to entertain a suit, like the one before us, where there are two or more defendants, but not where there is only one. It was admitted that this contention is unsound as applied to Rev. Stat. § 738, but it is insisted that the point is well taken in consequence of a change resulting from the reënactment of Rev. Stat. § 738, to be found in section 8 of the act of March 3, 1875. The Revised Statutes gave the right to bring such a suit where "any defendant" resided out of the district. The act of 1875 gives the right "where one or more" may so reside. We see no force in this argument, which in effect eliminates the word "one" from the statute and replaces it by the word "two," thus causing it to read "two or more," instead of "one or more." The suggestion that as the words "one or more," in section 737, Rev. Stat. contemplated a controversy in which two or more defendants would be involved, therefore the words "one or more" mean the same in the Act of 1875, is fallacious.

Section 737 provides for a case where there are "several defendants" and "one or more" may be outside of the district; the Act of 1875, on the contrary, provides for a case where "one or more of the defendants" may be outside of the district, the difference between the two being that which exists between "one or more of several" and "one or more." The demurrer was, therefore, correctly overruled.

The act of the Arkansas legislature which we have cited provides that on the filing of the complaint with the clerk, an

order shall be entered on the record, notifying all persons having any right or interest in the lands sought to be sold to appear within forty days, and show cause why a lien should not be declared on said land for unpaid taxes, and why said land should not be sold for non-payment thereof. The act directs the clerk to cause a copy of this order to be inserted twice, in a newspaper published in the county, and if there be no such newspaper to post a copy at the court-house door. It further declares that such publication shall be taken to be notice to all the world of the contents of the complaint. These are the only provisions made in the act for notice to the land owner. The proceedings leading up to the tax sale, as they appear on the record before us, do not include the required notice nor any order therefor, nor is it shown that any such notice was put on record in the course of the tax sale proceedings. It is true that the order directing the sale recites: "It appearing that the order herein made requiring the owners of the land in this suit to appear and show cause, if any they could, why a lien should not be declared on certain land, has been duly published in the manner required by statute," etc. This indirect reference to the notice is the only record evidence that such a notice was made, put on record, or published.

In *Gregory* v. *Bartlett*, 55 Arkansas, 30, 33, the Supreme Court of that State, having before it a case in which the notice required by law under the terms of the second section was not properly given, said:

"Without the statutory notice, therefore, there can be no jurisdiction. If the clerk makes the warning order, as the second section of the act requires, but fails to publish or post it, and that fact appears in the judgment record, there could be no justifiable pretence of jurisdiction. If he publishes the statutory warning without first making the order required by section 2, the question is, does he make a legal publication? In other words, is he authorized by the statute to make publication when there is no previous order of record? If he is not so authorized, then the publication is without authority and is not legal notice to the owner of the land. . . . When this requirement of the statute is complied with, it furnishes to the

owner of delinquent lands a means of information which the statute designed he should receive. Searching the records and finding no order for a proceeding against his land, he had a right to presume that none existed. There is nothing in the statute to indicate that the legislature considered the entry of the order upon the record as of any less significance than the publication of it. In a section of the act where a form of a decree to be entered is given, it is made to recite that the order was entered of record as well as that it was published; and the requirement as to publication is that a copy of the record entry shall be published. The order is the sole authority for the publication, and the evidence of it which the statute requires is the record entry. . . .

"The statute does not authorize the clerk to make the order in any manner other than by entry on the record, and authorizes publication of nothing except a copy of the record. To say that the clerk can dispense with the record and make his entry, in the first instance, in a newspaper, would be to disregard a plain provision of the statute and dispense with one of the means the law affords for imparting information to the land owner. But when a statutory provision is plain, and is made to aid in the accomplishment of a useful end, it cannot be treated as merely directory, and so be disregarded. Especially does that rule apply to proceedings where publication is relied upon as a substitute for personal service. *Bush* v. *Visant*, 40 Arkansas, 124; *Brodie* v. *Skelton*, 11 Arkansas, 120. . . . No process was ever issued in the cause in which the challenged decree was rendered; the court's determination of any question was therefore *coram non judice*, and binding upon no one. . . . The recital of the decree that there was proper notice to the parties in interest is not conclusive of that fact, but must be read in connection with that part of the record which gives, or is required to give, the official evidence of jurisdiction, as prescribed by statute. *Boyd* v. *Roane*, 49 Arkansas, 397; *Settlemier* v. *Sullivan*, 97 U. S. 444; *Galpin* v. *Page*, 18 Wall. 350.

"If such evidence is not required by the statute to be placed upon the record, and the record recites or is silent as to the

facts necessary to show jurisdiction, their existence will be presumed, but no presumptions are indulged when the evidence is stated upon the record, *Boyd* v. *Roane*, 49 Arkansas, 397, or where the statute requires the jurisdictional facts to appear of record and they are not made so to appear."

Thus the Supreme Court of Arkansas, in interpreting a statute of that State, has held that the making of the record entry of the notice required, and also the proof of its publication are indispensable to the validity of proceedings under the statute; that such recorded notice is essential to give jurisdiction to the court, and that where the notice is not of record the proceedings are absolutely void. As we have seen, this record does not show either notice or publication. The appellee, then, seeks to have a cloud removed from his title when he holds no title whatever; for, of course, it follows that if the court was without jurisdiction the decree by it rendered was utterly void, and the sale, having been made under the decree, was equally vicious and wholly null. The rule in ejectment is that the plaintiff must recover on the strength of his own title, and not on the weakness of the title of his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief. In *Frost* v. *Spitley*, 121 U. S. 552, 556, we said: "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95; *Orton* v. *Smith*, 18 How. 263; *Crews* v. *Burcham*, 1 Black, 352; *Ward* v. *Chamberlain*, 2 Black, 430. As observed by Mr. Justice Grier in *Orton* v. *Smith*, 'Those only who have a clear, legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' 18 How. 265."

The law of Arkansas authorizes a bill to remove a cloud on

a title whether or not the complainant be in possession. Act of March 26, 1891, No. 74, Stats. of 1891, 132. By reason of this statute a bill in equity may be maintained in the Circuit Court of the United States by a person not in possession against another who is also out of possession. *Holland* v. *Challen*, 110 U. S. 15, 25. But this does not make the complainant's rights any the less dependent upon title in him nor does it put him in a position to have a cloud removed from a title which has no existence. In *Frost* v. *Spitley*, *supra*, it was said, p. 557:

"A statute of Nebraska authorizes an action to be brought 'by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate.' Nebraska Stat. Feb. 24, 1873; Rev. Stat. 1873, p. 882. . . . The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is 'the title,' that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In *State* v. *Sioux City & Pacific Railroad*, the Supreme Court of Nebraska said: 'Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action.' 7 Nebraska, 357, 376. And in *Holland* v. *Challen*, above cited, this court said: 'Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises.' The necessary conclusion is, that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title."

It is said that the State of Arkansas became a party to the proceedings in the Ashley County court, and is hence bound thereby, and from this is deduced the argument that inasmuch as the defendant derived his title from the State subsequent to the complainant's purchase, the latter's title is validated,

Counsel for the Motion.

Stafford v. *Watson*, 41 Arkansas, 1. But the appearance of the State did not cure the radical defect in the proceedings under which complainant purchased. The notice was essential in order to affect the rights of the owner of the property as against whom the proceedings were initiated and the sale was made. The appearance of the State did not, therefore, give the court jurisdiction or render the sale valid. There are other contentions urged, but they are all covered by what has been already said. They either arise from the erroneous postulate that the complainant's title is not void, but simply voidable, or are predicated on the equally unsound premise that one having no title can successfully invoke the aid of a court of equity to "remove a cloud" from such non-existent title; that is to say, can ask a court to subtract something from nothing.

Decree reversed and case remanded with directions to dismiss the bill.

BOBB *v.* JAMISON.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 267. Submitted December 10, 1894. — Decided December 17, 1894.

Duncan v. *Missouri*, 152 U. S. 377, affirmed and followed.

MOTION to dismiss. This cause, after trial below, was argued before the Supreme Court of Missouri, Division No. 2, *in banc*. The organization of that court is set forth in the statement of facts in *Duncan* v. *Missouri*, 152 U. S. 377. After the court had given its opinion and announced its judgment, the plaintiffs in error for the first time raised a Federal question in the cause in a motion for a rehearing. That motion being denied, the case was brought here by writ of error, which writ the defendants in error moved to dismiss.

Mr. Thomas J. Rowe in support of the motion.

Statement of the Case.

Mr. Michael Kinealy, (with whom was *Mr. James R. Kinealy* on the brief,) opposing.

THE CHIEF JUSTICE: The writ of error is dismissed on the authority of *Duncan* v. *Missouri*, 152 U. S. 377, and cases cited.

Writ of error dismissed.

AUSTIN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 39. Argued October 26, 1894. — Decided December 17, 1894.

The act of March 3, 1883, c. 111, 22 Stat. 804, authorizing the Court of Claims to hear and determine the claims of the successors and representatives of Sterling T. Austin, deceased, for cotton alleged to have been taken from him in Louisiana by the authorities of the United States in 1863, 1864, and 1865, "any statute of limitation to the contrary notwithstanding, *provided, however*, that it be shown to the satisfaction of the court that neither Sterling T. Austin, Senior, nor any of his surviving representatives, gave any aid or comfort to the late rebellion, but were throughout the war loyal to the government of the United States," made the establishment of loyalty in fact, as contradistinguished from innocence in law produced by pardon, a prerequisite to jurisdiction, and the Court of Claims, having found that the claimant was not thus loyal, properly dismissed the petition.

CLAIMANT filed a petition in the Court of Claims, June 5, 1883, alleging that Sterling T. Austin, of the parish of Carroll, in the State of Louisiana, died in that State July 9, 1879; that March 20, A.D. 1883, claimant was duly appointed administratrix of the estate of said decedent, and duly qualified as such; and that her letters of administration were in full force.

The petition set up an act of Congress, approved March 3, 1883, c. 111, 22 Stat. 804, entitled "An act for the relief of the representatives of Sterling T. Austin, deceased," which referred the claims of the successors in interest and legal representatives of Sterling T. Austin for cotton taken by the military authorities of the United States during the war to the Court of

Counsel for Appellant.

Claims, to adjust and settle and to render judgment for the net amount realized by the United States therefrom, removing the bar of any statute of limitation, and providing that it be shown to the satisfaction of the court that neither Austin nor any of his surviving representatives "gave any aid or comfort to the late rebellion, but were throughout the war loyal to the government of the United States."

It was then charged that, in the years 1863, 1864, and 1865, the military authorities took from Sterling T. Austin, claimant's decedent, in the States of Louisiana and Texas, large amounts of cotton; that the United States sold said cotton and realized therefrom various sums, aggregating $367,500, which they appropriated to their own use; that Sterling T. Austin left him surviving a widow and children; that neither he nor his widow, nor either of his children, "gave any aid or comfort to the late rebellion, but they and each of them were and was throughout the war loyal to the government of the United States." Judgment was asked "for the sum of three hundred and sixty-seven thousand five hundred dollars, being the net amount realized by the United States from the sale of the cotton hereinbefore referred to and described."

The averments of the petition were traversed by the United States. The Court of Claims filed findings of fact and a conclusion of law.

The court was not satisfied that Sterling T. Austin did not give aid or comfort to the late rebellion, and that he was loyal throughout the war to the government of the United States, and found him disloyal; but the court was satisfied that the surviving representatives did not give any aid and comfort to the late rebellion, but were throughout the war loyal to the government of the United States.

The conclusion of law was that "the court decides upon the foregoing facts that the petition be dismissed." The opinion of the court, by Weldon, J., will be found in 25 C. Cl. 437. Judgment having been thereupon entered dismissing the petition, claimant appealed to this court.

Mr. John C. Fay and *Mr. Samuel Shellabarger* for appellant.

Mr. Assistant Attorney General Conrad for appellees.

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

An act amending the act establishing the Court of Claims was approved March 3, 1863, c. 92, which by its tenth section prescribed a limitation of six years on the prosecution of claims, and in its twelfth section provided "that in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegations may be traversed by the government, and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed." 12 Stat. 765, 767. On the same day an act was passed authorizing the Secretary of the Treasury to appoint special agents to collect and receive all abandoned or captured property in any State or Territory, or any portion of any State or Territory, of the United States designated as in insurrection, the second section of which required that "all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the Treasury of the United States;" and the third section, after making provision for the giving of bonds and the keeping of books, "showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof," proceeded thus: "And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to

the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase money which may have been paid, together with the expense of transportation and sale of such property, and any other lawful expenses attending the disposition thereof." Act of March 3, 1863, c. 120, 12 Stat. 820.

By joint resolution, No. 25, approved March 30, 1868, it was resolved "that all moneys which have been received by any officer or employé of the government, or any department thereof, from sales of captured and abandoned property in the late insurrectionary districts, under or under color of the several acts of Congress providing for the collection and sale of such property, and which have not already been actually covered into the treasury, shall immediately be paid into the treasury of the United States, together with any interest which has been received or accrued thereon." 15 Stat. 251.

June 25, 1868, an act was approved entitled "An act to provide for appeals from the Court of Claims and for other purposes," allowing an appeal to the Supreme Court of the United States from all final judgments of the Court of Claims adverse to the United States. The third section of this act provided "that whenever it shall be material in any suit or claim before any court to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant or party asserting the loyalty of any such person to the United States during such rebellion, shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in said rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to such rebellion and to the persons engaged therein." c. 71, 15 Stat. 75.

On the twentieth of August, 1866, the President issued his proclamation declaring the rebellion suppressed throughout the whole of the United States of America. 14 Stat. 814. And that day was recognized as the close of the rebellion by

an act of Congress passed March 2, 1867, 14 Stat. 422, c. 145, and by this court in *United States* v. *Anderson*, 9 Wall. 56.

July 4, 1868, the President issued a proclamation of pardon and amnesty to all persons who had directly or indirectly participated in the late rebellion, those under indictment for treason or felony excepted, "for the offence of treason against the United States or of adhering to their enemies during the late civil war, with restoration of all rights of property, except as to slaves and except, also, as to any property of which any person may have been legally divested under the laws of the United States" (15 Stat. 702); and on December 25, 1868, 15 Stat. 711, a proclamation of universal amnesty, unconditionally and without reservation, to all persons who had directly or indirectly participated in the rebellion, "with restoration of all rights, privileges and immunities under the Constitution and the laws which have been made in pursuance thereof."

In the case of *United States* v. *Anderson*, *supra*, decided at December term, 1869, it was ruled that it was not necessary, under the Abandoned and Captured Property Act, for a party preferring his claim in the Court of Claims, for the proceeds of property taken and sold under it, to prove in addition to his own loyalty the loyalty of the person from whom he bought the property, it having been purchased by him in good faith and without intent to defraud the government or any one else. Mr. Justice Davis, delivering the opinion of the court, said: "During the progress of the war it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things Congress acted. While providing for the disposition of this captured and abandoned property, Congress recognized the status of the loyal Southern people, and distinguished between property owned by them, and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But Congress did not

think proper to do this. In a spirit of liberality it constituted the government a trustee for so much of this property as belonged to the faithful Southern people, and while directing that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the Court of Claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership." p. 65.

In *United States* v. *Padelford*, 9 Wall. 531, also decided at December term, 1869, Padelford, the owner of the property, had taken the oath, and secured the benefit of the proclamation of pardon issued by President Lincoln, December 8, 1863, 11 Stat. 737, before the property was seized; and it was held that his status as a loyal citizen had been thereby restored, and with it all his rights and property, although he had previously given aid and comfort to the rebellion; and the Chief Justice remarked: "If, in other respects, the petitioner made the proof which, under the act, entitled him to a decree for the proceeds of his property, the law makes the proof of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion."

The act making appropriations for the legislative, executive, and judicial expenses of the government for the year ending June 30, 1871, was passed July 12, 1870, c. 251, 16 Stat. 230, 235, and contained an appropriation of $100,000 for payment of judgments which might be rendered by the Court of Claims, to which a proviso was attached, as follows:

"*Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty,

acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the twelfth section of the act of March three, eighteen hundred and sixty-three, entitled 'An act to amend an act to establish a court for the investigation of claims against the United States,' approved February twenty-four, eighteen hundred and fifty-five, and by the third section of the act entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' approved March twelve, eighteen hundred and sixty-three, and by the third section of the act entitled 'An act to provide for appeals from the Court of Claims, and for other purposes,' approved June twenty-five, eighteen hundred and sixty-eight, shall be made by proof of the matters required by said sections, respectively, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion.

"And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction: *And provided, further*, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act approved March twelve, eighteen hundred and sixty-three, and the acts amendatory of the same, and such pardon shall recite, in substance, that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against or disloyalty to the

United States, and such pardon shall have been accepted in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."

At December term, 1871, in the case of *United States* v. *Klein*, 13 Wall. 128, which was a case decided by the Court of Claims, May 26, 1869, and pending here on appeal filed herein December 11, 1869, this court held, the Chief Justice delivering the opinion, that the Captured and Abandoned Property Act did not confiscate, or in any case absolutely divest, the property of the original owner, even though disloyal, and that by the seizure the government constituted itself a trustee for those who were entitled or whom it should thereafterwards recognize as entitled; that persons who had faithfully accepted the provisions offered by the proclamation of pardon of December 8, 1863, became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war; and that the proviso in question was unconstitutional and void, its substance being that an acceptance of a pardon without a disclaimer should be conclusive evidence of the acts pardoned, but should be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; that the proviso denied to pardons granted by the President the effect which this court had adjudged them to have; that the denial of jurisdiction to this court as well as the Court of Claims was founded solely on the application of a rule of decision, in causes pending, prescribed by Congress, amounting to a rule for the decision of a cause in a particular way; and that the proviso invaded

the powers both of the judicial and executive departments of the government. Mr. Justice Miller and Mr. Justice Bradley dissented, on the ground that, although they agreed that the proviso was unconstitutional, they could not concur in the proposition that under the Captured and Abandoned Property Act there remained "in the former owner, who had given aid and comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the Treasury or had been converted to the use of the public under that act." This was followed by *Mrs. Armstrong's Case*, 13 Wall. 154, and *Pargoud's Case*, 13 Wall. 156.

In *Carlisle's Case*, 16 Wall. 147, 153, December term, 1872, Mr. Justice Field, speaking for the court, after referring to the foregoing cases, observed:

"After these repeated adjudications, it must be regarded as settled in this court that the pardon of the President, whether granted by special letters or by general proclamation, relieves claimants of the proceeds of captured and abandoned property from the consequences of participation in the rebellion, and from the necessity of establishing their loyalty in order to prosecute their claims. This result follows whether we regard the pardon as effacing the offence, blotting it out, in the language of the cases, as though it had never existed, or regard persons pardoned as necessarily excepted from the general language of the act, which requires claimants to make proof of their adhesion, during the rebellion, to the United States. It is not to be supposed that Congress intended by the general language of the act to encroach upon any of the prerogatives of the President, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants, restored to their rights of property, by the pardon of the President, were not in contemplation of Congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application, so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature."

In *Haycraft* v. *United States*, 22 Wall. 81, 92, it was held, at October term, 1874, that under the provision of the act of March 12, 1863, that any person claiming to be the owner of captured or abandoned property might "at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and, on proof . . . that he has never given any aid or comfort to the present rebellion," receive the proceeds of the sale of such property, a person who had given aid and comfort to the rebellion and who had not been pardoned until after two years from the suppression of the rebellion could not, on then preferring his petition, obtain the benefit of the act, even though in cases generally the limitation of actions in that court was one of six years; that the question was not one of limitation but of jurisdiction, and that the inability of an unpardoned rebel to sue in the Court of Claims did not control the operation of the statute. The court said, through Mr. Chief Justice Waite: "A sovereign cannot be sued in his own courts, except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution. That being done, the jurisdiction of the court is established and he may proceed. Otherwise, not." The Chief Justice pointed out that the required consent was not contained in the Captured and Abandoned Property Act itself, for the only action there consented to was one to be commenced within two years after the suppression of the rebellion, and that such consent could not be found in the provision of the act of March 3, 1863, reorganizing the Court of Claims, c. 92, 12 Stat. 765, 767, that the court might determine all claims "founded upon . . . any contract express or implied with the government of the United States," unless there was an implied promise by the United States to pay to every owner of captured or abandoned property, whether loyal or disloyal, the proceeds of his property taken and sold. But that involved the assumption that the Captured and Abandoned Property Act contained an undertaking by the United States, at that time, to receive and hold the property, or its proceeds if sold,

in trust for the use and benefit of the owner, whoever he might be, and that the trust in favor of the owner having then been created, the remedy for its enforcement in the Court of Claims as a contract was restored to a disloyal owner by the operation of the President's proclamation. Now, the statute was a war measure, and embraced private property abandoned by its owner or liable to capture, and the capture of cotton was legitimate under the circumstances. *Mrs. Alexander's Cotton*, 2 Wall. 404, 419. As, however, friends as well as foes might suffer in the indiscriminate seizure likely to follow the authority given, it was provided that any owner might, within two years after the suppression of the rebellion, prefer his claim, and upon proof of his ownership and loyalty receive the money realized by the United States. Under the ruling in *Klein's case* the effect of the act was to provide a reward for submission to the government and the acceptance of amnesty, as well as authority for the seizure of the property, and, according to the doctrine of that case, if a suit was commenced within two years, a pardoned enemy could recover as well as a loyal friend, but the commencement of the suit within the prescribed time was a condition precedent to the ultimate relief. There was no promise, except to such as should commence the suit in time, and upon the trial be in a condition to bring themselves within the requirements of the act. The promise was express and there was no room left for implication. Both the right to persons to demand and receive a restoration of their property taken, and the remedy by which that right was to be enforced, were created by the same statute, and in such cases the remedy afforded was exclusive of all others. That remedy was the only one of which the Court of Claims, or any other court, had been authorized to take jurisdiction, and as the claimant had neglected to avail himself of that remedy, he was consequently without any, and the Court of Claims was right in concluding that it had no jurisdiction.

In *Knote* v. *United States*, certain personal property of the claimant had been seized, libelled, condemned, and forfeited by the decree of a District Court, on the ground of his treason,

and the proceeds paid into the treasury prior to the proclamation of December 25, 1868, after which claimant brought suit for the proceeds, relying on that proclamation, but the Court of Claims, 10 C. Cl. 397, decided that he was not entitled to recover, and dismissed the petition. The judgment was affirmed by this court at October term, 1877. *Knote* v. *United States*, 95 U. S. 149. It was held that the general pardon and amnesty granted by the proclamation of December 25, 1868, did not entitle one receiving their benefits to the proceeds of his property previously condemned and sold under the confiscation act of July 17, 1862, after such proceeds had been paid into the treasury of the United States; although a full pardon released the offender from all penalties imposed by the offence pardoned, and restored to him all his civil rights, it did not affect any rights which were vested in others directly by the execution of the judgment for the offence, or which had been acquired by others whilst that judgment was in force. And if the proceeds of the property of the offender had been paid into the treasury, the right to them had so far become vested in the United States that they could only be recovered by him through an act of Congress. Moneys once in the treasury could only be withdrawn by an appropriation by law.

Mr. Justice Field, announcing the decision, referred, among other cases, to *Osborn* v. *United States*, 91 U. S. 474, and said: "An attempt is made by counsel to give some expressions used in the opinion of the court a wider meaning, so as to support the claim here presented; but the language will not sustain the conclusion sought. There was no consideration of the effect of the pardon upon the proceeds of the forfeited property when paid into the Treasury, but only of its effect upon those proceeds whilst under the control of the court in its registry. Any language which seemingly admits of a broader interpretation must be restricted to the facts of the case. There was no intention of expressing any opinion that a pardon could do away with the constitutional requirement as to money in the Treasury; whilst there, it is the property of the United States. . . . The claim here presented rests

upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."

In *Hart* v. *United States*, 118 U. S. 62, it was decided on appeal from the Court of Claims, (adjudged there June 7, 1880, and, on rehearing, May 16, 1881,) that that court, which had found the claimant to be a person who had "sustained the late rebellion," and that the claim accrued before April 13, 1861, did not err in deciding that it had no jurisdiction to proceed to judgment, as the payment of such a claim was forbidden by joint resolution No. 46, approved March 2, 1867, 14 Stat. 571; that although before the joint resolution was passed the claimant had received from the President a pardon "for all offences committed by him arising from participation, direct or implied, in the rebellion," the pardon did not authorize the payment of the claim, nor did the joint resolution take away anything which the pardon had conferred; and that it was entirely within the competency of Congress to declare that the claims mentioned in the joint resolution should not be paid until the further order of Congress.

On the same day that the Austin act was passed, March 3, 1883, an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," c. 116, 22 Stat. 485, was approved, of which the fourth section was as follows: "Sec. 4. In any case of a claim for supplies or stores taken by or furnished to any part of military or naval forces of the United States for their use during the late war for the suppression of the rebellion, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court

shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the courts shall not have jurisdiction of said cause, but the same shall, without further proceedings, be dismissed."

Twenty years after the passage of the Captured and Abandoned Property Act; nearly fifteen years after the close of the rebellion and the proclamations of amnesty; twelve years after the decision of Klein's, Armstrong's, and Pargoud's cases; eighteen years after the conversion of the cotton for whose proceeds the suit was brought; fifteen years after the proceeds were covered into the Treasury; and nearly four years after the death of Austin, the act proceeded on was passed. Referring to Austin's neglect to sue, the Court of Claims remarked: "This court was open to him until August 20, 1868; ready to adjudicate the claim, in the freshness of the memory of witnesses, then living, and able to testify with absolute certainty. . . . From the facts and circumstances, indicated by the proof, we conclude that the decedent was embarrassed by his inability to establish in this court his adherence to the United States, as required by law; and from that embarrassment originates his failure to prosecute his case within this jurisdiction." Loyal or not, he did not bring suit within the time prescribed by either of the acts of 1863, and if disloyal, whether his transgression was obliterated by the proclamation of July 4, or that of December 25, 1868, was not important.

Since it cannot be controverted that it is for Congress to determine when and under what circumstances the government may be sued, and that the Court of Claims has the right to entertain jurisdiction of cases against the United States and proceed to judgment only by virtue of acts of Congress granting such jurisdiction, and is limited precisely to such cases both in regard to parties and the cause of action as Congress has prescribed, *De Groot* v. *United States*, 5 Wall. 419, 431, the inquiry is, whether this suit can be sustained under the act authorizing it to be commenced, on the theory that loyalty in fact was not a condition to the exercise of jurisdiction, and,

on the merits, was rendered immaterial by the general amnesty. The act, c. 111, 22 Stat. 804, reads as follows:

"That the claims of the successors in interest and legal representatives of Sterling T. Austin, deceased, late of the parish of Carroll, in the State of Louisiana, for cotton taken by the military and civil authorities of the United States, or by either of them, during the years eighteen hundred and sixty-three, eighteen hundred and sixty-four, and eighteen hundred and sixty-five, in the States of Louisiana and Texas, be, and the same are hereby, referred to the Court of Claims, with full jurisdiction and power in the said court to adjust and settle such claims, and to render a judgment in said cause for the net amount realized by the United States from the sale of such cotton as shall appear from the evidence to have been so taken by said authorities; and in such action the said representatives shall be entitled to recover as aforesaid, any statute of limitation to the contrary notwithstanding: *Provided, however*, That it be shown to the satisfaction of the court that neither Sterling T. Austin, senior, nor any of his surviving representatives gave any aid or comfort to the late rebellion, but were throughout the war loyal to the government of the United States."

In *Voorhees* v. *Bank of the United States*, 10 Pet. 449, 471, certain acts required to be done previous to a sale were prescribed by a proviso, and were held to be conditions precedent, it being stated by Mr. Justice Baldwin that the effect of a proviso in deeds and laws is to declare that the grant made shall not operate, or the authority conferred shall not be exercised, unless in the case provided.

"The office of a proviso, generally," said Mr. Justice Story in *Minis* v. *United States*, 15 Pet. 423, 445, "is either to except something from the enacting clause or to qualify or restrain its generalities, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

While we concede that the law does not attach a fixed and invariable meaning to a proviso, we think it clear that this proviso negatived the authority granted beyond the limit

defined. It operated upon the entire enacting clause, and made loyalty a jurisdictional fact, since the consent to the prosecution of the suit was given upon the condition that that fact should be established. The Court of Claims was vested with jurisdiction to adjust the claim and render judgment, and the representatives of Austin were declared entitled to recover notwithstanding the two-year or the six-year bar, provided Austin were shown to the satisfaction of the court not to have given any aid or comfort to the late rebellion, and to have been loyal throughout the war to the government of the United States, and not otherwise, and the effect of the proviso cannot be confined to the right of recovery merely.

Congress in making this requirement in no respect attempted to defeat the operation of the President's proclamation of fifteen years before, which could not control the power of Congress in the matter of giving or withholding jurisdiction. In declining to bestow jurisdiction in favor of pardoned offenders, whose claims were barred, Congress did not deny its proper constitutional effect to amnesty. To whom the privilege of suit should be accorded was for Congress alone to determine.

It is contended that the words in reference to the establishment of loyalty are in substance the same as those used in the third section of the Captured and Abandoned Property Act, and that Congress must be held to have employed them in the Austin act in view of the interpretation of the former act by the decisions of the courts of the United States, and that that interpretation became as much a part of the Austin act as if written out there. If this were so, it would be difficult to assign any reason for the insertion of the proviso so far as Austin was concerned, for it would be made to read, provided, however, that it be shown to the satisfaction of the court that Austin was loyal in fact, although the amnesty proclamations have rendered that immaterial.

But it is not so. Undoubtedly Congress framed this act with due regard to the state of decision under the prior act, and hence, instead of making proof of loyalty an integral part of claimant's case with his ownership of the property and his right to the proceeds, as in the Captured and Abandoned Prop-

erty Act, it made the establishment of loyalty in fact, as contradistinguished from innocence in law produced by pardon, a prerequisite to jurisdiction. Consent to be sued was given only on this condition.

Nor do we perceive any ground for imputing the intention to Congress to revive the Captured and Abandoned Property Act for the purposes of this action. This is not the case of the revival of a law by express reënactment, or by the repeal of a repealing clause; and if such had been the intention of Congress, no reason suggests itself why Congress should not have unequivocally said so.

Again it is argued that because in the fourth section of the general act of March 3, 1883, the fact of loyalty was stated to be "a jurisdictional fact," therefore the proviso of the Austin act should not be construed to have that effect, because, while the same language was used as to the existence of loyalty, its establishment was not in terms expressed to be jurisdictional. But the structure of the two acts was different and required different treatment, and the special act cannot properly be construed as if it were a general act and part of a general system and the change of phraseology in this particular significant. On the contrary, as we have no doubt that the effect of the proviso is such as we have attributed to it, we think the argument for the Government not unreasonable that Congress, in employing the same language in both acts as to the condition of loyalty, did so in effectuation of a common object to be attained by the requirement.

As the President's proclamation could neither give jurisdiction to nor take it away from the Court of Claims, and Congress had the power to determine what classes of persons should be recognized in that court, and over what claims its jurisdiction should be exercised, we are of opinion that the court rightly held it to be its duty to determine as a preliminary question whether the decedent had given any aid or comfort to the late rebellion or was loyal throughout the war to the government of the United States, and, having found that he was not thus loyal, properly dismissed the petition.

Judgment affirmed.

INGRAHAM *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

No. 379. Submitted October 23, 1894. — Decided December 17, 1894.

Pointer v. *United States*, 151 U. S. 396, sustained and applied to the point that it is not error to join distinct offences in one indictment, in separate counts, against the same person.

A person who presents to the Third Auditor of the Treasury what purports to be an affidavit before a justice of the peace in support of a fraudulent claim against the Government, is estopped to deny that the document was not an affidavit when presented in evidence in criminal proceedings against him for such fraudulent act.

It is not necessary, in the first instance, in order to prove such offence, to produce the commission of the justice, or to introduce other official evidence of his appointment.

THE case is stated in the opinion.

Mr. Charles H. Page and *Mr. Franklin P. Owen* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

By the first count of an indictment in the court below it was charged that the plaintiff in error, Royal Ingraham, on the 11th day of December, 1890, within the District of Rhode Island, did knowingly, wilfully and unlawfully make and present and cause to be made and presented for payment and approval to the Third Auditor of the Treasury of the United States of America a claim for payment and reimbursement to him of certain alleged expenses of the last sickness and burial of his mother, Freelove Ingraham, who in her lifetime had been a pensioner of the United States of America under a pension issued to her, and who prior to the above date had died leaving no widower or minor child surviving her; which claim

it was alleged was false, fraudulent, and fictitious in that it was stated in it that the last sickness of the pensioner continued uninterruptedly from July 21, 1889, to the date of her death on the 19th day of September, A.D. 1890, that he had actually paid to Perry Ingraham and Mary Ingraham for board, nursing, and medicines furnished to the pensioner the sum of three hundred and eighteen dollars, and to one Zylphia Ingraham for services as nurse the sum of one hundred and forty-eight dollars and fifty-seven cents; whereas, the last sickness of the pensioner was of only a few days' duration, and the defendant had not at the time when he made his claim paid to Perry Ingraham and Mary Ingraham any sum for board, nursing, and medicine so furnished, and to Zylphia Ingraham any sum for services as nurse, he then and there well knowing his claim to be false, fraudulent, and fictitious, and the Third Auditor being then and there authorized to approve and allow it.

By a second count in the indictment it was charged that the plaintiff in error on the 11th day of December, 1890, for the purpose of obtaining and aiding to obtain the payment and approval of the above claim, did knowingly, wilfully and unlawfully use and cause to be used a certain false affidavit, to wit, the affidavit of Perry Ingraham and Mary E. Ingraham, subscribed and sworn to on the 9th day of December, A.D. 1890, before Daniel H. Remington, a justice of the peace, he then and there well knowing that said affidavit contained the fraudulent and fictitious statement that on the 1st day of November, 1890, they, Perry Ingraham and Mary E. Ingraham, received from him the sum of $318 in payment of an account therein stated for board, nursing, and medicine furnished to the pensioner, Freelove Ingraham, in her lifetime; whereas they, or either of them, did not, at any time prior to the making of such affidavit, receive from him any sum in payment of an account for board, nursing or medicine so furnished or for any services rendered to said pensioner.

There was evidence before the jury tending to show that the accused presented to the Third Auditor of the Treasury of the United States and used and caused to be used before that officer in the prosecution of his claim against the government

of the United States a certain paper in the form of and purporting to be an affidavit signed by Perry Ingraham and Mary E. Ingraham, and purporting to be sworn to before Daniel H. Remington as a justice of the peace, and certified to that effect by him. But there was no further testimony tending to show that Remington was duly commissioned and qualified as a justice of the peace and was authorized to administer oaths. Nor does the bill of exceptions state what evidence, relating to other points, was adduced before the jury.

At the conclusion of the evidence the prisoner presented several requests for instructions to the jury. These requests were refused, and an exception was properly taken to the action of the court.

After a verdict of guilty, and the denial of a motion in arrest of judgment, the defendant was sentenced to one year's imprisonment at hard labor in the state-prison. 49 Fed. Rep. 155.

The indictment in this case was based on section 5438 of the Revised Statutes of the United States. So much of that section as is relevant to this case is in these words: "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

1. Although each count of the indictment charged a distinct offence, it was not error to embrace both offences in one indictment in separate counts. Such joinder, where two or more acts or transactions are connected together, or are of the same

class of crimes or offences, is expressly provided for in section 1024 of the Revised Statutes. The subject of the joinder of distinct offences in one indictment against the same person was fully examined in *Pointer* v. *United States*, 151 U. S. 396, 400.

2. The paper presented by the defendant to the Third Auditor of the Treasury of the United States in support of his claim against the government, purporting to be the affidavit of Perry Ingraham and Mary E. Ingraham, certified by Daniel H. Remington, as a justice of the peace in Rhode Island, was admissible in evidence without formal proof that Remington had been duly commissioned and had duly qualified as a justice of the peace. Even if Remington had not been properly commissioned, or had not qualified so as to entitle him, in law, to discharge the functions of a justice of the peace, the paper presented by the defendant to the Third Auditor of the Treasury for the purpose of obtaining the payment or approval of his claim, being in the form of an affidavit, must, for all the purposes of this prosecution, be taken to be an affidavit. If he knew that the statement in that paper, described in the indictment, was fraudulent or fictitious, he was not the less guilty under the second count, because of the fact, if such was the fact, that Remington had not been duly commissioned as a justice of the peace, and was not, for that reason, entitled to administer the oath certified by him. The essence of the offence charged in the second count was the use by the defendant of a document or writing known by him to contain a fraudulent or fictitious statement made to secure the payment or approval of his claim. He is estopped to deny that the document or writing so used was not what it purports to be, namely, an affidavit.

Besides, the contention of the accused could not be sustained even if the word "affidavit" in section 5438 were held to imply a declaration or affirmation in writing, sworn to or affirmed before some officer duly appointed and having legal authority to administer oaths or to take affirmations. It is not suggested nor could it be said that Remington, if duly commissioned or appointed a justice of the peace, was without such authority.

Syllabus.

Pub. Stat. R. I. c. 23, § 9. But having acted in that capacity, the presumption will be indulged, nothing to the contrary appearing, that he was duly commissioned or appointed to the office whose functions he exercised. It was not necessary, in the first instance, in order to prove the offence charged, to produce his commission or introduce other official evidence of his appointment. Such is the general rule. It is one of public convenience and of long standing. *Berryman* v. *Wise*, 4 T. R. 366; 1 Greenleaf's Ev. § 92; 1 Bishop's Cr. Pro. § 1130, and authorities cited; 1 Wharton Cr. Ev. § 833, and authorities cited; *Reg.* v. *Roberts*, 14 Cox Cr. Cas. 101, 103; *Reg.* v. *Howard*, 1 Moody & Rob. 187; *Rex* v. *Verelst*, 3 Camp. 432.

What has been said meets all the points suggested in the brief of counsel for the plaintiff in error.

Judgment affirmed.

POTTER *v.* UNITED STATES.

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

No. 531. Argued November 14, 15, 1894. — Decided December 17, 1894.

In an indictment for a statutory offence, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offence, yet, if such language is, according to the natural import of the words, fully descriptive of the offence, then ordinarily it is sufficient.

A charge in an indictment that the defendant was president of a national bank, and as such on a day and at a place named unlawfully, knowingly, and wilfully certified a certain cheque, (describing it,) drawn upon the bank, and that the drawer did not then and there have on deposit with the bank an amount of money equal to the amount specified in the cheque, is a sufficient averment of the offence described in Rev. Stat. § 5208, the punishment for which is provided for in the act of July 12, 1882, c. 290, 22 Stat. 162, 166.

As it is of the essence of the offence against those acts that the criminal act should have been done wilfully, a person charged with it is entitled to have submitted to the jury, on the question of "wilful" wrongdoing, evidence of an agreement on the part of the officers of the bank that it should be treated as a loan from day to day, secured by ample collateral,

Statement of the Case.

and that for the cheque certified each day there was deposited each day an ample amount of cash.

In a criminal trial the burden of proof is on the government, and the defendant is entitled to the benefit of a reasonable doubt; and when testimony contradictory or explanatory is introduced by the defendant, it becomes a part of the burden resting upon the government, to make the case so clear that there is no reasonable doubt as to the inferences and presumptions claimed to flow from the evidence.

By section 5208 of the Revised Statutes it is provided that "it shall be unlawful for any officer, clerk, or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque."

No penalty was imposed on the individual for a violation of this section. But on July 12, 1882, c. 290, 22 Stat. 162, 166, it was enacted:

"Sec. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying cheques by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall," etc.

In May, 1892, the defendant was indicted in the Circuit Court of the United States for the District of Massachusetts for a violation of these sections. The indictment contained eighty-eight counts. By demurrer and *nolle* the last forty-eight counts were disposed of before the trial, which proceeded upon the first forty. In these forty counts the unlawful certification of five cheques was charged, the first eight counts relating to one cheque, the next eight to another, and so on. The case came on for trial in February, 1893, and resulted in

a verdict of guilty on fifteen counts, three in respect to the certification of each cheque. A motion for a new trial having been overruled, the defendant was sentenced to pay a fine of $1000, and to be imprisoned in jail for the term of sixty days. To reverse this judgment the defendant brought this writ of error.

The third count in the indictment, which was one of those upon which the defendant was found guilty, after stating time and venue, and that the defendant was president of the Maverick National Bank and authorized to lawfully certify cheques, charged "that said Potter as such president as aforesaid did then and there, to wit, on said twenty-third day of July, at Boston aforesaid, within said district and within the jurisdiction of this court, unlawfully, knowingly, and wilfully certify a certain cheque, which said cheque was then and there drawn upon said association for the amount of twenty-four hundred and fifty dollars by certain persons, to wit, Irving A. Evans, Austin B. Tobey, and William S. Bliss, copartners, then and there doing business under the firm name and style of Irving A. Evans and Company, and which said cheque was then and there of the tenor following — that is to say:

'BOSTON, *Jul-* 23, 1891. $2450. No. 54493.

Maverick National Bank.

Pay to the order of Hayward & Townsend $2450, twenty-four hundred & fifty dollars.

IRVING A. EVANS & C-.'

Irving A. Evans & Co.

by then and there writing, placing, and putting in and upon and across the face of said cheque the words and figures following — that is to say:

'Maverick National Bank.
Certified Jul- 23, 1891.
Pay only through clearing-house.
A. P. POTTER, *P.*'

(meaning said Asa P. Potter, such president as aforesaid).

'—— ———, *Paying Teller.*'

that the said persons, as copartners under the firm name and style as aforesaid, by whom said cheque was then and there drawn as aforesaid, did not then and there, to wit, at the time said cheque was so certified by said Potter as aforesaid, have on deposit with said association an amount of money then and there equal to the amount then and there specified in said cheque, to wit, the amount of twenty-four hundred and fifty dollars in money, as he, the said Potter, then and there well knew, against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided."

All the counts upon which the defendant was found guilty, both in respect to this and the other cheques, were, so far as any question is involved in this case, substantially like the one quoted.

On the trial the books of the bank were presented, showing that at the time these five cheques were certified the account of Evans & Co. was overdrawn in a large sum — between $100,000 and $200,000. There was testimony tending to show that upon each day that these cheques were certified, and prior thereto, Evans & Co. deposited in cash an amount more than sufficient to cover the certifications. Thereupon, as the bill of exceptions shows —

"The defence called the defendant, Mr. Potter, and offered to prove by him an oral agreement between I. A. Evans & Co. and the Maverick National Bank, in the early part of 1891, before June or July, 1891, that Evans & Co. might have a loan by overdraft limited to $200,000, with interest to be charged daily at the rate of six per cent, against which collateral was to be put up, and further to show that the overdrafts existing in June and July, 1891, were under this agreement, and that collateral was actually deposited and kept against it in the hands of the assistant cashier; that this agreement was communicated to the executive officers of the bank and to a majority of the directors of the bank, who approved it, and this offer was made in connection with the facts that appear in evidence in relation to the books of the bank; also the defence offered another conversation between

Mr. Potter and Mr. Evans in relation to the matter of certification of cheques and deposits connected with this certification, in which Mr. Evans called his attention to the fact that a cheque had been refused certification, and Mr. Potter told Mr. Evans that it was undoubtedly because he had no deposit there. Whereupon Mr. Evans said, 'But I have a loan, as I understand it;' to which Mr. Potter replied substantially, 'We cannot certify cheques against a loan; if you are going to have certified cheques you must have deposits in the bank to certify them against;' and that from that time forward the deposits were in, to Mr. Potter's knowledge, from day to day after this conversation with Mr. Evans, in which the defence claims that the parties to the conversation understood distinctly that the daily deposits were to be in for the very purpose of certifying cheques.

"This whole offer was made by the defence as material matter of substantive defence, as a part of the *res gestæ* and of the transaction, and as specifically bearing upon the question of criminal intent upon the part of the defendant. The facts 'that appear in evidence in relation to the books of the bank,' as referred to in the above offer and in connection with which the offer is made, are heretofore fully stated in this bill of exceptions."

And in pursuance of this offer the defendant asked the witness certain questions, for the purpose of showing a state of facts, as indicated in the offer, but the testimony was rejected, the court saying, in response to an inquiry of counsel as to whether "a definite agreement" was ruled out —

"Yes, sir; I rule out anything that does not appear on the books of the bank in connection with this deposit. I think what was on deposit and not on deposit as the case now stands must be determined by what appears on the books of the bank — as this case now stands — and the papers of the bank."

Exceptions were duly taken to the action of the court in this respect.

Among other instructions to the jury was the following:

"But, upon some reflection, I have come to the conclusion

that notwithstanding Evans & Co. may have been overdrawn on the morning of any particular day and during the whole of that day, yet if the bank did in fact receive a special deposit and set aside certain cheques or other moneys and hold them for the purpose of covering the certified cheques, that it would not be any violation of the letter or policy of the statute and would be a defence. But I must say, gentlemen, that I am unable to see in this case any evidence that anything of that sort was done. I am unable to see in the case any evidence — I do not mean to say evidence of what was intended or agreed to be done, which is not essential to this case, but any evidence that as a matter of fact any of these cheques deposited by Evans & Co. did not go into the general deposit account and were not absorbed the instant they passed into the bank. Upon this branch of the case I instruct you the burden of proof is on the defence — not proof beyond a reasonable doubt, but to satisfy you by a preponderance of evidence. If the defence does satisfy you by the preponderance of evidence that there was a segregation in fact appearing upon or shown from the books and papers of the bank — a segregation, a setting apart of certain deposits sufficient to cover the certified cheques and against which the cheques were certified — it is a defence in this case."

To the giving of which instruction the defendant at the time duly excepted.

Mr. W. S. B. Hopkins and *Mr. Henry D. Hyde*, (with whom was *Mr. William A. Sargent* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

The only questions which we deem it material to consider are those presented by the foregoing extracts from the record. The first is, was the indictment sufficient?

It is objected that "certification," to constitute an offence

within the scope of the statute, must be such an act or series of acts as creates a contract binding upon the bank; that a mere writing of the word "certified" on a cheque does not, until delivery to some person, have any such effect; and that while an indictment, charging simply in the language of the statute that the defendant wrongfully certified a cheque, might carry an implication that the cheque was not only written upon but also delivered so as to complete the contract included in the word "certification," yet here the pleader has limited the scope of those words by a particular statement of what the defendant did, which statement does not include the matter of delivery. Every allegation made in the indictment might, it is said, be satisfied by proof that the defendant, finding on his table a cheque of the form described, wrote the words thereon as charged, and then tore the paper up and threw it in the fire, or disposed of it in some other way so as not to create any obligation against the bank.

We think this is placing too narrow a construction on the indictment. The offence charged is a statutory one, and while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing such an offence, *United States* v. *Carll*, 105 U. S. 611, yet if such language is, according to the natural import of the words, fully descriptive of the offence, then ordinarily it is sufficient.

The word "certify" as commonly understood implies that the cheque, upon which the words of certification have been written, has passed from the custody of the bank and into the hands of some other party, and when the charge is that the defendant "did unlawfully, knowingly and wilfully certify a certain cheque," the import of that accusation is not simply that he wrote certain words on the face of the cheque, but that he did it in such a manner as to create an obligation of the bank; in such a way as to make an instrument which can properly be called a certified cheque. And the subsequent recital, "by then and there writing, placing, and putting in and upon and across the face of said cheque the words and figures following," etc., is not to be taken as absolutely limiting the import of the word "certified" to the mere act of so

writing, placing, etc., but as simply descriptive of the form of the certification — of that which he personally did. It was not necessary, to constitute the offence, that he should himself deliver the cheque to some third party outside the bank, or even that he should take any part in such delivery. His offence would be complete if, after he had written the words of certification as stated, with the intent that they should be used to create a contract on the part of the bank, the actual delivery had been made by some clerk or other officer of the bank without his actual knowledge. The full details of the transaction by which the words written by him upon the face of this instrument became operative to make it a "certified cheque" were matters of evidence rather than of allegation. An unlawful certification is in terms charged, and the form of the writing creating the certification is given.

It is generally true as claimed that where an indictment is unnecessarily descriptive, even the unnecessary description must be proved as laid; but that proposition does not seem to be in point, for it is not claimed that the testimony did not show just such a writing as is charged to have been made by the defendant, and surely it cannot be claimed that unnecessary matter of description must be proved otherwise than as it is stated. While there is plausibility in the contention of counsel, yet we think it would be giving an unnecessary strictness to the language of the indictment to adjudge it insufficient, or to hold that it failed to inform the defendant exactly of what he was accused, or lacked that precision and certainty of description which would enable him to always use a judgment upon it as a bar to any other prosecution; and that, as we all know, is the substantial purpose of a written charge.

The next question relates to the admissibility of the testimony which was offered and rejected. The charge is of a wilful violation. That is the language of the statute. Section 5208, Revised Statutes, makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing

officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one "who shall wilfully violate," etc., as well as upon one "who shall resort to any device," etc., "to evade the provisions of the act;" "or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association." The word "wilful" is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word "wilful" in criminal statutes has been considered by this court. In *Felton* v. *United States*, (96 U. S. 699, 702,) it was said:

"Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, § 428."

And later, in the case of *Evans* v. *United States*, 153 U. S. 584, 594, there was this reference to the words "wilfully misapplied:"

"In fact, the gravamen of the offence consists in the evil design with which the misapplication is made, and a count which should omit the words 'wilfully,' etc., and 'with intent to defraud,' would be clearly bad."

Now, it is not disputed that if the overdraft had in form been cancelled on the books of the bank and a note taken for the amount thereof, so that the obligation of Evans & Co. was evidenced only by a note, and not left as an open account, this particular section of the law would not be applicable, and any wrong done by the defendant in making or continuing

such a loan would have to be punished by proceedings under some other section. If at the opening of the account a note of $200,000 had been discounted and the amount entered to the credit of Evans & Co., the certifications complained of would not have been in violation of this section, because the credit side of the account would always have been in excess of the certifications; or if, at the close of each day's business, a note had been taken for the balance due the bank and the open account cancelled, the same result would follow, because each morning before any certification an amount in money was deposited larger than the total certifications of the day. The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and that such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith supposed that this arrangement was the equivalent of a loan by note, and that the indebtedness of Evans & Co. was fully secured by collateral, it seems to us that the jury would have a right to be informed of the fact as bearing upon the question whether he had "wilfully" violated the statute. It cannot be that the guilt or innocence of the defendant under this indictment turns upon the mere matter of bookkeeping. While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offences, and subjecting them to the severe punishments which may be imposed under those statutes. We must not be understood as holding that this testimony established an absolute defence, and that by the form of such an agreement the mandatory terms of section 5208 can be evaded, but only that evidence of a positive agreement upon the part of the officers of the bank that this overdraft account should be practically treated as a loan from day to day, to be and in fact secured by ample collateral — coupled with testi-

mony that for the cheques certified each day there was deposited in advance an ample amount of cash — should have been submitted to the jury on the question of "wilful" wrongdoing. As "wilful" wrong is of the essence of the accusation, testimony bearing directly on the question of wilfulness is of vital importance, and error in rejecting it cannot be regarded otherwise than as material and manifestly prejudicial.

The remaining question is in reference to the instruction as to the burden of proof. We think that, so far as respects the particular matter mentioned in the instruction quoted, the rule remains as in other phases of a criminal trial; that the burden of proof is on the government, and the defendant is entitled to the benefit of a reasonable doubt. It may be that certain presumptions follow from the entries in the books, and accompanying testimony introduced by the government. It may also be that those presumptions are conclusive in the absence of contradictory or explanatory testimony, and, in that aspect of the case, that the defendant must introduce something to weaken the otherwise conclusive force of such presumptions; but whenever testimony thus contradicting or explaining is introduced, it becomes a part of the burden resting upon the government to make the case so clear that there is no reasonable doubt as to the inferences and presumptions claimed to flow from the books or other evidence.

Judgment reversed, and new trial ordered.

ALSOP *v.* RIKER.

RIKER *v.* ALSOP.

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

Nos. 59, 63. Argued November 8, 1894. — Decided December 10, 1894.

A court of equity, in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the

time elapsed without suit is less than that prescribed by the statute of limitations.

The length of time during which a party neglects the assertion of his rights which must pass in order to show laches in equity, varies with the peculiar circumstances of each case, and is not subject to an arbitrary rule. *Halstead* v. *Grinnan*, 152 U. S. 412, affirmed and applied to this point.

The facts in this case, detailed in the opinion, disclose such laches on the part of Riker in asserting the rights which he here claims, that a court of equity should refuse to interpose, without inquiry whether the suit can or cannot be excluded from the operation of the statute of limitations of the State of New York.

THE case is stated in the opinion.

Mr. Andrew J. Riker in person for himself.

Mr. George W. Wingate for Alsop and for Campbell's executors.

Mr. John M. Bowers, for Whitewright, submitted on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

William H. Aspinwall, Joseph W. Alsop, Edwin Bartlett, David Leavitt, Edward Learned, Samuel W. Comstock, and William A. Booth, holders of construction bonds of the Ohio and Mississippi Railroad Company, Eastern Division, issued to the stockholders and creditors of that corporation on the 15th day of December, 1858, a circular inviting them to unite in adopting an agreement such as was transmitted with the circular. In that circular they expressed the opinion that by the adoption of the proposed agreement the company would be enabled to place its road and property in a condition to command the entire business to which from its location it would be fairly entitled; "to meet promptly all future demands upon it for interest on its remaining indebtedness; from its net earnings to pay fair dividends upon its stock within a reasonable time; and that all causes for litigation will be removed and the interests of all parties be thereby placed in a safe and reliable position."

With the circular was submitted a statement showing that the estimated liabilities of the company, with interest to July 1, 1859, aggregated $18,393,768, of which $2,050,000 were first-mortgage bonds, $258,000 were second-mortgage bonds, $4,242,000 were construction or third-mortgage bonds, part of which were to be used in redeeming and retiring the second-mortgage bonds, and $3,320,000 were income bonds, including scrip certificates.

The appellant, Andrew J. Riker, was at that time the holder and owner of nine of the company's construction bonds.

The agreement recited that the subscribers were "desirous that concessions shall be made by all parties in interest which shall discharge a portion of the indebtedness of said company and thereby assure the prompt payment of all sums which shall become due on the residue thereof, and without prejudice to the proper improvement and maintenance of the road and its appurtenances."

By the first paragraph of the proposed agreement it was provided that subscribers who were owners or legal representatives of legal demands against the company would discharge the same on payment therefor by the company, as follows: For the three coupons that were then, or that should become due, on its first-mortgage bonds, next prior to and including those due July 1, 1859, one-half thereof in money, and one-half thereof in shares of the capital stock of the company at par; for the coupons that were then, or that should become due, on second-mortgage bonds, up to and including those due April 1, 1859, one-half thereof in money, and one-half in shares at par; for the principal of second-mortgage bonds, one-third in shares at par, and the remaining two-thirds in construction bonds at par; for the coupons that were then due or that might become due, on its income bonds, up to and including those due May 1, 1859, together with the principal of such income bonds, in shares at par; for the scrip (certificates convertible into income bonds) issued by the company, in shares at par; for other evidences of indebtedness against the company, as the same were admitted or allowed by its directors, in shares at par — the interest on the above demands,

(excepting coupons,) so to be paid, to be made up to the first day of July, 1859, and to be paid in the same manner as the demands to which it related.

By the second paragraph it was provided that subscribers being owners or legal representatives of shares of the capital stock of the company, would transfer all their shares to its directors or to such person or persons as the directors should designate and appoint — to be reissued or retransferred to make the above payments, and to return to the subscribers or their legal representatives who transferred their shares such portion as they would be entitled to under the agreement, the residue, if any, to belong to the company.

The third paragraph provided that the covenants contained in the above paragraphs were upon the following conditions: 1st. That the owners or legal representatives of all demands or stock paid or transferred should subscribe to and comply with the agreement, or that equivalent concessions be made so that the entire payments contemplated should be made — the company to purchase with any balance of shares remaining after the payments above named, or with other means, fifty thousand dollars of the first-mortgage or construction bonds, and to cancel all the bonds and coupons so paid or purchased, except those necessary for exchange for second-mortgage bonds as aforesaid — so that on the first day of July, 1859, the indebtedness should not exceed $5,000,000, of which not more than $2,050,000 should be represented by first-mortgage bonds, and the residue by construction bonds, with interest running from March 1, 1859. 2d. That the owners of income bonds should have loaned to the company the money required to make the cash part of the above payments, such loan with interest to be repaid at the earliest practicable time, consistent with the proper maintenance of the road. 3d. That the city of Cincinnati should grant such modifications and releases of its demands, contracts, and claims against the company as its directors and the trustees named in the agreement should deem satisfactory. 4th. That the capital stock of the company should not exceed $7,500,000, unless increased by a further reduction of its bonded debt.

It was further provided that the subscribers should transfer and deliver to the persons named as trustees, their survivors and successors in trust, their several demands, and all evidences thereof, that were contemplated to be discharged or paid for in shares of stock, and all their shares of said capital stock, (with power to transfer,) to be managed by such trustees for the benefit of the subscribers and their legal representatives in the proportions and upon the terms and conditions specified in the agreement, and should comply with any requirements which the trustees, pursuant to authority, should make.

The persons who sent out the above circular, their survivors and successors, were named as trustees under the agreement, a majority of them to have authority to do such acts and things on behalf of the subscribers as they deemed necessary or expedient to carry out the purposes of the agreement which did not impose liability upon a subscriber to pay any money except at his option.

The other paragraphs of the agreement prescribed in detail the mode in which the proposed scheme should be executed, and the authority which the designated trustees might exercise.

Among other things, it was provided in the proposed agreement that the trustees should issue and deliver certificates equal to the amount of demands admitted or allowed, properly equalizing any differences occasioned by priorities of time in such transfers or deliveries; that the trustees, in their discretion, might purchase for the benefit of the trust, bonds of the company not contemplated to be delivered to them, also other evidences of indebtedness and shares of stock deemed essential or beneficial to the trust and to parties interested therein, and issue certificates in payment therefor; that said certificates should be the only evidence of the interest of subscribers in the property of the trust, which interest was to be such proportion thereof as the amount of any certificate or certificates bore to the amount of all the certificates issued by the trustees; and that when the parties necessary to carry out the provisions of the first three paragraphs of the agree-

ment had subscribed and complied with the same, and the trustees were furnished with evidences of the demands to be paid only in part, the trustees should cancel and surrender to the company all evidences of its indebtedness then belonging to the trust.

In view of the contingency of a foreclosure of some of the mortgages upon the road and property, it was provided that the trustees might make such arrangements with the trustees named therein, or with the owners of the bonds secured thereby, as, in their opinion, would enable them to protect the interests of the trust without making calls upon subscribers; but failing in this, and if they deemed the trust property insufficient or unavailable for the purchase of the road and property at any sale thereof, then they might, on sixty days' notice, make calls on owners of certificates for their just proportion of the means necessary for the purpose, provided that any party so called on could, at his option, omit or refuse to pay any portion of any or of all such calls in the proportion of money or bonds called, in which case the trustees could procure the deficiency from other persons, and issue and deliver certificates for such amounts as they might agree upon.

It was further provided, that in the event of the purchase of the road and property by the trustees and the procurement of title and possession, the trustees should transfer the same to the owners or legal representatives of the certificates issued in pursuance of the proposed agreement, according to and on the surrender of their several certificates, and distribute to them severally any other trust property, or the proceeds therefrom, remaining in their hands, such transfer and distribution to be made to each certificate holder in the proportion that the amounts of his certificates shall bear to the whole amount of the certificates outstanding; and, that if any subscriber to the agreement should, directly or indirectly, purchase the whole or any part of the road or property, then every other subscriber, or his legal representative, could at any time thereafter, until sixty days shall have elapsed from service of notice upon him, pay or legally tender to such purchasing subscriber or subscribers such proportion of the purchase money paid by

him or them as was equal to the amounts of the certificates issued to him or them, and to such other subscribers respectively under the agreement, and he should then be entitled to participate in the ratio the money he paid or tendered should bear to the purchase money.

The appellant Riker signed the agreement for three of the nine construction bonds held by him and kept the remaining six in his possession.

On the 18th of March, 1859, formal notice was given to the stockholders of the company by the trustees named that only a part of those whose signatures were essential in order to carry out the main purpose of the agreement had signed it, and that the trustees under the authority given them had adopted a resolution that the right to subscribe would cease from and after May 1, 1859, except upon the unanimous consent of the trustees, and that on that day the trustees would determine whether the agreement had been subscribed by a sufficient number for the consummation of the objects contemplated by it.

On the 13th day of December, 1860, and at the request of the holders of certificates, the trustees made a statement that was embodied in a circular addressed to creditors and stockholders, showing that the claims surrendered to the trustees under the agreement aggregated at that time $10,549,570.84, for which $182,995.66 was paid in cash and $10,366,575.18 in trust certificates.

In the same statement the trustees said: "The suit instituted by the second-mortgage bondholders is being urged to a decision in the courts of Ohio and Indiana, and a decree of sale will no doubt be obtained in a few weeks at the latest; when it will become necessary for the trustees to exercise the authority given in the agreement of 15th December, 1858, to protect the property of the trust."

By a circular issued by the trustees to creditors and stockholders on the 11th day of July, 1861, the latter were informed that the foreclosure suit instituted by the second-mortgage bondholders had resulted in a decree of sale, and that by the terms of such decree the road could not be sold for less than

$1,000,000 subject to the first mortgage of $2,050,000. Creditors and stockholders were also informed by the same circular that the trustees required from them $623,165 in addition to their then available means to enable them to protect the trust by a purchase of the property. The sale under the decree obtained by the holders of second-mortgage bonds was advertised for October 21, 1861. But as no bid was offered equal to the requirements of the decree, the property was not then sold.

Subsequently, certain amendments of the trust agreement were made at meetings of the subscribers, which amendments, the trustees claim, were made for the purpose of enabling them to protect the trust by purchasing second-mortgage bonds and holding them for the benefit of the trust. These purchases were made prior to April 17, 1863.

During the year 1866 the trustees and the holders of certificates issued under the trust agreement determined to wind up the trust. To that end the trustees, holding second-mortgage bonds for the benefit of the trust, caused the property specified in the decree of foreclosure to be duly re-advertised for sale. The sale was adjourned from time to time, but it finally took place on the 9th of January, 1867, the trustees becoming the purchasers at $1,000,000. A plan of reorganization was adopted by the certificate holders, and the trust agreement was so amended that it could be carried into effect. That plan contemplated the formation of a new corporation to receive from the trustees the property purchased by them, and all other property and rights belonging to the trust. The new corporation was formed by the name of the Ohio and Mississippi Railway Company, and on the 18th day of December, 1867, it took, by regular transfer from the trustees, the trust property held by the latter, including all the property, real and personal, and all the franchises of the old corporation.

The object of the present suit is to hold those who were trustees under the agreement of 1858, and who participated in the proceedings under which the Ohio and Mississippi Railway Company acquired the property in question, personally liable to Riker for the amount due on the six construction

bonds he withheld from the trustees. The theory of the suit is that the agreement of 1858 had in view the protection of all the bonds held by subscribers, those withheld from as well as those delivered to the trustees under that agreement; and, consequently, that the purchase of the property by the trustees for the protection simply of the particular debts covered by the trust agreement was contrary to its object and provisions, and was such a breach of duty upon their part as made them liable to him for the amount due on six construction bonds.

The defence, stated generally, was that the trustees held relations of trust to those who subscribed the agreement of 1858 only in respect to the debts for which the subscribers signed; that the plaintiff refused to avail himself of the opportunity to become a party to that agreement in respect to the bonds held by him except the three construction bonds for which he signed; that by the sale under the above decree of foreclosure all the debts of the Ohio and Mississippi Railroad Company that were subordinate in right to the holders of second-mortgage bonds were cut off; and that those who acted from time to time as trustees under the agreement of 1858 had no duty to perform except to represent the subscribers thereto in respect to the parts of claims for which they signed. The defendants also relied upon the statute of limitations barring all claims not accruing within six and ten years, respectively, before the commencement of action.

The court below sustained the plaintiff's demand, and rendered a personal decree for the amount due on his six construction bonds not embraced in the agreement of 1858. The decree was for the aggregate sum of $18,305. Both plaintiff and defendants appealed, the former claiming that a larger amount should have been awarded to him.

The grounds upon which the Circuit Court held the plaintiff to be entitled to a decree for the value of his six unsurrendered construction bonds are fully stated in an opinion rendered by the learned Circuit Judge who tried the case. 27 Fed. Rep. 251, 256, 257. "The concessions to be made by holders of construction bonds," the court said, "was the surrender by them of one-third of the principal of their bonds,

and the acceptance in lieu thereof of an interest in the trust fund which was to come into the hands of the trustees under the plan of the agreement. Beyond the one-third which they were to surrender they were to have no interest in the trust fund, and their rights were to remain the same as though no agreement had been subscribed; and the only change effected in their previous relations to the company was that thenceforth they were embarked with the trustees in the common undertaking which the trustees obligated themselves to carry out. By the terms of the agreement the trustees promised to distribute the trust fund which was to be created among the certificate holders according to their respective interests. If they had succeeded in exchanging the claims which had been surrendered to them by creditors for stock of the company, the trust fund which they would have distributed would have been the stock of the company, and the certificate holders would have become stockholders whose rights would have been subordinate to the existing mortgages upon the property. The holders of construction bonds who had surrendered a third of their holdings under the agreement would have occupied the position of stockholders for the amount surrendered, but their rights as bondholders for the unsurrendered two-thirds of their bonds would have remained the same as before." Again: "There is not a word in the agreement to indicate that they could purchase the road discharged of the equitable lien of those who had surrendered a portion of their bonds in order that the remaining part should be more safely secured. . . . The trustees did not purchase upon the foreclosure of the second mortgage because a sale of the property was imminent. They did so because a sale, and a purchase by them under such a sale, would afford a convenient method of closing out their trust, and enable them to convey a satisfactory title to the new corporation. Of course they occupy no better position toward the complainant than they would if they had purchased pursuant to the conditions of the trust. They now insist, as they have insisted all along, that they owe no duty to the complainant, and that no one had any right to share in the proceeds of the trust fund arising under the agreement except

certificate holders, or in the distribution of the property which they acquired by purchase. It does not follow because the complainant had no interest in the trust fund, and was not entitled to share in its distribution after he had parted with his certificate, that the trustees owed him no duty respecting the unsurrendered two-thirds of his bonds. They undertook to become his trustee for the purpose of protecting, as well as could practically be done, his interest as a secured bondholder of the company, to the extent of two-thirds of his original security, in consideration of his becoming a subscriber to the agreement."

On the other hand, the contention of the trustees, from the outset, was that the securities received by them and those they purchased were to be held for the exclusive benefit of certificate holders, and that they never became trustees for the plaintiff in respect of the six construction bonds not surrendered by him, and for which no certificate was issued.

Whether the view taken by the Circuit Court of the relations between the trustees and the complainant be correct or not, we do not deem it necessary to determine; for, in our judgment, the case must be disposed of without considering that question, namely, upon the ground that the plaintiff was not entitled to the interposition of equity in his behalf. His bill should have been dismissed without prejudice to an action at law. It is impossible to doubt that he was fully informed of every step taken by the trustees from time to time in the discharge of what they conceived to be their duty to certificate holders. He was not ignorant of the fact that the original agreement of 1858 was amended in important particulars in 1862 and 1863, and that in virtue of the additional powers conferred by those amendments, the trustees, by purchases made prior to April 15, 1863, acquired the second-mortgage bonds and thereby obtained control of the foreclosure suit.

In November, 1866, he was present at a meeting of certificate holders and mentioned to Campbell, who became a trustee in 1864, the fact that he held six construction bonds. Campbell replied that he knew nothing about the early workings of the trust, and would inquire into the matter. In

January, 1867, the road and its appurtenances were sold, as he well knew, and were purchased by the trustees. And in December, 1867, he presented his six construction bonds to Campbell, the chairman of the trustees, and told him that he, Riker, wanted done for those bonds what was done for them in the agreement — meaning the agreement of December 15, 1858. Campbell, doubtless supposing that Riker meant to assert some interest in the property, replied to him that the bonds "were not worth a cent, as they were shut out by the sale" under the foreclosure decree. He was thus distinctly informed as early as December, 1867, that his claim upon the property acquired by the trustees for the certificate holders was disputed. But he took no steps to vindicate his rights, if any he then had. He was quiescent until December 10, 1870, which was nearly four years after the purchase by the trustees and nearly three years after they had conveyed it to a new corporation, the Ohio and Mississippi Railway Company. On that day he served a formal written notice upon Campbell, as chairman of the trustees, that he held and owned the six construction bonds, (describing them,) and demanded that Campbell pay or secure to him the aggregate of principal and interest then due on them — $10,830. Then ensued another period of inaction; for the present suit was not brought until August 7, 1876, more than thirteen years after the trustees purchased the second-mortgage bonds for the benefit of the trust, more than nine years after the purchase of the road, at the foreclosure sale, for the benefit of certificate holders, and nearly nine years after the interview between the plaintiff and Campbell, in which the latter told him that his bonds had been cut off by that sale and were not worth anything.

The record discloses no element of fraud or concealment upon the part of the trustees or of any of them. What they did was done openly and was known or might have been known by the exercise of the slightest diligence upon the part of every one interested in the property of the old corporation. The plaintiff unquestionably knew, or could easily have ascertained, before the trustees bought the property at

the foreclosure sale — at any rate, before they transferred it to the new corporation — that their purchase would be, and was, exclusively for the benefit of certificate holders interested in the trust. Although his bonds had not then matured, he could have taken steps to prevent any transfer of the property that would impair his equitable rights in it or instituted proper judicial proceedings, of which all would be required to take notice, to have his interest in the property adjudicated. He allowed the trust to be wound up, and postponed any appeal to a court of equity based upon an alleged breach of trust by the trustees, until six out of the seven original trustees had died. His laches cannot be excused upon the ground that the trust assumed by the trustees was express or direct, for it is clearly established that the trustees, as early as December, 1867, denied and repudiated, as the plaintiff knew, the existence of any trust in relation to such of the construction bonds as the plaintiff did not surrender to them. *Speidel* v. *Henrici*, 120 U. S. 377; *Riddle* v. *Whitehill*, 135 U. S. 621; *Phillipi* v. *Phillipe*, 115 U. S. 151. We, therefore, incline to think that this suit cannot be excluded from the operation of the statute of limitations of New York prescribing a limitation of six years for an action "upon a contract, obligation, or liability, express or implied." N. Y. Civ. Code Pro. in force prior to September 1, 1877; Voorhees' Code, § 91, 4th ed. 86; 5th ed. 69, 70; *Miller* v. *Wood*, 116 N. Y. 351; *Carr* v. *Thompson*, 87 N. Y. 160; *Kirby* v. *Lake Shore &c. Railroad*, 120 U. S. 130, 139.

But, without placing our decision upon that ground and independently of the statute of limitations, the case is one in which a court of equity should refuse to interpose because of laches upon the part of appellant in asserting the rights he now claims. Looking at all the circumstances, particularly the nature of the property, good faith demanded that if he intended to question the right of the trustees to acquire, hold, and transfer it for the exclusive benefit of certificate holders, he should have done so by formal proceedings, commenced within a reasonable time after he became cognizant of all the facts. The case is one peculiarly for the application of the

rule that equity in the exercise of its inherent power to do justice between parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations. *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 592; *Hayward* v. *National Bank*, 96 U. S. 611, 616; *Richards* v. *Mackall*, 124 U. S. 183, 187; *Hammond* v. *Hopkins*, 143 U. S. 224, 250. As observed in *Halstead* v. *Grinnan*, 152 U. S. 412, 416, "the length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defence, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them."

The decree is reversed at the costs of the complainant, and the cause remanded with directions to dismiss the bill without prejudice to an action at law.

Reversed.

PLUMLEY *v.* MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

No. 406. Argued April 5, 6, 1894. — Decided December 10, 1894.

The act of August 2, 1886, c. 840, 24 Stat. 209, does not give authority to those who pay the taxes prescribed by it, to engage in the manufacture or sale of oleomargarine in any State which lawfully forbids such manufacture or sale, or to disregard any regulations which a State may lawfully prescribe in reference to that article; and that act was not intended to be, and is not, a regulation of commerce among the States.

The statute of Massachusetts of March 10, 1891, c. 58, "to prevent deception in the manufacture and sale of imitation butter," in its application to the sales of oleomargarine artificially colored so as to cause it to look like yellow butter and brought into Massachusetts, is not in conflict with

the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States.

Leisy v. *Hardin*, 135 U. S. 100, 124, is restrained in its application to the case there actually presented for determination, and held not to justify the broad contention that a State is powerless to prevent the sale of articles of food manufactured in or brought from another State, and subjects of traffic or commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import.

The judiciary of the United States should not strike down a legislative enactment of a State, especially if it has direct connection with the social order, the health and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.

THE case is stated in the opinion.

Mr. Robert M. Morse, (with whom were *Mr. Albert H. Veeder* and *Mr. William J. Campbell* on the brief,) for plaintiff in error.

Mr. Albert E. Pillsbury for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

Plumley, the plaintiff in error, was convicted in the Municipal Court of Boston upon the charge of having sold in that city on the 6th day of October, 1891, in violation of the law of Massachusetts, a certain article, product and compound known as oleomargarine, made partly of fats, oils and oleaginous substances and compounds thereof, not produced from unadulterated milk or cream but manufactured in imitation of yellow butter produced from pure unadulterated milk and cream.

The prosecution was based upon a statute of that Commonwealth approved March 10, 1891, Mass. Stats. 1891, c. 58, p. 695, entitled "An act to prevent deception in the manufacture and sale of imitation butter." By that statute it is provided as follows:

"SECTION 1. No person by himself or his agents or servants, shall render or manufacture, sell, offer for sale, expose for sale or have in his possession with intent to sell, any article, product or compound made wholly or partly out of any

fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same: *provided*, That nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.

"SECTION 2. Whoever violates any of the provisions of section one of this act shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment in the house of correction for a term not exceeding one year.

"SECTION 3. Inspectors of milk shall institute complaints for the violation of the provisions of this act when they have reasonable cause to believe that any of its provisions have been violated; and on the information of any person who lays before them satisfactory evidence by which to sustain such complaint, said inspectors may enter all places where butter or imitations thereof are stored or kept for sale, and shall also take specimens of suspected butter and imitations thereof and cause them to be analyzed or otherwise satisfactorily tested, the result of which analysis or test they shall record and preserve as evidence; and a certificate of such result sworn to by the analyzer, shall be admitted in evidence in all prosecutions under this act. The expense of such analysis or test, not exceeding twenty dollars in any one case, may be included in the costs of such prosecutions. Whoever hinders, obstructs, or in any way interferes with any inspector in the performance of his duty shall be punished by a fine of fifty dollars for the first offence, and one hundred dollars for each subsequent offence.

"SECTION 4. This act shall not be construed to impair or prevent the prosecution and punishment of any violation of laws existing at the time of its passage and committed prior to its taking effect."

The defendant was found guilty of the offence charged.

The court adjudged that he pay a fine of one hundred dollars and on default thereof stand committed in the common jail of Suffolk County until the fine was paid. Such default having occurred, a writ of commitment was issued under which he was taken for the purpose of imprisoning him in jail until the fine was paid.

He sued out a writ of *habeas corpus* from the Supreme Judicial Court of Massachusetts upon the ground that he was restrained of his liberty in violation of the Constitution and laws of the United States.

In his petition for the writ the accused set forth, in substance, that at the time and place charged he offered for sale and sold one package containing ten pounds of oleomargarine, manufactured from pure animal fats or substances and designed to take the place of butter produced from pure, unadulterated milk or cream. He also alleged that the oleomargarine in question was manufactured by a firm of which he was an agent, and the members of which were citizens and residents of Illinois engaged at the city of Chicago in the business of manufacturing that article and shipping it to various cities, towns, and places in Illinois and in other States and there selling the same; and that all oleomargarine manufactured by that firm and by other leading manufacturers was a wholesome, nutritious, palatable article of food, in no way deleterious to the public health or welfare.

The petitioner claimed that the statute of Massachusetts was repugnant to the clause of the Constitution providing that the Congress shall have power to regulate commerce among the several States; to the clause declaring that the citizens of each State shall be entitled to all the privileges and immunities of citzens in the several States; to the clause providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor 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; to the clause declaring that private property shall not be taken for public purposes; and to the act of Congress of August 2, 1886,

c. 840, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." 24 Stat. 209; Rev. Stat. Suppl. 2d ed. 505.

The case was heard before one of the Justices of that court and was reported to the full court on the petition and on the following facts and offer of proof:

"The proceedings are as alleged in the petition. The article sold by the petitioner was the article the sale of which is forbidden by chapter 58 of the acts of 1891. Oleomargarine has naturally a light-yellowish color, but the article sold by the petitioner was artificially colored in imitation of yellow butter.

"The allegations concerning the quality or wholesome character of the article sold are not admitted. The petitioner offers to prove the allegations of the petition in respect to the character and qualities of the article, and the Commonwealth objects to such proofs as immaterial, and the petitioner is to have the benefit of his offer if found material.

"It is admitted that the article sold was sent by the manufacturers thereof in the State of Illinois to the petitioner, their agent in Massachusetts, and was sold by him in the original package, and that in respect to the article sold the importers and the petitioners had complied with all the requirements of the act of Congress regulating the sale of oleomargarine, and it was marked and distinguished by all the marks, words, and stamps required of oleomargarine by the laws of this Commonwealth."

It was adjudged that the prisoner be remanded to the custody of the keeper of the common jail to be therein confined, the opinion of that court being that the statute of Massachusetts was not in violation of the Constitution or laws of the United States, and, consequently, that the petitioner was not illegally restrained of his liberty. 156 Mass. 236. The present writ of error brings up that judgment for review.

The learned counsel for the appellant states that Congress in the act of August 2, 1886, has legislated fully on the subject of oleomargarine. This may be true so far as the purposes of that act are concerned. But there is no ground to

suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufactures of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (§ 3) that sections 3232 to 3241 inclusive and section 3243 of the Revised Statutes, Title Internal Revenue, "are, so far as applicable, made to extend to and include and apply to the special taxes" so imposed, "and to the persons upon whom they are imposed." Section 3243 of the Revised Statutes is in these words: "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes." It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. *License Tax Cases*, 5 Wall. 462, 474; *Pervear* v. *Commonwealth*, 5 Wall. 475; *United States* v. *Dewitt*, 9 Wall. 41.

Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargarine from one State of the Union to another. They

relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfere with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits.

The vital question in this case is, therefore, unaffected by the act of Congress or by any regulations that have been established in execution of its provisions. That question is, whether, as contended by the petitioner, the statute under examination in its application to sales of oleomargarine brought into Massachusetts from other States is in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several States. This is the only question the learned counsel for the petitioner urges upon our attention, and, in view of the decision in *Powell* v. *Pennsylvania*, 127 U. S. 678, is the only one that we need consider.

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears, in this case, that oleomargarine, in its natural condition, is of "a light-yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion

that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practise, in such matters, a fraud upon the general public. The statute seeks to suppress false pretences and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?

Several cases in this court were cited in argument to support the contention that the grant of power to Congress to regulate interstate commerce extended to such legislation as that enacted by the Commonwealth of Massachusetts. Let us see whether those cases announce any principle that compels this court to adjudge that the States have surrendered to the general government the power to prevent fraud in the sales of property.

Railroad Co. v. *Husen*, 95 U. S. 465, 473, involved the validity of a statute of Missouri which was so framed as to prevent the bringing into that State of any Texan, Mexican, or Indian cattle, between March 1 and December 1 in any year, whether free from disease or not, or whether their coming into the State would be injurious to its inhabitants or not. If they were brought into Missouri for the purpose of carrying them

through that State without unloading them, such burdens and restrictions were imposed as amounted to an exclusion from its limits of any cattle such as those described in the statute. This court held that the Missouri statute was neither a quarantine nor an inspection law; that its object and effect was to meet at the borders of Missouri a large and common subject of commerce and prohibit its crossing the state line during the larger part of each year, and to obstruct interstate commerce and discriminate between the property of citizens of one State and that of citizens of other States. The statute was, consequently, adjudged to be unconstitutional.

Minnesota v. *Barber*, 136 U. S. 313, 322, involved the validity of a statute of Minnesota which, by its necessary operation, excluded from the markets of that State all fresh beef, veal, mutton, lamb, or pork, in whatever form, and although entirely sound, healthy, and fit for human food, taken from animals slaughtered in other States; and which directly tended to restrict the slaughtering of animals, whose meat was to be sold in Minnesota, to those engaged in such business in that State. The court said: "If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork, from animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result."

Brimmer v. *Rebman*, 138 U. S. 78, 82, involved the validity

of a statute of Virginia relating to the sale, in that Commonwealth, of unwholesome meat. The statute was held to be unconstitutional as prohibiting, by its necessary operation, the sale in Virginia of beef, veal, or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. The court said: "Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of the State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void." This case was followed in *Voight* v. *Wright*, 141 U. S. 62, 66, where this court held a statute of Virginia, relating to the inspection of flour brought into that Commonwealth, to be unconstitutional, because it required the inspection of flour from other States, when no such inspection was required of flour manufactured in Virginia.

So in *Walling* v. *Michigan*, 116 U. S. 446, 459, which involved the validity of a statute of Michigan imposing a tax upon persons not residing or having their principal place of business within the State, but engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but not imposing a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in that State. The statute

was held to be in restraint of interstate commerce, and therefore void. It having been suggested that the tax imposed was an exercise of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people, this court said: "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce among the States, and thus usurp one of the prerogatives of the national legislature."

It is obvious that none of the above cases presented the question now before us. Each of them involved the question whether one State could burden interstate commerce by means of discriminations enforced for the benefit of its own products and industries at the expense of the products and industries of other States. It did not become material in any of them to inquire, nor did this court inquire, whether a State, in the exercise of its police powers, may protect the public against the deception and fraud that would be involved in the sale within its limits for purposes of food of a compound that had been so prepared as to make it appear to be what it was not. While in each of those cases it was held that the reserved police powers of the States could not control the prohibitions of the Federal Constitution nor the powers of the government it created, (*New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650,) it was distinctly stated that the grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the States of their police powers. If the statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other States, and which had been made in imitation of pure butter, the case would have been wholly different. But we have seen that it is not of that character, but is aimed at all oleomargarine artificially colored so as to *cause* it to look like genuine butter and offered for sale in Massachusetts.

In none of the above cases is there to be found a suggestion or intimation that the Constitution of the United States took from the States the power of preventing deception and fraud

in the sale, within their respective limits, of articles in whatever State manufactured, or that that instrument secured to any one the privilege of committing a wrong against society.

Referring to the general body of the law, from whatever source derived, existing in each State of the Union and regulating the rights and duties of all within its jurisdiction, even those engaged in interstate commerce, this court, speaking by Mr. Justice Matthews, said in *Smith* v. *Alabama*, 124 U. S. 465, 476, that "it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implication." It was, consequently, held in that case that a State may enact laws and prescribe regulations, applicable to carriers engaged in interstate and foreign commerce, to insure the safety of persons carried by them as well as the safety of persons and things liable to be affected by their acts while they were within the territorial jurisdiction of the State. So, in *Dent* v. *West Virginia*, 129 U. S. 114, 122, which involved the validity of a state enactment making it a public offence for any one to practise medicine in West Virginia without complying with certain prescribed conditions, this court, speaking by Mr. Justice Field, said: "The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as deception and fraud."

If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.

Opinion of the Court.

For, as said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only directly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may be introduced into a State and there sold in original packages, without any restriction being imposed by the State upon such sale, is *Leisy* v. *Hardin*, 135 U. S. 100.

The majority of the court in that case held that ardent spirits, distilled liquors, ale and beer, were subjects of exchange, barter, and traffic, and, being articles of commerce, their sale while in the original packages in which they are carried from one State to another State, could not without the assent of Congress be forbidden by the latter State; that the parties in that case, who took beer from Illinois into Iowa, had the right, under the Constitution of the United States, to sell it in Iowa in such original packages, any statute of that State to the contrary notwithstanding; and that Iowa had no control over such beer until the original packages were broken and the beer in them became mingled in the common mass of property within its limits. "Up to that point of time," the court said, "we hold that in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action in prohibition of

importation and sale by the foreign or non-resident importer." p. 124.

It is sufficient to say of *Leisy* v. *Hardin* that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that State to the contrary notwithstanding, was beer manufactured in Illinois and shipped to the former State to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from *Leisy* v. *Hardin* must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a State is powerless to prevent the sale of articles manufactured in or brought from another State, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance import. At the term succeeding the decision in *Leisy* v. *Hardin*, this court in *Rahrer's Case*, 140 U. S. 545, 546, sustained the validity of the act of Congress of August 8, 1890, c. 728, 26 Stat. 313, known as the Wilson act, and in the light of the decision in *Leisy* v. *Hardin*, said, by the Chief Justice, that "the power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive," and that "it is not to be doubted that the power to make the ordinary regulations of police remains with the individual States, and cannot be assumed by the national government."

The judgment of the court below is supported by many well-considered cases.

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In *People* v. *Arenburg*, 105 N. Y. 123, 129, 130, the precise question now before us came before the Court of Appeals of New York. That court, after referring to its decision in *People* v. *Marx*, 99 N. Y. 377, 385, adjudging a statute of New York relating to the manufacture of oleomargarine to be in violation of the fundamental right and privilege of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, said: "Assuming, as is claimed, that butter made from animal fat or oil is as wholesome, nutritious, and suitable for food as dairy butter; that it is composed of the same elements and is substantially the same article, except as regards its origin, and that it is cheaper, and that it would be a violation of the constitutional rights and liberties of the people to prohibit them from manufacturing or dealing in it, for the mere purpose of protecting the producers of dairy butter against competition, yet it cannot be claimed that the producers of butter, made from animal fat, or oils, have any constitutional right to resort to devices for the purpose of making their product resemble in appearance the more expensive article known as dairy butter, or that it is beyond the power of the legislature to enact such laws as they may deem necessary to prevent the simulated article being put upon the market in such a form and manner as to be calculated to deceive." "If it possesses," continued the court, "the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it for and as what it actually is and upon its own merits, and are not entitled to the benefit of any additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other." Again: "The statutory prohibition is aimed at a designed and intentional imitation of dairy butter, in manufacturing the new product, and not at a resemblance in qualities inherent in the articles themselves

and common to both." The court, therefore, held that artificial coloring of oleomargarine for the mere purpose of making it resemble dairy butter came within the statutory prohibition against imitation, and "that such prohibition is within the power of the legislature, and rests upon the same principle which would sustain a prohibition of coloring winter dairy butter for the purpose of enhancing its market price by making it resemble summer dairy butter, should the legislature deem such a prohibition necessary or expedient."

In *McAllister* v. *State*, 72 Maryland, 390, the Court of Appeals of Maryland sustained the validity of a statute of that State declaring it unlawful to offer for sale as an article of food an article in imitation and semblance of natural butter. The object of the statute being to protect purchasers against fraud and deception, the power of the legislature, the court said, following the previous decision in *Pierce* v. *State*, 63 Maryland, 596, was too plain to be questioned.

In *Waterbury* v. *Newton*, 21 Vroom, (50 N. J. Law,) 534, 537, the New Jersey Supreme Court sustained the validity of an act that forbade the sale of oleomargarine colored with annotto. In response to the suggestion that oleomargarine colored with annotto was a wholesome article of food, the sale of which could not be prohibited, the court said: "If the sole basis for this statute were the protection of the public health, this objection would be pertinent, and might require us to consider the delicate questions, whether and how far the judiciary can pass upon the adaptability of the means which the legislature has proposed for the accomplishment of its legitimate ends. But, as already intimated, this provision is not aimed at the protection of the public health. Its object is to secure to dairymen and to the public at large a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view to deceive those purchasing it. It is not pretended that annotto has any other function in the manufacture of oleomargarine than to make it a counterfeit of butter, which is more generally esteemed, and commands a higher price. That the legislature may repress such counterfeits does not admit, I think, of substantial ques-

tion. Laws of like character have of late years been frequently assailed before the courts, but always without success." It was further held by the court that the statute of New Jersey was not repugnant to the clause of the Constitution empowering Congress to regulate commerce among the States, but that the package there in question, and which had been brought from Indiana, became, on its delivery in Jersey City, subject to the laws of New Jersey relating generally to articles of that nature.

So in *State* v. *Marshall*, 64 N. H. 549, 551, 552, arising under a statute of New Hampshire relating to the sale of imitation butter, the court said: "Butter is a necessary article of food, of almost universal consumption; and if an article compounded from cheaper ingredients, which many people would not purchase or use if they knew what it was, can be made so closely to resemble butter that ordinary persons cannot distinguish it from genuine butter, the liability to deception is such that the protection of the public requires those dealing in the article in some way to designate its real character. . . . The prohibition of the statute being directed against imposition in selling or exposing for sale artificial compounds resembling butter in appearance and flavor, and liable to be mistaken for genuine butter, it is no defence that the article sold or exposed for sale is free from impurity and unwholesome ingredients, and healthy and nutritious as an article of food."

In *State* v. *Addington*, 77 Missouri, 110, 118, the court, referring to a statute prohibiting the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of dairy products, said: "The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tends to confirm this view. If this was the purpose of the enact-

ment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and unless we can say this, we cannot hold the act to be anything less than valid."

To the same effect are *Powell* v. *Commonwealth*, 114 Penn. St. 265; *Butler* v. *Chambers*, 36 Minnesota, 69; and *Weideman* v. *State*, 56 N. W. Rep. (Minnesota) 688.

In *Railroad Co.* v. *Husen*, above cited, the court, speaking generally, said that the police power of a State extended to the making of regulations "promotive of domestic order, morals, health, and safety." It was there held, among other things, to be "within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others," and that "the police powers of a State justified the adoption of precautionary measures against social evils," and the enactment of such laws as would have "immediate connection with the protection of persons and property against the noxious acts of others."

It has therefore been adjudged that the States may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people, may be done by the States in the exercise of the right of self-defence. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the State in which it is offered for sale, because of the circumstance that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adul-

terated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offence against society; and the States are as competent to protect their people against such offences or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which "can be most advantageously exercised by the States themselves." *Gibbons* v. *Ogden*, 9 Wheat. 1, 203.

We are not unmindful of the fact — indeed, this court has often had occasion to observe — that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of national and state authority. But in view of the complex system of government which exists in this country, "presenting," as this court, speaking by Chief Justice Marshall, has said, "the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union," the judiciary of the United States should not strike down a legislative enactment of a State — especially if it has direct connection with the social order, the health, and the morals of its people — unless such legislation plainly and palpably violates some right granted or secured by the national Constitution or encroaches upon the authority dele-

gated to the United States for the attainment of objects of national concern.

We cannot so adjudge in reference to the statute of Massachusetts, and as the court below correctly held that the plaintiff in error was not restrained of his liberty in violation of the Constitution of the United States, the judgment must be affirmed.

Mr. Justice Jackson, now absent, was present at the argument and participated in the decision of this case. He concurs in this opinion.

Judgment affirmed.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Brewer, dissenting.

The power vested in Congress to regulate commerce among the several States is the power to prescribe the rule by which that commerce is to be governed, and, as that commerce is national in its character and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammelled. Manifestly, whenever state legislation comes in conflict with that will, it must give way.

In whatever language such legislation may be framed, its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.

Upon this record oleomargarine is conceded to be a wholesome, palatable, and nutritious article of food, in no way deleterious to the public health or welfare. It is of the natural color of butter and looks like butter, and is often colored, as butter is, by harmless ingredients, a deeper yellow, to render it more attractive to consumers. The assumption that it is thus colored to make it appear to be a different article, generically, than it is, has no legal basis in this case to rest on. It cannot be denied that oleomargarine is a recognized

article of commerce, and moreover, it is regulated as such, for revenue purposes, by the act of Congress of August 2, 1886, c. 840, 24 Stat. 209; *United States* v. *Eaton*, 144 U. S. 677.

The act under consideration prohibits its sale if "in imitation of yellow butter," though it may be sold "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." This prohibits its sale in its natural state of light yellow, or when colored a deeper yellow, because in either case it looks like butter. The statute is not limited to imitations made for a fraudulent purpose, that is, intentionally made to deceive. The act of Congress requiring, under penalty, oleomargarine to be sold only in designated packages, marked, stamped, and branded as prescribed, and numerous acts of Massachusetts, minutely providing against deception in that respect, (Pub. Stat. Mass. c. 56; Stats. 1884, c. 310; Stats. 1886, c. 317; Stats. 1891, c. 412,) amply protect the public from the danger of being induced to purchase oleomargarine for butter. The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see.

I deny that a State may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.

In the language of Knowlton, J., in the dissenting opinion below, I am not "prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations."

Other illustrations will readily suggest themselves. The concession involves a serious circumscription of the realm of trade and destroys the rule by an unnecessary exception.

The right to import, export, or sell oleomargarine in the original package under the regulations prescribed by Congress cannot be inhibited by such legislation as that before us. Fluctuation in decision in respect of so vital a power as that to regulate commerce among the several States, is to be deprecated, and the opinion and judgment in this case seem to me clearly inconsistent with settled principles. I dissent from the opinion and judgment, and am authorized to say that Mr. Justice Field and Mr. Justice Brewer concur with me in so doing.

POSTAL TELEGRAPH CABLE COMPANY *v.* ALABAMA.

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

No. 702. Submitted November 19, 1894. — Decided December 17, 1894.

Under the Judiciary Acts of the United States, a suit taken between a State and a citizen or corporation of another State is not a suit between citizens of different States; and the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws, or treaties of the United States.

Under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

This was an action brought November 4, 1892, in the circuit court of Montgomery County in the State of Alabama, by the State of Alabama against the Postal Telegraph Cable Company, a corporation organized under the laws of the State

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of New York, to recover taxes and penalties claimed by the State of Alabama under its statute of February 28, 1889, c. 103.

By that statute, it is enacted that "all express and telegraph and sleeping-car companies, doing business between points wholly within this State, and without reference to their interstate business, shall pay in advance on the first day of January, in each year, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with one dollar for each mile of telegraph line, or of railroad tracks, on or along which the lines of said companies operate or extend; and no express or telegraph company, which has paid the privilege tax hereby required, shall be liable to pay any other privilege or other tax in this State, except licenses required by cities and towns, and except upon their real estate, fixtures and other property, which shall be taxed at the same rate as is now levied and collected upon other property in this State: Provided, that all express or telegraph companies, which have heretofore paid their taxes to the State under existing laws, for the year 1889, are hereby exempt from the provisions of this clause for said year: And provided further, that all telegraph companies, whose lines on which business is done wholly within the State do not exceed 150 miles, shall pay, at the same time and in the same manner and for the same purpose, a privilege tax at the rate of one dollar a mile for each mile of railroad along or upon which they operate or do business, and no more: And provided further, that said company, or some agent thereof, shall, when making payment of the tax hereinbefore mentioned, report under oath the mileage of railroad operated by them respectively; and, in default of the payment of said tax, or the making of said report, for sixty days after maturity of said tax, a penalty of double the amount of the same shall be imposed on such defaulting companies." Acts of Alabama of 1888–89, p. 89.

The complaint consisted of three counts, the first of which was as follows:

"The plaintiff, the State of Alabama, claims of the defendant, the Postal Telegraph Company, a foreign corporation,

the sum of fifteen hundred dollars; for that whereas heretofore, to wit, on the first day of January, 1890, and for more than sixty days thereafter, the defendant did engage in the business of a telegraph company between points wholly within the State of Alabama, and did run and operate its lines on or along two hundred and fifty miles of railroad track within the State of Alabama, whereby it became and was the duty of the defendant to pay in advance on the first day of January, 1890, to the auditor of the State of Alabama, a privilege tax of five hundred dollars, together with the further sum of one dollar for each mile of railroad track on or along which the lines of the defendant as such telegraph company did operate or extend, and at the same time to report under oath the mileage of railroad track operated by it within the State of Alabama; and the plaintiff avers that the defendant made default in the payment of said tax, and in the making of said report, for more than sixty days, whereby it became and was and is liable to pay to the plaintiff a penalty in double the amount of said tax, that is to say, a penalty of fifteen hundred dollars, for which plaintiff here sues."

The second and third counts were precisely like the first, except that the second substituted January 1, 1891, for January 1, 1890; and that the third substituted January 1, 1892, and alleged that the defendant operated its lines on or along three hundred and twenty-eight miles of railroad track, and became liable to pay to the plaintiff a penalty of $1656.

In December, 1892, the case was removed into the Circuit Court of the United States for the Middle District of Alabama, under the act of Congress of March 3, 1887, c. 373, (24 Stat. 552,) as corrected by the act of August 13, 1888, c. 866, (25 Stat. 433,) upon the petition of the defendant, alleging that it was a corporation organized under the laws of the State of New York in 1886 for the purpose of constructing, owning, using, and operating electric telegraph lines within that State, and extending beyond its limits into and across other States and Territories, for the purpose of commercial and interstate communication by telegraph lines for general public use; that it had its principal executive, financial, and

accounting offices in the city of New York; that it was "engaged in the general telegraph business of receiving and sending telegrams over its lines for commercial purposes for the public, between citizens within the State of New York and other States, and across the same to and from other places within other States, and also in sending messages by telegraph communication between the several departments of the government of the United States and their officers and agents at a rate of charges designated and prescribed by the Postmaster General of the United States under the laws of Congress;" that on March 6, 1886, it accepted the provisions of the act of Congress of July 24, 1866, c. 230, (now title 65 of the Revised Statutes,) and in pursuance thereof the Postmaster General of the United States had annually from time to time designated it as one of the telegraph companies to transmit government messages for the United States; that most of its lines were upon the post roads of the United States; that now and during all these times it was a citizen and resident of the State of New York; and "that the said action is a suit of the civil nature at common law, in which the matter in dispute and the interests involved exceed, exclusive of the interests and costs, the sum or value of two thousand dollars; and that the controversy therein arises under the Constitution and laws of the United States and laws of the State of Alabama, and is wholly between citizens of different States, to wit, between your said petitioner, who avers that it was at the time of the bringing of this suit and still is a citizen and resident of the said State of New York, and the said plaintiff, the said State of Alabama, who, your petitioner avers, was then and still is a citizen and resident of the State of Alabama."

In May, 1893, the defendant filed in the Circuit Court of the United States an answer, setting up substantially the same facts as in its petition for removal.

In January, 1894, the plaintiff filed an amended complaint, claiming for each of the years 1890, 1891, and 1892, a privilege tax of $500, and a penalty of $1816; and the defendant filed an answer, similar to its original answer, and admitting the

number of miles of telegraph line owned by it within the State.

In February, 1894, the parties submitted the case to the judgment of the court upon an agreed statement of facts, in which the facts set up in the answer were admitted. The court thereupon gave judgment for the plaintiff for the sum of $3846.20; and the defendant sued out this writ of error.

Mr. T. Moultrie Mordecai and *Mr. P. H. Gadsden* for plaintiff in error.

Mr. William L. Martin, Attorney General of the State of Alabama, for defendant in error.

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

By section 1 of the act of Congress of March 3, 1875, c. 137, as amended by the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, it is enacted that the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, "and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority; or in which controversy the United States are plaintiffs or petitioners; or in which there shall be a controversy between citizens of different States;" "or a controversy between citizens of the same State claiming lands under grants of different States; or a controversy between citizens of a State and foreign States, citizens or subjects." And by section 2, the defendant's right to remove a suit — whether arising under the Constitution, laws or treaties of the United States, or coming within any other class above enumerated — from a state court into the Circuit Court of the United States, is restricted to suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section." 25 Stat. 434.

The grounds upon which the present suit was removed from a court of the State of Alabama into the Circuit Court of the United States were that the controversy therein arose under the Constitution and laws of the United States, and that it was wholly between citizens of different States.

But the suit was one brought by the State to recover taxes and penalties imposed by its own revenue laws, the jurisdiction over which belongs to its own tribunals, except so far as Congress, in order to secure the supremacy of the national Constitution and laws, has provided for a removal into the courts of the United States. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290; *Huntington* v. *Attrill*, 146 U. S. 657, 672. And the complaint by which the suit was begun did not mention the Constitution or any law of the United States, or claim any right under either.

A State is not a citizen. And, under the Judiciary Acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the Circuit Court of the United States has no jurisdiction of it, unless it arises under the Constitution, laws or treaties of the United States. *Ames* v. *Kansas*, 111 U. S. 449; *Stone* v. *South Carolina*, 117 U. S. 430; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473.

It is equally well settled that under the provisions, above referred to, of the existing act of Congress, no suit can be removed by a defendant from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws or treaties of the United States, unless the fact that it so arises appears by the plaintiff's statement of his own claim; and that a deficiency in his statement, in this respect, cannot be supplied by allegations in the petition for removal, or in subsequent pleadings in the case. *Tennessee* v. *Bank of Commerce*, 152 U. S. 454; *Chappell* v. *Waterworth*, *ante*, 102.

The conclusion is inevitable, that the judgment of the Circuit Court of the United States must be reversed, and the case remanded to that court, with directions to remand it to the state court; and that, the case having been wrongfully

removed into the Circuit Court of the United States by the Postal Telegraph Cable Company, that company must pay the costs in that court, as well as in this court. *Tennessee* v. *Bank of Commerce*, above cited; *Hanrick* v. *Hanrick*, 153 U. S. 192.

Judgment reversed accordingly.

EAST LAKE LAND COMPANY *v.* BROWN.

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

No. 121. Submitted December 14, 1894. — Decided December 17, 1894.

Chappell v. *Waterworth*, 155 U. S. 102, affirmed and applied to the point that, under the acts of March 3, 1887, c. 373, and August 13, 1888, c. 866, a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the Circuit Court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings.

This action was commenced in the City Court of Birmingham, Alabama. The complaint was as follows: "The plaintiff sues to recover the following tract of land, the north half of the southwest quarter of section fourteen (14), township seventeen (17), range two (2) west, in Jefferson County, Alabama, of which it was possessed before the commencement of this suit, and after such possession accrued the defendant entered thereupon and unlawfully withholds and detains the same, together with one thousand dollars for the detention thereof."

The defendant pleaded "not guilty," and petitioned for the removal of the cause to the Circuit Court of the United States on the ground "that said action was brought by the said East Lake Land Company for the purpose of recovering from petitioner the possession of the N. ½ of the S. W. ¼ of section 14, township 17, of range 2 west, in Jefferson County, Alabama, of

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which land petitioner was at the beginning of said suit and is now seized and possessed, and that petitioner's right and title to said land is as a homestead entered by him under the homestead laws of the United States, and for which petitioner holds a certificate of entry under said statutes, and that petitioner's title and right to said lands arise under the laws of the United States, and that the matter in dispute in this suit exceeds the sum of two thousand dollars, exclusive of costs."

The cause was so removed, and on trial a verdict was had for the defendant, and judgment on the verdict. The cause was brought here by writ of error.

Mr. John T. Morgan for plaintiff in error.

Mr. D. P. Bestor for defendant in error.

THE CHIEF JUSTICE: The judgment is reversed with costs, and the case remanded with a direction to remand it to the City Court of Birmingham, county of Jefferson, Alabama, on the authority of *Chappell* v. *Waterworth*, 155 U. S. 102.

Reversed and remanded.

CHASE v. UNITED STATES.

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

No. 83. Argued November 19, 1894. — Decided December 10, 1894.

Judgments in a District or Circuit Court of the United States in cases brought under the act of March 3, 1887, c. 359, 24 Stat. 505, are not required to be brought here for revision by appeal only, but may be brought by writ of error; but they will be reëxamined here only when the record contains a specific finding of facts with the conclusions of law thereon.

On the 1st day of May, 1870, the Postmaster General had no authority to contract in writing for the lease of accommodations for a local post office in a building for a term of twenty years.

THIS writ of error brought up a judgment of the Circuit Court of the United States for the District of Indiana, dis-

missing a suit instituted against the United States by the personal representatives of Hiram W. Chase.

It appears from the statement of facts made by the court below that on the 17th day of July, 1866, John K. Snider leased for a term of ten years a certain lot with the building thereon in Lafayette, Indiana, to be occupied by the United States as a post office; that the building was so occupied until December, 1869, when it was destroyed by fire; that James Montgomery, previous to the fire, became the owner of the property, and entitled to the benefit of the lease; that on the 1st day of May, 1870, Montgomery made a lease, in form to the United States represented by the Postmaster General, for the term of twenty years and at an annual rental of $1500, payable in equal quarterly instalments, of certain parts of a building which he covenanted to erect upon the same lot. He also covenanted to supply and keep in repair to the satisfaction of the Postmaster General all boxes and fixtures necessary for a post office in that building.

Montgomery erected the required building and the United States took possession of it. On the 15th day of April, 1870, he assigned his interest in the lease to one Tuttle, who, on the 10th of February, 1871, assigned to Chase, the testator of the plaintiff. Subsequently, May 10, 1886, the government, without complaining of any violation of the terms of the lease, vacated the premises and refused to pay rent thereafter.

During the occupancy of the premises Chase laid out and pended for furniture, fixtures, and required changes the sum of $2000, and, at the time the premises were vacated, he was engaged in conformity with the request of the postal officers in making other repairs and additions.

The present action was brought on the lease to recover the amount due for the unexpired term.

The Circuit Court adjudged that the Postmaster General had no authority to execute the lease, and that the government was not liable to suit upon it. For that reason the suit was dismissed. 44 Fed. Rep. 732.

That judgment being brought here by writ of error, a motion was made to dismiss the writ, on the ground that there

was no jurisdiction in this court by writ of error to review the judgment complained of. The hearing of this motion was postponed to the hearing on the merits.

Mr. John C. Chaney, for plaintiff in error, (*Mr. Addison C. Harris* filed the brief for same,) said, on the merits:

The Postmaster General had, by virtue of his power "to establish post offices," full power to rent, or lease, in short all the power of Congress which had not been taken from him by some negative act of Congress; and the power to lease, while it has been treated as a power "necessarily implied" from the power "to establish," is something more. It is more correct to call it an "included" power than an "implied" power; but whatever be its correct name, it was a power which reposed in the Postmaster General's hands at the time he made the lease sued on; so it was "authorized by law" within section 3732 of the Revised Statutes. *Ware* v. *United States*, 4 Wall. 617.

When it is admitted that the Postmaster General has power to make a lease, it follows that, in the absence of a statute limiting the length of time leases may run, he has plenary power (unless acting in bad faith) to make leases; for, if a court should assume to inquire into the necessity of the lease, *i.e.* whether a lease of one, two, five or twenty years was longer than necessary to the proper conduct of the post office in a given place, that would be *ipso facto* to deny the power, and moreover it would seem impossible to find any basis for the decision of such a question. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Jacksonville, Pensacola &c. Railroad* v. *United States*, 118 U. S. 626; *Garfielde* v. *United States*, 93 U. S. 246; *Ex parte Jackson*, 96 U. S. 727, 732; *Ware* v. *United States*, *supra*.

Mr. Assistant Attorney General Dodge, (with whom was *Mr. Solicitor General* on the brief on the motion to dismiss, and *Mr. Assistant Attorney General Conrad* on the brief on the merits,) said, on the motion to dismiss:

This case, coming to the court as it does by writ of error, presents the opportunity for an authoritative construction of the appellate provisions of the act of March 3, 1887, c. 359, 24 Stat. 505, commonly known as the Tucker Act, and for the decision of the question whether the judgments of Circuit and District Courts under that peculiar jurisdiction should be brought up for review by appeal or by writ of error.

This question has grown greatly in importance since the interposition of the Circuit Courts of Appeal as reviewing tribunals. Owing to unfamiliarity of many District Attorneys and Federal judges with the Court of Claims practice, and the inaccessibility of reports of the decisions of that court, the methods adopted in bringing up judgments and records for review and the rulings of the courts thereon vary widely and are extremely confusing. In many cases the right of litigants to review such judgments is jeopardized, and, indeed, entirely defeated.

In one Circuit Court of Appeals, appeals are dismissed because no bill of exceptions is settled bringing into the record the various objections and exceptions saved in the course of the trial. In others, both attorneys and court apparently deem it essential that the evidence taken on the trial be embodied in the record. In very many the importance and significance of the findings of fact and conclusions of law are wholly lost sight of by reason of misapprehension as to the proper method of review. In others, appeal is held to be proper. *United States* v. *Fletcher*, 60 Fed. Rep. 53; *United States* v. *Yukers*, 60 Fed. Rep. 641.

The existing statutes for the review of judgments of the Court of Claims reached their present form in the Revised Statutes in 1874, in §§ 707, 708, by the latter of which authority was expressly conferred on the Supreme Court to regulate the method of allowing appeals. By virtue of these statutes certain rules prescribed by the Supreme Court have been incorporated into and have undoubtedly become a part of the law regulating the appeals; among others Rule I, limiting the review to the purely legal question, *what judgment properly results from the facts found by the trial court*, thereby elimi-

nating many of the questions usually presented on appeals, but more especially eliminating those matters which are presented by writs of error, and require exceptions to be taken in the trial court and bills of exceptions to be settled to bring them into the record, such as error in the admission or rejection of evidence, or in making findings of fact unsupported by evidence or contrary to the undisputed evidence. The single question so to be considered requires no variation in the method of bringing it up, and therefore an *appeal* only is provided and no writ of error authorized. *United States* v. *Young*, 94 U. S. 258, 259.

Under this jurisdiction grew up a well-recognized class of cases known as claims against the United States, distinguished from all other litigations by the character of the defendant, and unaffected by the nature of the transactions out of which they sprang or by considerations as to whether they would have been legal or equitable in their character if between individuals.

When in 1887, by the Tucker Act, *concurrent* jurisdiction over this same class of cases was conferred on Circuit and District Courts, no change took place in the distinctiveness of the class; they remained cases of claims against the United States as before. The statute, § 9, gave to the parties "the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made. . . . The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects as near as may be to the statutes and rules of court governing appeals and writs of error in like causes."

This court has had occasion to pass upon this portion of the statute but once, viz., in *United States* v. *Davis*, 131 U. S. 36. That was an *appeal* from a judgment in an action of legal, as distinguished from equitable, character, rendered by the District Court of the District of Maryland. This court held that the rights of appeal and writ of error reserved by the Tucker Act were the same as formerly existed from the Court of Claims, and that the words in that act "reserved in the statutes of the United States in that behalf made" meant

reserved with reference to judgments in cases of claims against the United States in the Court of Claims.

The statute has received further construction at the hands of Mr. Justice Lamar, sitting at circuit in *Strong* v. *United States*, 40 Fed. Rep. 183, So. Dist. Alabama. The logic of the Davis case is there slightly amplified, and it is held that the right to the review of judgments in claims cases in Circuit and District Courts is controlled by the statutes regulating reviews of judgments of the Court of Claims; in other words, sections 707 and 708, Revised Statutes, are held to be, by the section above quoted, embodied in the Tucker Act, and therefore to constitute and limit the full measure of review to which either party is entitled.

This principle applied to the present case is conclusive of the motion to dismiss the writ. Writ of error is not and never was authorized to review judgments of the Court of Claims, and therefore is not available to bring up for review judgments of the Circuit and District Courts rendered in their concurrent jurisdiction over claims cases.

Another consideration exists in the long and well-established practice of this court under the Tucker Act to take jurisdiction by appeal from judgments which in case of individual litigants would be reviewable only on writ of error. We cite below all the reviews of judgments of Circuit or District Courts in claims cases upon which this court has passed otherwise than to dismiss either on stipulation or on motion of the appellant or plaintiff in error. They are all *appeals*, and all except three are actions at *law* as distinguished from suits in equity. So far as we have been able to discover, no case other than the one at bar has been brought to this court by writ of error, except that of *Richard S. Tuthill*, which was dismissed in April, 1890, on motion of the government, plaintiff in error, for what reason we have been unable to ascertain. *United States* v. *Davis* (Maryland), 131 U. S. 36. Motion to dismiss overruled; *United States* v. *Barber* (Mid. Alabama), 140 U. S. 164, affirmed; *United States* v. *Tuthill* (Nor. Illinois). Writ of error dismissed April, 1890, on motion of the plaintiffs in error, 136 U. S. 652; *United States* v. *Jones* (Oregon), 131

U. S. 1, reversed; *United States* v. *Taubenheimer* (Oregon), 131 U. S. 1, reversed; *United States* v. *Montgomery* (Oregon), 131 U. S. 1, reversed; *United States* v. *Barber* (Mid. Alabama), 140 U. S. 177, reversed; *United States* v. *Poinier* (South Carolina), 140 U. S. 160, reversed; *United States* v. *McDermott* (Kentucky), 140 U. S. 151, reversed; *United States* v. *Jones* (So. Alabama), 147 U. S. 672, reversed; *United States* v. *Fletcher* (E. Arkansas), 147 U. S. 664, reversed; *United States* v. *Faulkner* (Mid. Tennessee), 145 U. S. 658, reversed on stipulation; *United States* v. *Van Duzee* (Nor. Iowa), 140 U. S. 169, reversed; *United States* v. *Julian* (Mid. Tennessee), 145 U. S. 659, reversed on stipulation; *United States* v. *Taylor* (E. Tennessee), 147 U. S. 695, reversed; *United States* v. *Harmon* (Maine), 147 U. S. 268, affirmed; *United States* v. *Carter* (E. Tennessee), 140 U. S. 702, reversed on stipulation; *United States* v. *Clough* (W. Tennessee), 145 U. S. 658, dismissed on the government's motion; *United States* v. *Ewing* (E. Tennessee), 140 U. S. 142, reversed; *United States* v. *Hall* (N. Ohio), 147 U. S. 691, reversed; *United States* v. *Pitman* (Rhode Island), 147 U. S. 669, affirmed; *United States* v. *Fitch* (W. Michigan), 145 U. S. 658, dismissed on government's motion; *United States* v. *Bashaw* (E. Missouri), 152 U. S. 436, reversed.

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

The first question to be considered involves the jurisdiction of this court to review the judgment below upon writ of error. The United States contend that a judgment rendered in a suit brought under the act of March 3, 1887, c. 359, entitled "An act to provide for the bringing of suits against the government of the United States," and commonly known as the Tucker Act, cannot be reëxamined here except upon appeal. 24 Stat. 505. So much of that act as can have any bearing upon this case is printed in the margin.[1]

[1] Sec. 1. That the Court of Claims shall have jurisdiction to hear and determine the following matters:

The contention of the government as to the jurisdiction of this court is not well founded. Congress did not intend that

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First. All claims founded upon the Constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided,* That no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

SEC. 3. That whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney

cases brought under this act in a District or Circuit Court of the United States, should be brought here by appeal only.

General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the District Attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the District Attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defence whatsoever of the Government in the premises: *Provided*, That should the District Attorney neglect or refuse to file the plea, answer, demurrer, or defence, as required, the plaintiff may proceed with the case

Throughout all the provisions relating to actions commenced in those courts there is shown a purpose to preserve the dis-

under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

SEC. 7. That it shall be the duty of the court to cause a written opinion to be filed, in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

SEC. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the District Attorney to transmit to the Attorney General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the District Attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same; *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

SEC. 11. That the Attorney General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case.

SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed.

tinction between cases at law, cases in equity, and cases in admiralty. The phrases "judgment or decree," "right of exception or appeal," "equity or admiralty," "rights of appeal or writs of error," and "appeal or writ of error," taken in connection with the clause in the fourth section relating to the jurisdiction of the respective courts of the United States proceeding under the act and providing that "the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt;" with that part of section seven which in terms refers to the distinction between cases at law and cases in equity and admiralty, and directs that "if the suit be in equity or admiralty the court shall proceed with the same according to the rules of such courts;" with the express recognition in section nine, of the "same rights of appeal or writs of error" in any suit brought under this act as were reserved in the statutes of the United States in that behalf at the date of the passage of the act; with the requirement, in the same section, that "the modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes;" and with the provision in section ten, making it the duty of the District Attorney, when the Attorney General shall determine "whether an appeal or writ of error shall be taken or not" in cases in which "the judgment or decree" shall be adverse to the government, to cause "an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same;" these phrases, clauses, and provisions make it, we think, reasonably clear that Congress intended that the final determination of suits brought under this act in a District or Circuit Court of the United States shall be reviewed here upon writ of error, if the case be one at law, and upon appeal, if the case is one cognizable in equity or in admiralty under the existing statutes regulating the jurisdiction of those courts.

But Congress, while recognizing the settled distinction between law, equity, and admiralty, did not intend that the

records of cases brought against the government under this act should contain all that is required in suits instituted in the courts of the United States under the general statutes regulating their jurisdiction and the modes of procedure therein. Neither the mode of procedure in the Court of Claims, nor the mode in which cases there determined may be brought here for reëxamination, were changed by the act of March 3, 1887. But under that act, a judgment of a District or Circuit Court of the United States in an action at law brought against the government, will be reëxamined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this court will only inquire whether the judgment below is supported by the facts thus found. And, we think, it was also the purpose of Congress to require like specific findings or statements of fact and conclusions of law in cases in equity and in admiralty brought under that act in the District and Circuit Courts of the United States, and to restrict our inquiry in such cases, as in actions at law, to the sufficiency of the facts so found or stated to support the final judgment.

For the reasons stated the motion to dismiss the writ of error for want of jurisdiction in this court to review, in that mode, the final judgment of the court below is overruled.

Was the United States liable upon the written contract of lease which is the foundation of this action?

By the law in force when the lease sued on was executed, it was made the duty of the Postmaster General "to establish post offices." By section 3732 of the Revised Statutes it is provided, as did, substantially, the statutes in force when the lease was made, that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfilment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year." Act of March 3, 1825, c. 64, § 1, 4 Stat. 102; Act of March 2, 1861, c. 84, § 10, 12 Stat. 220.

Much stress is placed by counsel for the plaintiff upon the

clause making it the duty of the Postmaster General to establish post offices; the contention being that the power to establish a post office carries with it authority to lease rooms or a building in which the postmaster may conduct the business of his office. In support of this position *Ware* v. *United States*, 4 Wall. 617, is cited. But that case does not justify any such interpretation of the act of Congress. The question there was as to the power of the Postmaster General to discontinue a post office that had once been established by him under the authority conferred by the act of 1825, 4 Stat. 102, "to establish post offices." This court, observing that the power to discontinue post offices is incident to the power to establish them, unless there was some provision in the acts of Congress restraining its exercise, said: "Undoubtedly, Congress might discontinue a post office which they had previously established by law, and it is difficult to see why the Postmaster General may not do the same thing when acting under an act of Congress, expressed in the very words of the Constitution from which Congress derives its power." Again: "Power to establish post offices and post roads is conferred upon Congress, but the policy of the government from the time the general post office was established has been to delegate the power to designate the places where the mail shall be received and delivered to the Postmaster General." p. 632.

There was no issue in that case as to the extent of the authority of the Postmaster General to bind the government by contract for the payment of money or for the lease of a building for a post office. That case did not call for any consideration of the general question, whether the words in the statute, "to establish post offices," had the full meaning of the same words found in the section of the Constitution enumerating the powers of Congress.

Nor is it necessary to determine all that may be done by the Postmaster General under the power "to establish post offices" conferred upon that officer; for those words are to be interpreted in connection with the above statutory provision forbidding the making, except in the War and Navy Departments, and in those departments only for certain

things and under specified conditions, of any contract or purchase on behalf of the United States unless the same be authorized by law, or is under an appropriation adequate to its fulfilment. There is no claim that the lease in question was made under any appropriation whatever, much less one adequate to its fulfilment. So that the only inquiry is, whether the contract of lease was "authorized by law" within the meaning of the statute relating to contracts or purchases on behalf of the government.

The counsel of the plaintiff contends that a contract of lease on behalf of the United States is authorized by law if made by the Postmaster General for the purpose of procuring rooms or a building for a post office established by him. The same argument would sustain a purchase by the Postmaster General, on behalf of the United States, of a building to be used for a post office so established by that officer. We cannot give our sanction to this interpretation of the statute. It would give the Postmaster General much larger powers than we believe Congress intended to give him. While the Postmaster General, under the power to establish post offices, may designate the places, that is, the localities, at which the mails are to be received, he cannot bind the United States by any lease or purchase of a building to be used for the purposes of a post office, unless the power to do so is derived from a statute which either expressly or by necessary implication authorizes him to make such lease or purchase. The general authority "to establish post offices" does not itself, or without more, necessarily imply authority to bind the United States by a contract to lease or purchase a post-office building, although an appropriation of money to pay for the rent of a post-office building at a named place might give authority to the Postmaster General to lease such building in that locality as he deemed proper for the service, always keeping within the amount so appropriated. So also the power to lease a building to be used as a post office may be implied from a general appropriation of money to pay for rent of post offices in any particular fiscal year or years.

We have considered the case in the light of the statutes in

force when the lease of May 1, 1870, was executed. Shortly after that date, by the act of July 12, 1870, c. 251, § 7, 16 Stat. 251, it was provided that no department of the government should expend, in any one year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations. And that provision is reproduced in section 3679 of the Revised Statutes.

We are of opinion that the lease sued on was not authorized by law, and, consequently, no action can be maintained thereon.

The judgment is *Affirmed.*

LINFORD *v.* ELLISON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 90. Submitted November 22, 1894. — Decided December 17, 1894.

A judgment of the Supreme Court of the Territory of Utah against the tax collector of a municipal corporation for fifty dollars, the value of property levied on by him for unpaid municipal taxes, rendered on the ground that a municipal corporation, which is a small village but has extensive limits, cannot tax farming lands for municipal purposes lying within the corporate limits but outside of the platted portion of the city and so far removed from the settled portion thereof that the owner would receive no benefits from the municipal government, does not draw in question the validity of the organic law of the Territory or the scope of the authority to legislate conferred upon the territorial legislature by Congress; and as the matter in dispute, exclusive of costs, does not exceed the sum of five thousand dollars, nor involve the validity of a patent, or copyright, or of a treaty, this court is without jurisdiction to review it.

This was an action brought by Ephraim P. Ellison in the District Court of the Third Judicial District of the Territory of Utah against James H. Linford, Jr., to recover damages for the conversion of a wagon belonging to plaintiff, which had been levied on by defendant, as tax collector of the city of Kaysville, for unpaid municipal taxes. A jury was waived, and the cause submitted to the court for trial upon an agreed statement of facts. The court held the taxes invalid, and gave judgment in favor of plaintiff for $50 and costs. Defendant prosecuted an appeal to the Supreme Court of the Terri-

tory, which affirmed the judgment, and defendant appealed to this court. The Supreme Court of the Territory filed the following findings of fact:

"First. That the defendant, James H. Linford, Jr., was the legal and acting collector of taxes for the city of Kaysville at the time of the transaction out of which this action arose.

"Second. That the city of Kaysville was a duly and legally organized municipal corporation under the laws of the Territory of Utah, and in pursuance of ordinances duly passed assessed and levied a regular municipal tax for city purposes upon all the premises and property within its corporate limits.

"That, the tax levied upon the property of plaintiff not being paid and having become delinquent, the defendant, in pursuance of authority conferred by the ordinances of the city, levied upon a wagon belonging to the plaintiff of the value of fifty dollars and sold it to satisfy said taxes.

"Third. That the map or plat of the city of Kaysville, which was a part of the record and marked 'Exhibit 1,' correctly shows the boundaries of the city and the location of the several tracts of plaintiff's land and of his store with reference to the platted and settled portion of the said city, and that the portion of the city which is platted into lots and blocks and marked 'city lots,' as shown on said map, correctly shows the thickly settled portions of said city and the only part thereof which is laid off into blocks and lots with streets and alleys.

"Fourth. That plaintiff owns the three tracts of land where his name appears on the map, and that they are agricultural lands, used for farming purposes only, and on which he resides, and that he also owns a store at the point indicated by the letters 'F. U.' and 'E. P. E.' at a little place called Layton; that one of said tracts of land is situated a little over half a mile from the nearest part of the platted portion of the city. The second tract is situated about one mile and the third tract about two miles from the platted portion of the city while the store is situated about two miles away, at a little place called Layton, on a county road leading to the city proper, and also on the line of the Utah Central Railroad.

"Fifth. That the city of Kaysville was incorporated by

an act of the legislative assembly of Utah Territory passed March 15th, 1868, and contains about six hundred inhabitants in the platted portion thereof, and that it contains within its corporate limits more than twenty-three square miles.

"Sixth. It is not shown that the platted and settled portion of the city or what may be termed the city proper is likely to be extended in the direction of plaintiff's premises, nor that any streets, driveways, or other improvements in that direction are contemplated or are likely to be made, nor that the plaintiff will receive any benefit from the expenditures of the taxes for city purposes."

The cause was submitted on the merits and on a motion to dismiss.

Mr. Jabez G. Sutherland and *Mr. Arthur Brown* for the motion to dismiss.

Mr. J. L. Rawlins opposing.

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

By the sixth section of the act establishing a territorial government for Utah, it was enacted "that the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." Act of September 9, 1850, c. 51, 9 Stat. 453.

The seventh section of the charter of Kaysville provided: "The city council shall have authority to levy and collect taxes, for city purposes, upon all taxable property real and

personal, within the limits of the city, not exceeding one-half of one per cent per annum upon the assessed value thereof; and may enforce the payment of the same to be provided for by ordinance, not repugnant to the Constitution of the United States or to the laws of this Territory." 1 Comp. Laws Utah, 1888, 427, 429.

In *People* v. *Daniels*, 6 Utah, 288, 292, 296, the Supreme Court had under consideration certain taxes imposed upon Daniels by a municipal corporation named Moroni City, the seventh section of whose charter was identical with that of Kaysville, and the question in respect to the legality of the taxation the same as in the case at bar. The Supreme Court of Utah held that the taxation in question could not be sustained, and, among other things, said: "In the organic act Congress, under restrictions, express or implied, confers upon the territorial legislature authority to legislate with respect to such subjects as concern the people of the Territory. When the authority with respect to the subject is specific, and its extent is clearly defined, the discretion of the legislature within constitutional limitations cannot be questioned; the denial of such discretion would be a denial of the power of Congress; but when the power is given in general terms, and the extent to which it may be exercised upon the subject is not expressly limited and clearly defined in the organic act, then the territorial legislature must exercise its discretion. So far as that discretion is expressly limited by the Constitution or the organic act such limitation must be observed; but when it is not, the legislature must follow the dictates of reason and justice. The law must be reasonable and just, because the court will not presume that Congress intended to authorize the legislature to make an unjust, an unreasonable, an unequal, or an oppressive law. The subjects to which the power of the territorial legislature extends are not specifically described, and their number is limited by the word 'rightful.' A law upon a subject not of that number would be held void. In that case the court would determine that the subject was not within the power of the legislature; and as to the extent to which the legislature may act on a rightful subject, when the

limit is not expressly fixed, the court must ascertain the limit and determine whether the law is within it. . . . Municipal charters, boundaries of cities and villages, and municipal taxation, are rightful subjects of legislation, but the extent of the legislative discretion with respect to those subjects is not expressly limited; there must be a reasonable limit, however, to that discretion." The court applied to the provisions of the organic act in question, conferring power on the legislature, the rule of construction applicable to similar provisions in municipal charters, as laid down in Dillon on Municipal Corporations, (4th ed., § 328,) namely, that what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy, but where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then an ordinance passed in pursuance thereof must be a reasonable exercise of the power or it will be pronounced invalid. And upon principle and authority the court was of opinion: "*First*, that municipal taxation should be limited to the range of municipal benefits; *second*, that lands and their occupants without the range of municipal benefits should not be taxed to aid those within; *third*, that a law authorizing the assessment of taxes for municipal purposes upon lands or their occupants located beyond the range of municipal benefits is not a rightful subject of legislation; *fourth*, that taxation for city purposes should be within the bounds indicated by its buildings, or its streets and alleys, or other public improvements, and contiguous or adjacent districts so situated as to authorize a reasonable expectation that they will be benefited by the improvements of the city or protected by its police; that no outside districts should be included when it is apparent and palpable that the benefits of the city to it will only be such as will be received by other districts not included, such as will be common to all neighboring communities."

In the case at bar, (7 Utah, 166,) the Supreme Court declared that it had no reason to doubt the correctness of the former decision, and affirmed the judgment of the District

Court. And, in accordance with the view that such taxation was not within the power granted, it was ruled that "a municipal corporation, which is a small village, but having extensive limits, cannot tax farming lands for municipal purposes, lying within the corporate limits but outside of the platted portion of the city, and so far removed from the settled portion of the city that the owner will receive no benefits from the municipal government."

It is thus seen that the decision of the Supreme Court of the territory involved the construction of the organic law and the scope of the authority to legislate conferred upon the Territorial legislature; but that the validity of that authority and of the statute was not drawn in question. In order to give us jurisdiction of this appeal, the matter in dispute exclusive of costs must have exceeded the sum of $5000, or else, without regard to the sum or value in dispute, the validity of a patent or copyright must have been involved, or the validity of a treaty or statute of or an authority exercised under the United States have been drawn in question. Act of March 3, 1885, c. 355, 23 Stat. 443. Confessedly, the matter in dispute here did not reach the requisite pecuniary value, and the validity of no patent or copyright was involved, nor was the validity of a treaty questioned; and, as just stated, we are of opinion that the validity of no statute of the United States, nor of an authority exercised under the United States, was drawn in question within the intent and meaning of the jurisdictional act.

As was observed in *Lynch* v. *United States*, 137 U. S. 280, 285: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." In *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 226, the question in controversy was whether a railroad corporation, authorized by acts of Congress to

establish freight stations, and to lay as many tracks as "its president and board of directors might deem necessary" in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority, exercised under the United States, to so occupy the public streets, was drawn in question; but this court held otherwise, and said: "The validity of the statutes and the validity of authority exercised under them, are, in this instance, one and the same thing; and the 'validity of a statute,' as these words are used in this act of Congress, refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power." And see *South Carolina* v. *Seymour*, 153 U. S. 353, where the cases are marshalled and applied. The result is that the motion to dismiss must be sustained.

Appeal dismissed.

MR. JUSTICE HARLAN dissenting.

I am of the opinion that this court has jurisdiction to review the judgment below, and, consequently, that the writ of error should not be dismissed.

We have jurisdiction to review the judgment or decree of the Supreme Court of a Territory, without regard to the sum or value in dispute in any case in which is "drawn in question the validity of . . . an authority exercised under the United States." Act of March 3, 1885, c. 355, 23 Stat. 443.

The city of Kaysville, Utah, was incorporated and its territorial limits were defined by an act of the territorial legislature passed February 13, 1868, c. 9, Laws of Utah, 1868, 8; 1 Compiled Laws of Utah, 1888, 427. That act provided that the city council "shall have authority to levy and collect taxes, for city purposes, upon all taxable property, real and personal, within the limits of the city." §. 7. Within those limits were the plaintiff's lands, part of a large body of what are alleged to be merely "agricultural lands," outside of the platted part of the city, and upon which, it was contended, taxes for city purposes could not be legally imposed.

Certain taxes were levied on the plaintiff's lands by the municipal corporation of Kaysville. The issue in the court of original jurisdiction was as to the liability of those lands for taxes assessed by that corporation under the authority given by the territorial statute. That court found, as conclusions of law, that "the organization of the city of Kaysville, including large quantities of agricultural lands which, at the time of its organization, could not be benefited by municipal government, was, at the time thereof, illegal and void, and that it now is illegal and void, as to the lands which cannot by any possibility be benefited by municipal government;" that "to impose tax upon such lands is contrary to that part of the Constitution which provides that private property shall not be taken for public purposes without just compensation;" and that the lands of the plaintiff "being agricultural lands, to tax him would be to take his property without just compensation."

The District Court, therefore, held that the city of Kaysville "had no authority to tax the lands and property of Mr. Ellison for municipal purposes." It thus appears that the validity of the authority given by the territorial legislature, acting under the United States, to tax agricultural lands like those belonging to the plaintiff, was directly drawn in question and was passed upon by the court of original jurisdiction.

In the Supreme Court of the Territory the judgment was affirmed. It is true that the findings of fact in that court differed in some respects not vital in the present inquiry from those made in the inferior territorial court, but they disclosed the real issue between the parties, and the judgment of the Supreme Court proceeded distinctly upon the ground that a tax upon agricultural lands for city purposes was invalid and void. This appears from the following extract from the opinion of that court: "The questions involved in this case were fully considered and elaborated by this court in the case of *People* v. *Daniels*, 6 Utah, 288; *S.C.* 22 Pac. Rep. 159. The case involved the validity of a tax on agricultural lands for city purposes, and the tax was declared void. In that case Zane, Ch. J., in delivering the opinion of the court, said that

'taxation for city purposes should be within the bounds indicated by its buildings or streets or alleys or other public improvements, and contiguous or adjacent districts so situated as to authorize a reasonable expectation that they will be benefited by the improvements of the city or protected by its police; that no outside districts should be included when it is apparent and palpable that the benefits of the city to it will be only such as will be received by other districts not included — such as will be common to all neighboring communities.' We see no reason to doubt the correctness of that decision, and as it is decisive of the point involved in this case the judgment of the District Court is affirmed."

That the Supreme Court of the Territory passed upon the validity of the territorial statute so far as it authorizes the taxation of agricultural lands for city purposes is made still clearer by an examination of the opinion in *People* v. *Daniels*, the decision in which was followed in the present case. In that case it was adjudged that the taxation of agricultural lands for city purposes was forbidden by the Fifth Amendment of the Constitution which prohibited the taking of private property for public use without just compensation. The court said: "Inasmuch as it appears from the record in the case that the defendant resides and that his lands are situated outside of Moroni City, as indicated by public or private improvements, and beyond such contiguous or adjacent district as will be benefited by its municipal expenditure, the court holds that the territorial legislature had no power to subject his property to the burden of taxation for the corporate purposes of the city. The judgment of the court below is reversed, and the cause is remanded."

The present case then is this: The legislature of the Territory, exercising whatever authority it has "under the United States," passed a statute which embraced certain agricultural lands within the limits of Kaysville, and assumed to authorize that municipal corporation to tax them for city purposes. The action of the corporation and its officers is based upon the territorial statute and is justified, if to be justified at all, only by its provisions. Plainly, therefore, there was "drawn in ques-

tion" the authority of the territorial legislature, acting "under the United States," to confer upon a particular municipal corporation the power to tax the lands in question for purely city purposes. No question was presented as to the mere construction of the statute. It is not disputed that the plaintiff's lands are within the limits of Kaysville as defined by the act of the territorial legislature. It is conceded that the seizure of the plaintiff's wagon for the taxes on his lands was legal, if the statute of the Territory was constitutional so far as it authorized taxes to be imposed on such lands within the defined limits of Kaysville as were agricultural lands, namely, lands outside of the platted part of the city, which did not receive the benefits of the city government. I submit that there is no disputed question in the case, except that which involves the constitutional power of the territorial legislature, acting under the United States, to authorize the imposition of taxes for city purposes on lands situated as are those of the plaintiff. The facts were agreed and it is apparent that the parties intended to raise no question except as to the validity of the authority exercised by the territorial legislature in empowering the city of Kaysville to tax the lands here in question.

These views expressed by me are not at all in conflict with the decision in *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 226. The validity of the act of Congress referred to in that case was not drawn in question. The issue there was as to whether certain things were within or were authorized by the provisions of that act. The dispute was as to the construction, not the validity, of the act of Congress. I cannot suppose that the Hopkins case would have been determined as it was, if it had appeared that the authority of Congress to pass the act referred to was drawn in question. Here there is drawn in question the validity of a statute of the territorial legislature, acting under the United States, which permitted the taxation of certain kinds of lands for city purposes.

It seems to me that if a case in a territorial court turns upon the validity of an act which is authorized by a statute of the territorial legislature deriving its existence and powers from the United States, and if that statute is itself drawn in ques-

tion as being repugnant to the Constitution of the United States, then we have a case in which is "drawn in question the validity of . . . an authority exercised under the United States."

INDIANA *ex rel.* STANTON *v.* GLOVER.

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

No. 57. Argued and submitted November 6, 1894. — Decided January 7, 1895.

A Circuit Court has jurisdiction of a suit brought in the name of the State in which the circuit is situated, on the relation of a citizen of another State, to enforce the obligations of a bond given by citizens of the State in which the suit is brought for the faithful performance of his duties by a municipal officer of that State.

A certificate, made and payable in a State out of a particular fund, and purporting to be the obligation of a municipal corporation existing under public laws and endowed with restricted powers, granted only for special and local purposes of a non-commercial character, is not governed by the law merchant, and is open in the hands of subsequent holders to the same defences as existed against the original payee.

The sureties on the bond of the trustee of a municipal township in Indiana are not subjected by the Revised Statutes of that State, §§ 6006, 6007, to liability for the payment of warrants or certificates which, apart from those sections, it was not within the authority of the trustee to execute, or which were fraudulent in themselves.

A township trustee in Indiana cannot contract a debt for school supplies unless supplies suitable and reasonably necessary for the township have been actually delivered to and accepted by it.

This was an action brought in the name of the State of Indiana on the relation of Walter Stanton, trustee, a citizen of New York, against Arista Glover and four other defendants, citizens of Indiana, on the official bond of said Glover as trustee of Mill Creek township, in the county of Fountain, State of Indiana, the other defendants being sureties on said bond. The complaint was demurred to on the grounds that it did not state facts sufficient to constitute a cause of action and that the court had no jurisdiction of the subject-

matter. The demurrer was sustained, and judgment rendered in favor of defendants, and plaintiff sued out a writ of error.

The complaint averred that Glover was elected trustee of the township, April 7, 1884; qualified April 19, and entered upon the discharge of his duties as such, and so continued until some time in the month of August or September, 1885, when he abandoned his office and fled the country; that on April 19, 1884, he executed his bond as such trustee with his codefendants as sureties thereon, a copy of which bond is made part of the complaint, and the first condition expressed therein is that "the said Arista Glover shall well and faithfully discharge the duties of said office according to law." The complaint stated facts showing that, under the provisions of law in that behalf, the township trustee had no right to incur any further debt on behalf of his township without first procuring an order from the board of county commissioners allowing him to contract therefor; and averred that in violation of the duties of his office and of the terms of his bond, said Glover executed and delivered to R. B. Pollard certain promissory notes, seven in number, aggregating $5375.76, all of the same form, filed as exhibits and made part of the complaint, and one of which is as follows:

"$772.50. State of Indiana, County of Fountain,
"Trustee's Office.

"Mill Creek School Township, *May 19th*, 1885.

"This is to certify that there is now due from this township to R. B. Pollard or order seven hundred & seventy-two & $\frac{50}{100}$ dollars for school supplies bought for and received by this township and payable out of the special school funds, for which taxes are now levied, at the Citizens' Bank, at Attica, Indiana, on the 20th day of January, 1887, with interest at 8 per cent per annum on the amount from date till paid, and attorneys' fees. Arista Glover,

"*School Trustee of Mill Creek Township.*"

It was further alleged that Glover, "as such trustee, did not at or prior to the execution of said promissory notes or either

or any of them, nor at any other time, obtain any order from the board of commissioners of said Fountain County authorizing him to contract any indebtedness for or in the name of said Mill Creek school township, but the execution and delivery of said notes and each and every of them was executed and issued in express violation of the provisions of sections one and two of the act of the general assembly of the State of Indiana, entitled 'An act to limit the powers of township trustees in incurring debts and requiring them to designate certain days for transacting township business,' approved March 11, 1875, the same being sections numbered 6006 and 6007 of the Revised Statutes of the State of Indiana." The complaint then averred the transfer by Pollard of the notes in blank for value received to certain banks and a trust company, citizens of Rhode Island, and their transfer and delivery to the plaintiff; that subsequent to the endorsements and prior to the institution of the suit, Pollard abandoned his residence and citizenship in the United States and fled beyond the seas; and that plaintiff was unable to state whether Pollard had acquired a citizenship in a foreign country, or of what country; but plaintiff averred that he is not now and was not at the commencement of this action either a resident or citizen of the State of Indiana.

In the second paragraph or count of the complaint, plaintiff averred that Glover "did, in violation of the duties of his office and of the terms and conditions of his bond aforesaid, purchase and obtain from one R. B. Pollard a large amount of goods for the use of the schools of said Mill Creek township, and in payment therefor did execute and deliver to said R. B. Pollard" the notes (describing them); and that said Glover, "as such trustee, did not at or prior to the purchase of said goods or the execution and delivery of said promissory notes or either or any of them, nor at any other time, obtain any order from the board of commissioners of said Fountain County authorizing him to contract any indebtedness for or in the name of said Mill Creek school township, but the purchasing of said goods and the execution and delivery of said notes and each and every of them was made in express violation of the pro-

Counsel for Plaintiff in Error.

visions" of sections 6006 and 6007. Both paragraphs of the complaint were otherwise the same, and the breach alleged was the execution of the notes or certificates in question.

Section 6006 of the Revised Statutes of 1881 is: "Whenever it becomes necessary for the trustee of any township in this State to incur on behalf of his township, any debt or debts whose aggregate amount shall be in excess of the fund on hand to which such debt or debts are chargeable, and of the fund to be derived from the tax assessed against his township for the year in which such debt is to be incurred, such trustee shall first procure an order from the board of county commissioners of the county in which such township is situated, authorizing him to contract such indebtedness."

Section 6007 provided for the manner in which such order of the board of county commissioners should be obtained by the trustee.

On March 5, 1883, an act of the legislature of Indiana was approved, entitled "An act touching the duties of township trustees with reference to liquidating and contracting indebtedness of townships in certain cases." The second section of this act reads as follows: "And it is further provided that any township trustee, in any county of the State of Indiana, who shall contract any debt in the name or in behalf of any civil or school township of which he may be the trustee, contrary to the provisions of sections one and two of 'An act to limit the powers of township trustees in incurring debts, and requiring him to designate certain days for transacting township business,' approved March 11, 1875, (the same being numbered six thousand and six and six thousand and seven of the Revised Statutes of the State of Indiana,) shall be personally liable, and liable on his official bond, to the holder of any contract or other evidence of such indebtedness, for the amount thereof." Stats. Ind. 1883, c. 95, p. 114. This act was repealed March 9, 1889, Stats. Ind. 1889, c. 138, p. 278, but was in force at the date of the bond sued on and at the date of the alleged breach thereof.

Mr. J. M. Wilson, *Mr. Solomon Claypool*, and *Mr. William Ketcham* for plaintiff in error, submitted on their brief.

Mr. Charles B. Stuart, *Mr. Daniel W. Simms* and *Mr. Lucas Nebeker* for defendant in error Rinn, submitted on their brief.

Mr. L. T. Michener (with whom was *Mr. W. W. Dudley* on the brief,) for defendants in error.

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

The case must be treated, so far as the jurisdiction of the Circuit Court is concerned, as though Stanton was alone named as plaintiff. *Maryland* v. *Baldwin*, 112 U. S. 490. If the suit could be regarded as founded on the certificates attached to the complaint, there would be a want of jurisdiction, as it does not appear that Pollard could have prosecuted the suit in the Circuit Court, Rev. Stat. § 629; Act of March 3, 1875, c. 137, 18 Stat. 470; Act of March 3, 1887, c. 373, 24 Stat. 552, 553; but as the suit is upon the bond, and Stanton and his *cestuis que trust* were citizens of other States than Indiana, we think the jurisdiction may be maintained.

But although the suit is upon the bond, the liability asserted under section two of the act of 1883 is to the holder of the certificates "for the amount thereof," and the breach alleged is the execution of the certificates.

Such a liability might be transferable to successive holders of the warrant or certificate, but it would seem quite clear that if the liability did not exist in favor of the payee, subsequent holders would stand in no better position. Certificates, like those exhibited in the case at bar, made and payable in Indiana, out of a particular fund, and purporting to be the obligations of a corporation existing under public laws and endowed only with restricted powers granted for special and purely local purposes of a non-commercial character, are not governed by the law merchant, and are open in the hands of subsequent holders to the same defences as existed against the original payee. *Stanton* v. *Shipley*, 27 Fed. Rep. 498; *State*

ex rel. Cohen v. *Hawes*, 112 Indiana, 323; *Merrill* v. *Monticello*, 138 U. S. 673.

The contention is that where an order of the county commissioners is requisite, under sections 6006 and 6007 of the Revised Statutes of Indiana, to empower a township trustee to contract indebtedness, and has not been obtained, the mere fact of the issue of a warrant or certificate by the trustee, in form the warrant or certificate of the township, authorizes the recovery of the amount thereof of the trustee and his sureties by suit on the official bond. We cannot concur in that view.

The section in question provides that when the trustee contracts a debt in the name or in behalf of the township, without the proper order of the county commissioners, if required, liability on the official bond is incurred to the holder of the contract or other evidence of such indebtedness. The indebtedness thus referred to is manifestly an indebtedness contracted within the line of official duty and authority for something furnished to or obtained for the township, although in disregard of the provisions of sections 6006 and 6007. The sureties were not subjected to liability by the statute for the payment of warrants or certificates which, apart from those sections, it was not within the authority of the trustee to execute, or which were fraudulent in themselves, but only when persons had in good faith parted with money or property to the township on the strength of the official character of the transaction. Such we understand to be the construction put upon the act by the highest judicial tribunal of Indiana. That court in *Jeffersonville School Township* v. *Litton*, 116 Indiana, 467, 475, pointed out that by the first section of the act provision was made for the protection of creditors without actual knowledge of the facts where a township trustee had theretofore undertaken to incur debts without an order of the county commissioners, when such an order was requisite; and that by the second section it was attempted to check further extravagance, and at the same time to save innocent creditors. But a writing purporting to be evidence of such indebtedness could not create it. And, in respect of school supplies, the Supreme Court of Indiana has de-

cided "again and again, that a township trustee has no power, by any form of obligation, to bind the corporation of which he is the agent or trustee by contract for school supplies, unless supplies suitable and reasonably necessary have been actually delivered to and received by the township." *Boyd* v. *Mill Creek School Township*, 114 Indiana, 210.

In *State* v. *Hawes*, 112 Indiana, 323, the action was brought on the official bond of a trustee to recover for a certificate made to Pollard, purporting to be for school supplies bought and received by the township, it being averred that the same was executed in violation of sections 6006 and 6007. The certificate was in fact issued without any actual consideration, and the Supreme Court said: "The liability imposed by the act of 1883 requires, as a condition precedent, that the township trustee must have contracted a debt, in the name or in behalf of his township, either civil or school, and the debt must have been contracted in violation of the provisions of sections 6006 and 6007. If, therefore, the transaction in which the certificate had its inception was such as to create no debt, or if the debt created was not within the prohibition of the above-mentioned sections, manifestly the statutory liability has not been incurred by any one. . . . The mere delivery of a piece of paper which imports an obligation to pay money, but which is in fact no evidence of an actual existing debt, does not constitute the contracting of a debt. It cannot be supposed that it was the purpose of the statute to enable a holder of a contract, or other evidence of indebtedness, issued by a township trustee in the name or in behalf of his township, to hold the trustee personally liable, and liable on his official bond, whether an indebtedness had been in fact contracted or not. A recovery in any case is limited by the statute to the amount of the indebtedness, and not by the amount stipulated in the contract. Hence, given a case in which there is no indebtedness, that is, no one who occupies the situation of a creditor, and there can be no recovery under the statute. *Stanton* v. *Shipley*, 27 Fed. Rep. 498. A township trustee cannot contract a debt for school supplies unless supplies suitable and reasonably necessary for the township have been

actually delivered to, and accepted by, the township. *Bloomington School Township* v. *National School Furnishing Co.*, 107 Indiana, 43; *Reeve School Township* v. *Dodson*, 98 Indiana, 497; *Wallis* v. *Johnson School Township*, 75 Indiana, 368.

"Where, therefore, as is the case here, paper purporting to be the obligation of a township has been issued without any consideration whatever, nothing having been given or received therefor, the holder of such paper, whether he be the payee named therein or an assignee, has no right of action under the act of 1883, because the trustee has not, in any legal or equitable sense, contracted a debt. Such paper creates no obligation against any one; it is void. *Axt* v. *Jackson School Township*, 90 Indiana, 101. Since township trustees can issue obligations, binding on the township, only in case a debt has been contracted, and since, in any event, paper issued as evidence of an actual indebtedness already incurred by a municipal corporation, which possesses only limited powers, conferred for special and local purposes of a purely non-commercial character, is not negotiable according to the law merchant, a subsequent holder of paper issued by a township trustee, can occupy no better ground than that occupied by the person to whom it was issued. . . . The certificate having been issued in the name and in behalf of the township without power or authority, and not as evidence of any debt contracted by the trustee, it was absolutely void in the hands of the original payee, both as respects the trustee personally and the township, and, being for that reason void in his hands, it was equally invalid in the hands of any subsequent holder."

In *State ex rel. Cunningham* v. *Helms*, 35 N. E. Rep. (Indiana,) 893, the action was against Helms and others, sureties on his bond, as trustee of Sugar Creek township, to enforce the liability on such bond, and the complaint averred that Helms, being the trustee of the township, was engaged in erecting a school house suitable for the educational purposes of the township and necessary therefor, and that to complete the building it became necessary for him to borrow money and incur an indebtedness on the part of his township; that in order to obtain money in that behalf, he, as such trustee, and in the

name and in the behalf of the township executed a promissory note to the relator, exhibited with the complaint; that thereupon the trustee received the sum represented by the note in money for the purposes aforesaid, and that the loan was made and the fund was received by the trustee for those purposes, but that the trustee, without the knowledge of the plaintiff, appropriated the fund to his own use; that the facts existed bringing the case within sections 6006 and 6007, but the trustee did not at any time procure an order from the board of commissioners of said county, in which the township was situated, authorizing him to contract such indebtedness; and that plaintiff loaned the money to the township in good faith and without any knowledge of the fact that there were no funds in hand or a sufficient amount of funds arising from the current levy to pay the debt so made. The Supreme Court of Indiana held that the note, which was signed "trustee of Sugar Creek Township, Indiana," was, under the circumstances, the note of the township and not of the trustee individually; that a municipal or *quasi* corporation can make in a proper case a promissory note, and thereby bind itself for any debt contracted in the course of its legitimate business, for any expenses incurred in any matter or thing which it is authorized to do, or any matter which is not foreign to the purposes of its creation; that where money is loaned to a township trustee for building a suitable school house, the trustee not then having the funds on hand to complete the same, and the money is applied to such purpose, the school township represented by such trustee and receiving the benefit of such money is liable therefor; that under the averments in the complaint the trustee did contract a debt in the name of and in behalf of his township; that as the complaint charged the violation of sections 6006 and 6007 by the trustee, but that he had secured the money in the name of the township by virtue of and under color of his office, he and his bondsmen were liable under the act of March 5, 1883, for the amount of money so received and converted. *Township* v. *Litton*, and *State* v. *Hawes*, *supra*, were cited.

It will be perceived that the consideration of the notes was

fully set forth in the pleading; that it appeared therefrom that the indebtedness was contracted in the line of official duty and authority; and that the money was loaned in good faith.

Tested by these principles, the defect in the complaint before us lies in the failure to show that any debt was contracted within the meaning of the act of 1883.

The first paragraph contains no averment as to what the certificates were given for. The certificates stated that the sums specified therein were due for "school supplies" or "for maps, charts, and supplies," "bought for and received by this township;" but the action was upon the official bond and not upon the certificates, and the latter could neither add to nor take from the pleading, and "to withstand a demurrer the pleading must be good within itself without reference to the writing." *State ex rel. Cunningham* v. *Helms*, *supra*. If, however, resort were had to the recitals in the certificates to aid the complaint, the paragraph would still be lacking, for it would not appear therefrom that the supplies were suitable and necessary for the township.

The second paragraph alleged that the consideration of the certificates was "a large amount of goods for the use of the schools of said Mill Creek township," but it was not averred that the goods were suitable and necessary, or were delivered to and received by the township.

There was no averment as to value, and it appeared in neither count that school supplies suitable and necessary for the township formed the consideration of the certificates. No basis was laid for the claim that they were taken by the payee in good faith as issued either in virtue, or under color, of office. *Grimsley* v. *State*, 116 Indiana, 130; *Bloomington Township* v. *National School Furniture Company*, 107 Indiana, 43; *Litton* v. *Wright School Township*, 127 Indiana, 81; *Honey Creek School Township* v. *Barnes*, 119 Indiana, 213.

We do not regard the averments as sufficient under the act of March 5, 1883, as interpreted by the Supreme Court of the State.

Judgment affirmed.

In re NEW YORK AND PORTO RICO STEAMSHIP COMPANY, Petitioner.

ORIGINAL.

No. 8. Original. Submitted December 17, 1894. — Decided January 7, 1895.

In re Rice, Petitioner, ante, 396, affirmed and applied, to the points: (1) That a party is entitled to a writ of prohibition as a matter of right where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, and that he objected to the jurisdiction at the outset, and has no other remedy; (2) That where there is another remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary; and it is not obligatory where the case has gone to sentence, and the want of jurisdiction does not appear on the face of the proceedings.

When a District Court has general jurisdiction in admiralty over the subject-matter and over the parties, it should be allowed to proceed to decision; and if it commits error in entertaining a claimant's contention against the charterers in the same suit with the libel against the ship, the error may be corrected on appeal.

THE American Sugar Refining Company and John B. Gossler filed their libel July 22, 1893, in the District Court of the United States for the Southern District of New York, against the British steamship Centurion to recover damages to a consignment of hogsheads of sugar imported from ports in Porto Rico to New York under certain bills of lading. The faults specified as the grounds of the claim were negligent and improper stowage; want of proper care on the part of the master, officers, and crew, or of the agent of the vessel and persons employed by him; failure to properly clean the hold and bilges for the cargo before loading it; omission to close the hatches between certain molasses, which was stowed in the between-deck, and sugar stowed in the lower hold; negligence on the part of the officers and crew to use the pumps on the voyage. And it was alleged that "a number of hogsheads of molasses having been broken and others having been shifted, either through stress of weather or improper stowage, their

contents ran down into the lower hold upon the sugar, partly through the hatches and partly through the scuppers; that by reason of such defective condition of the hatches, pumps, bilges, sluiceways, decks, scuppers, and other equipment and appurtenances, and the failure and negligence of the officers and crew or those in charge of her to properly pump the vessel, the molasses and drainage from the sugar collected in the lower hold, washing out part of the sugar from the hogsheads and damaging the remainder."

On the twenty-eighth day of February, 1894, John Blumer & Co., owners and claimants of the Centurion, filed their petition, averring, among other things, that "the Centurion at all the times mentioned in the said libel of the American Sugar Refining Company and John B. Gossler was under a time charter to the New York and Porto Rico Steamship Company, a domestic corporation, by a charter of demise, which provided, amongst other things, that all cargoes should be loaded and stowed by the said charterers, and all work and labor in and about the loading, stowage, and discharging thereof was performed and paid for by the charterers and their servants, the master and officers of said steamship under the charter party having no duties to perform in connection with the loading, stowage, and discharge of the cargo, their functions being limited exclusively to the navigation of the vessel. The cargo in question was loaded by the agents and servants of the said charterers, the New York and Porto Rico Steamship Company, in Porto Rico, under the supervision of their purser and supercargo, who accompanied the vessel, and if there was any negligence in and about the loading, stowage, or care of the said cargo, as alleged in the said libel (which is expressly denied), such improper stowage, negligence, and want of care was on the part of the said servants of the time charterers and not on the part of the master, officers, and crew of said steamship." And petitioners prayed that process, according to the course of cases in admiralty and maritime jurisdiction, should issue against the New York and Porto Rico Steamship Company, citing it to appear and answer the petition and the libel, and that the court should pronounce against the

charterers instead of against the steamship, if the allegations of the libel should be proved and sustained; and for general relief.

Citation was ordered to issue and upon the return thereof the charterers appeared "specially for the purpose of objecting to the jurisdiction of this court," and moved to set aside the process on the grounds: "1. That this court has no jurisdiction in admiralty to entertain such petition. 2. That upon the face of said petition it does not set forth any case wherein process ought of right to issue against the said New York and Porto Rico Steamship Company." The District Court denied the motion to set aside, the District Judge stating in a memorandum: "I cannot sustain either of the within objections, and no such inconveniences are made probable as should lead to the disallowance in this instance as a matter of discretion." The New York and Porto Rico Steamship Company then applied to this court for an order to show cause why a writ of prohibition should not issue prohibiting the District Court from taking jurisdiction of the petition under which that company was brought into the suit of the libellants against the Centurion. Leave having been granted to file the application, and a rule having been entered thereon, the District Judge made his return thereto, submitting:

"That the order and the citation to make the New York and Porto Rico Steamship Company a party defendant were issued because in the libel it was alleged that the damage to the sugars in question arose from different alleged acts of negligence, for some of which, if established, it appeared by the petition of the owners of the Centurion that the New York and Porto Rico Company would be primarily liable and bound to indemnify the shipowners, and for other of said acts of negligence, if proved, the ship would be primarily liable; and that the presence of the last-named company as a party to the suit was necessary to the due administration of justice in order to avoid a multiplicity of suits; to secure a complete hearing of the subject-matter through the presence of all the parties interested; to obtain an adjudication which should do justice to each and be binding upon all; to avoid conflicting decisions to which separate suits would be liable

through the different evidence likely to be produced in them when the parties were different, and thus to avoid any possible failure of justice through such causes, and any discredit to the administration thereof; and because the case, though not within the letter, was deemed to be within the spirit of the 59th Rule of the Supreme Court in admiralty, and because the order of this court to bring in the said company as a defendant at once instead of requiring the owners of the Centurion to wait until after a judgment against them before filing an independent libel against the said company in case negligent stowage was established, was, in the absence of any express rule on the subject by the Supreme Court, deemed to be within the limits of the authority of this court, as conferred by section 918 of the Revised Statutes, whereby this court is authorized 'to regulate its own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings,' and also as conferred by the 46th Rule of the Supreme Court in admiralty authorizing the District Court in cases 'not provided for by the previous rules' to regulate its practice 'in such manner as it shall deem most expedient for the due administration of justice in suits in admiralty.' Of these considerations a fuller statement has been given by this court in the cases of *The Hudson*, 15 Fed. Rep. 162, and *The Alert*, 40 Fed. Rep. 836, to which reference is hereby respectfully made.

"A further reason for the said order and citation was, that since the promulgation of the said 59th Rule, the constant resort to it in innumerable instances has been found in practice most useful in preventing abuses, and in general extremely satisfactory; and the occasional application of the rule to other cases of negligence or torts, closely analogous to those expressly covered by the 59th Rule, has proved equally conducive to the most speedy and satisfactory distribution of justice.

"The motion to set aside the citation was denied for the above reasons, and because in the present instance no inconvenience to the said New York and Porto Rico Company was shown or even averred to be likely to arise, such as

might lead the court in its discretion to withhold the relief asked for by the defendant shipowners.

"I further certify that the following additional pleadings have been filed in said cause, viz., the claimants' answer to the libel, and the libellants' answer to the petition, copies of which are hereto annexed; and that, on the argument of the motion to set aside the additional process, the substance of said claimants' answer was stated to the court, as the answer to be filed; and that the New York and Porto Rico Steamship Company has not answered, having been given by me until twenty days after the decision on this application for a writ of prohibition, in which to answer."

The answer of claimants thus referred to denied that the loss was ascribable to any act or omission for which the vessel or her owners were liable, but averred that it should be ascribed to perils of the sea; and in the alternative, "that if there was any neglect or default on the part of those engaged in or about the stowage, care or delivery of the cargo, as to which they had no knowledge, such neglect or default was on the part of the said charterers, their agents or servants, for which the claimants and the said steamship should not be held responsible." Claimants also set up in bar of the suit a decree in favor of libellants under a previous libel. 57 Fed. Rep. 412. That was a case arising on a different consignment of cargo stored in the same hold, on the same voyage, and the charterers, who were brought in as in this case, were held liable to pay the decree.

Mr. George A. Black for the petitioner.

Mr. J. Parker Kirlin opposing.

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

In his return to the rule the learned District Judge, in elucidation of the grounds on which his order rested, refers to *The Hudson*, 15 Fed. Rep. 162, and *The Alert*, 40 Fed.

Rep. 836. In *The Hudson* it was held that where several vessels are alleged to be in fault in causing a collision by which the property of a third person is injured, in a libel by the latter to recover his damages, all the vessels should be proceeded against as defendants to avoid multiplicity of suits, and to enable the damages to be justly apportioned among those liable according to the law in admiralty; and that if in such suit the libellant proceeds against one vessel only, it is competent for the District Court to award its further process in the cause, upon the petition of the vessel sued, for the arrest of the other vessels to answer for their share of the damage. The question of the right to pursue this course was discussed at large by the learned judge and the conclusion reached that it was competent for the District Court in cases not provided for by the rules in admiralty of this court to regulate its own practice and to allow remedies according to the analogies of admiralty procedure as new exigencies arose, which the court might deem necessary for the due administration of justice; and that it was essential and expedient in collision cases in admiralty that the liability of all persons or vessels involved should be determined in a single action rather than in successive independent suits. The decision was announced February 7, 1883, and on March 26, 1883, Rule 59 in admiralty was promulgated by this court. 112 U. S. 743. This rule provided for procedure through which in a suit against one vessel for damage by collision process might be issued in the same suit against any other vessel charged with contributing to the same collision, or any other party, and for proceedings thereon.

In *The Alert* the District Court decided that in an action *in rem* against a chartered ship for damage to cargo, the charterers might, on the claimants' petition showing that the damage arose from the charterers' fault, be made parties defendant on the analogy of *The Hudson*, and of Rule 59. Afterwards, the court, having no doubt upon the evidence taken in the case that libellant was entitled to a decree against the Alert, while it did not clear up the dispute between the codefendants, held that the libellant might take

a decree against the Alert, and the case be retained for subsequent determination as between the defendants. 44 Fed. Rep. 685. The claimants thereupon appealed to the Circuit Court of Appeals for the Second Circuit, because the District Court had not decided the whole case and determined the rights of all the parties thereto, but the decree of the Circuit Court was affirmed. 61 Fed. Rep. 113.

The opinion of the District Judge on the motion to set aside the process against the charterers as unauthorized (40 Fed. Rep. 836) is an able and exhaustive discussion of the question involved.

The Alert was sued *in rem* for damage to cargo by the breaking of her tackle while discharging under a charter, and her owners in their answer averred that the tackle was furnished either by the shipper or by the charterers under a special agreement between them and not by the ship. The learned judge said: "The papers on which the present order against the charterers was issued show that the contract sued on was the charterers' contract. The libel is for damages upon the breach of this contract, through a negligent delivery of cargo. The charterers were in possession of the ship; they were the owners *pro hac vice;* they were the principals in the contract. The bill of lading was their obligation, not that of the master, who protested against such cargo, and no fault appears in the ship or master. The owners of the ship, who have been obliged to interpose as claimants to prevent the sacrifice of their property, and the master, are under no personal responsibility. They are strangers to the contract sued on, and without any certain means of ascertaining the facts, or producing the evidence of them. Upon the case, as thus far presented, if the ship is liable, the charterers are also liable, and bound to indemnify the claimants. Yet the claimants, if defeated in this suit, when they sue the charterers for indemnity may be again defeated through the difference in the proofs; and the libellants, if defeated here, may again sue the charterers. If the charterers admitted their obligation to indemnify the claimants for the results of the present action, or if there were any express contract imposing this

obligation on them, the need of such an order as the present would be less, since notice to the charterers of the pendency of this action, and an opportunity to defend it, would bind them by the result, . . . though this would not prevent the injustice to the shipowners of being compelled to pay the damages on the charterers' contract before the latter were called on for payment.

"The charterers, however, do not admit their liability to indemnify the shipowners. There is no express contract covering the point. The obligation of the charterers to indemnify is directly involved in the question to be tried in this suit, viz., whether charterers agreed to supply the tackle, and depends on the same evidence. The charterers, if not made parties now, might litigate the same question anew in any subsequent suit. . . . Under the former practice in equity, the charterers would be brought in as defendants as a matter of course. Under the present practice in England, since 1873, the introduction of third persons in such cases is in the ordinary course of procedure, even in common law suits."

Many cases under the English Judicature Act were cited, and the practice in countries deriving their procedure from the civil law examined in the light of authority.

In the case at bar the bill of lading, under which the cargo described in the libel was transported, was the contract of the New York and Porto Rico Steamship Company and not the contract of the shipowners. It was issued in virtue of authority conferred by the charter party, and the charter party was alleged in the petition to be the basis of the claim made by the shipowners to receive indemnity for any sum they might be compelled to pay by reason of the charterers' negligence in and about the transportation of the cargo.

The District Court had jurisdiction over subject-matter and parties so far as the libel was concerned, and if, after decree thereon against the shipowners, the latter had brought suit against the charterers to recover from them, under the provisions of the charter party, the damages the shipowners had been compelled to pay, or if libellants had originally pro-

ceeded against the charterers *in personam* for breach of the implied or expressed obligations of the bill of lading, the District Court would have had jurisdiction.

In this instance, the District Court saw fit to adopt the practice, which would have obtained in equity, of bringing all the parties in and trying the whole matter at once, and we are asked to prohibit that court from so proceeding on the ground of want of jurisdiction thus to implead the charterers.

We have recently thus stated the principles applicable to the issue of the writ of prohibition, in *In re Rice*, *ante*, 396: "Where it appears that the court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. *Smith* v. *Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495."

Without reviewing the action of the District Court on its merits, it certainly cannot be said that that court was clearly without jurisdiction, or that petitioners were without other remedy; for in the event of a decree against them, they could appeal directly to this court on the question of jurisdiction, or to the Circuit Court of Appeals upon the whole case, and that court might certify the question to this court for decision. *Ex parte Morrison*, 147 U. S. 114, 126; *United States* v. *Jahn*, 155 U. S. 109.

And the case is far from being one in which we should regard it as a proper exercise of discretion to interfere with the orderly progress of the suit below by the issue of this writ. The District Court, having general jurisdiction over the subject-matter and over the parties, should be allowed to

Counsel for Plaintiffs in Error.

proceed to decision, and if error has been committed in entertaining the claimants' contention against the charterers in the same suit with the libel against the ship, it may be corrected on appeal. *In re Fassett, Petitioner*, 142 U. S. 479, 484; *Moran* v. *Sturges*, 154 U. S. 256, 286.

Writ of prohibition denied.

COOPER *v.* NEWELL.

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

No. 129. Submitted December 18, 1894. — Decided January 7, 1895.

Horne v. *George H. Hammond Co.*, 155 U. S. 393, affirmed and applied.

TRESPASS to try title. The premises in dispute were alleged in the plaintiff's petition to be "of the value of fifty thousand dollars." The allegations therein respecting the citizenship of the parties were as follows: "The petition of Stewart Newell, a resident citizen of the city of New York, in the State of New York, hereinafter styled plaintiff, complaining of Eliza Cooper, B. P. Cooper, and Fannie Westrope, all residents of Galveston County, in the State of Texas, and hereinafter styled defendants." No other allegations on this point were made below, and no question of jurisdiction was raised there. Verdict and judgment for plaintiff. Defendant sued out this writ of error. In his brief, filed in this court, the counsel for the plaintiffs in error said: "We here assign, as ground for reversal, the further error that the court had no jurisdiction of the cause, in that the citizenship of the defendants is not disclosed by the record. The petition complains of defendants 'all residents of Galveston County, in the State of Texas.' Nothing further on the subject is reflected by the record."

Mr. F. Charles Hume for plaintiffs in error.

Argument for Defendant in Error.

Mr. John Ireland and *Mr. A. H. Garland* for defendant in error. *Mr. Garland*, in his brief, said:

Counsel for plaintiffs presents here to this court a question which is not raised in the court below, and it is now for the first time in the progress of the case suggested; and that is, that there is no sufficient averment of the citizenship of the defendant below to give the trial court jurisdiction of this cause. It is true that the petition does not state with directness that defendants below were citizens of the State of Texas, but if their citizenship can be sufficiently shown by the record, that will be sufficient. In other words, it is not necessary, in order to give the jurisdiction, that citizenship should absolutely be averred in the petition or declaration. To use the language of the Chief Justice in *Railway Co.* v. *Ramsey*, 22 Wall. 322, 328, "If, therefore, with these papers in the record the jurisdiction would appear, the judgment ought not to have been arrested," we say, if the papers and proceedings in this record show the citizenship, that would be quite sufficient." That case has been affirmed and followed by this court in *Briges* v. *Sperry*, 95 U. S. 401; *Robertson* v. *Cease*, 97 U. S. 646; and *Grace* v. *American Ins. Co.*, 109 U. S. 278.

Now to the record: they are averred in the petition to be residents; residence is *prima facie* evidence of citizenship. Then the averment is distinct that they entered into possession of the land in controversy, ejected Newell therefrom, and are in possession of the land, and withhold it from him. Then they are served with process where they are residents, and they come and appear by attorney and plead to the merits of the case. Ordinarily right here the question would end, and they would not be permitted to raise the point of jurisdiction. Here is an express waiver of the question, and a virtual admission of citizenship. Upon this state of the case, to say no more, it would appear that there was jurisdiction ample and complete. And it is entirely too late, in view of these facts, to insist upon the question here. *Gassies* v. *Ballon*, 6 Pet. 761; *Express Co.* v. *Kountze Bros.*, 8 Wall. 342; *Bradstreet* v. *Thomas*, 12 Pet. 59.

Statement of the Case.

THE CHIEF JUSTICE: The judgment is reversed and the cause remanded to the Circuit Court for further proceedings, upon the authority of *Horne* v. *George H. Hammond Company*, *ante*, 393, and cases cited. *Reversed.*

BURKE *v.* AMERICAN LOAN AND TRUST COMPANY.

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

No. 102. Argued December 4, 1894. — Decided January 7, 1895.

An agreement by a Finance Company to undertake the work of the reorganization of a railway company and the procuring of a loan to it is *held* to have been executed by it so far as to entitle it to a commission of ten per cent on the par value of the bonds issued by the company, payable in such bonds at par.

ON January 23, 1887, a decree of foreclosure and sale was entered in the Circuit Court of the United States for the Northern District of Ohio, in the case of *The American Loan & Trust Company* v. *The Toledo, Columbus & Southern Railway Company and Theophilus P. Brown.* In this decree there was a finding that on April 22, 1885, the defendant railway company, owning a line of railway, with appurtenances, extending from Toledo to Findlay, had issued 825 bonds of $1000 each, and secured the same by a trust deed on all its property, and that it had defaulted in the payment of interest on the bonds; and an order for a sale of the property in satisfaction of the debt, principal, and interest. On October 16, 1888, the property was sold for the sum of $600,000 to Stevenson Burke and Charles Hickox, who turned in on their purchase 713 of the outstanding bonds, and at the same time made claim of title to the remaining 112 not in their possession. On February 4, 1889, the sale was confirmed, and the dispute as to the ownership of the bonds not surrendered was referred to a special master, who, on March 25, 1890,

reported adversely to the claims thereto of the said purchasers. This report was sustained by the court on December 20, 1890, and a final decree of distribution entered. Pending these proceedings Charles Hickox died, and an order of revivor as to his interest was entered in the name of Charles G. Hickox, his administrator. From the decree the appellants took this appeal. On the hearing in this court the only contention was as to the ownership of 80 of these bonds which had been delivered to the American Finance Company.

The dispute as to title grew out of these facts: Prior to April 14, 1884, Theophilus P. Brown was the owner of all the stock except a nominal amount, and of all the first mortgage bonds, amounting to $800,000, of the Toledo and Indianapolis Railway Company. The bonds were held in hypothecation by various persons or corporations to secure the payment of certain obligations of the railway company or of Brown. The railroad had been constructed from Toledo to Findlay, in the State of Ohio, a distance of about 41 miles, but was at the time in the hands of a receiver. There were also sundry lien claims for right of way, lumber, and material. In order to extricate himself and the railway company from the financial embarrassments, and to provide for extending the railroad, he, as party of the first part, on that day entered into a contract with the American Finance Company as party of the second part. The contract provided conditionally for the organization of a new railroad corporation. To this new corporation all the stock, bonds, property, and franchises of the old corporation were to be sold and transferred, and the former was to issue its stock and bonds — of the former $25,000 per mile, and of the latter $20,000 per mile — such stock and bonds to be used in the purchase of the properties of the old corporation, in the payment of its debts and obligations, and in extending the road. The Finance Company was to undertake the work of organization, the settlement of the claims, and the procuring of a loan of from $300,000 to $400,000 in money, to be secured by the promissory note of the party of the first part, and a pledge of either bonds of the old or the new corporation, the money thus raised to be used

in payment of the debts, and in extension of the road. Articles six, nine, and ten of the contract are as follows:

"ARTICLE VI. There is to be allotted and paid to said party of the second part, in consideration of the premises, a commission or compensation of two and one-half per centum on the amount of money raised by said party of the second part for said party of the first part by way of loans or by means of the settlement of the claims and obligations: such commission or compensation to be payable at such time as the money received from such loan or loans shall be paid over to said party of the first part by said party of the second part, or as the existing obligations secured by the pledge of bonds as collateral shall be taken up, and as said liens and other claims shall be paid by said party of the second part, it being understood that the commission mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about as result of this agreement. But it is understood and agreed that if and so far as the loan of money shall be obtained, said party of the first part is to have the right of causing the purchase of such claims and liens upon such terms as he may be able to make with the holders thereof, and that whatever discount is saved in such purchase shall inure to the benefit of said party of the first part."

"ARTICLE IX. Said party of the second part is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by said railroad companies and negotiated: said ten per centum on said bonds being payable in said bonds at par, or in the net cash proceeds of the sales thereof, at its option, and on said stock in said stock at par: such payments or deliveries to be made from time to time *pro rata* as any of said bonds shall be negotiated, sold, or exchanged for outstanding liabilities or for property, labor, and materials required by said railroad companies or either of them, or otherwise used or disposed of.

"ARTICLE X. In addition to the said ten per centum of stock hereinbefore agreed to be paid to said party of the second

part as commission, there is to be appropriated and transferred to said party of the second part, as hereinbefore mentioned, in further consideration of the premises and of its undertakings to secure the marketing of said bonds, the forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered to said party of the second part *pro rata*, from time to time, as said bonds or any of them shall be negotiated or otherwise disposed of, as provided in paragraph last above written: but the total of said ten per centum commission on stock and bonds shall not exceed ten per centum of the amount issued for each mile of road in the name of the new railroad company."

In pursuance of this agreement the Finance Company made arrangements with Israel B. Mason, of Providence, and Francello G. Jillson, of Woonsocket, in Rhode Island, for a loan of $325,000, but before the loan was actually consummated, and on September 24, 1884, a tripartite agreement was entered into between Brown as party of the first part, the Finance Company as party of the second part, and Mason and Jillson as parties of the third part, which contained these recitals and stipulations:

"That whereas an agreement was entered into, under date of April 14, 1884, by and between said parties of the first and second part (copies of which are held by each of the parties hereto) in relation, among other things, to the negotiation undertaken by said party of the second part for said party of the first part of the notes of said party of the first part to the amount of $325,000, and also to the negotiation of $800,000 of the stock and $800,000 of the first mortgage bonds of said Toledo and Indianapolis Railway Company, and said party of the second part has requested said parties of the third part to take said notes on behalf of themselves and associates, and said parties of the 3d part have consented thereto, upon and subject to the terms and conditions herein expressed, and subject to the consummation of all the details to the satisfaction of all the parties hereto:

"It is therefore hereby agreed by and between the parties hereto that said terms and conditions are and shall be as follows:

"1. Said Brown is to make, endorse, and deliver his several promissory notes in approved form and denominations, payable to his own order within two years from this date, with interest at six per cent per annum from date, said interest to be payable semi-annually, and said notes to be accompanied by first mortgage bonds of said Toledo and Indianapolis Railway Company, at the rate of fifty cents on the dollar as collateral security, said bonds bearing coupons maturing April 1, 1885, all past-due coupons and those maturing October 1, 1884, being first taken off and cancelled.

* * * * *

"6. A bonus of ten per cent on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of such purchase, in the first mortgage bonds of said Toledo and Indianapolis Railway Company at par.

* * * * *

"8. The net proceeds of said notes are to be deposited in such bank or trust company as the said Mason and Jillson and said American Finance Company may designate; such deposit to be made for the credit and account of said 'American Finance Company, trustee,' in trust for disbursement by it for the purposes hereinabove expressed.

"9. All the remainder of said $800,000 of first mortgage bonds of said Toledo and Indianapolis Railway Company over and above the $650,000 of the same pledged to secure the payment of said $325,000 of said notes are hereby appropriated as follows: 1. To the purchasers of said notes their said bonus, amounting to $65,000 thereof, to be distributed among them *pro rata* according to their respective holdings of said notes. 2. To said American Finance Company $80,000 thereof, in full payment of all its claims for commissions for negotiating said $800,000 of said bonds. 3. To said Brown $5000 thereof; such appropriations and the delivery of said bonds to be made from time to time *pro rata* as said notes are disposed of."

Provision was also made in this contract for a substitution of the bonds and stock of the new corporation as soon as it

should be organized. These contracts were carried into effect, Mason and Jillson receiving the notes of Brown to the amount of $325,000, together with the bonds of the Toledo, Columbus and Southern Railway Company, the new corporation, $650,000 as collateral and $65,000 as bonus. The $80,000 bonds were delivered to the Finance Company. Subsequently Brown, Mason, and Jillson sold out to Burke and Hickox, and transferred to them all the bonds then remaining in their possession, to wit, the 713 surrendered at the time of the purchase.

Mr. Stevenson Burke for appellants.

Mr. Benjamin F. Blair for appellee.

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

The contention of appellants is that by the contract of April 14, 1884, the Finance Company was to receive a commission of two and one-half per cent upon all moneys obtained by way of loans; that it has been paid such sum; that the ten per cent provided by article nine was to be in compensation for the negotiation of the bonds, and to be paid over to the Finance Company from time to time *pro rata* as such bonds should be negotiated, sold, or exchanged for outstanding liabilities, or for property, labor, and material; that none were so negotiated, sold, or exchanged, and, therefore, nothing ever became due to the company on account thereof; that the tripartite agreement of September 24, 1884, reaffirms the same stipulation, for it provides that the bonds shall be "appropriated as follows . . . to said American Finance Company $80,000 thereof in full payment of all its claims for commissions for negotiating said $800,000 of said bonds."

We are unable to concur in this construction. Article nine does not limit the ten per cent compensation to the case of bonds "negotiated, sold, or exchanged," but extends it to those "otherwise used or disposed of;" and $720,000 — that is, all of the $800,000 except the ten per cent received by the

Finance Company — were used in securing the notes for $325,000, and in payment to Brown. So that it might plausibly be urged that under the terms of the first agreement, taken by itself, the Finance Company had earned the $80,000 of bonds. But we are not limited to the language of the first agreement. The second provides that the $150,000 of bonds remaining after the pledge of the $650,000 to secure the payment of the money borrowed shall be "appropriated" as follows: To the purchasers of the notes, a bonus of $65,000; to the Finance Company, $80,000; and to Brown, $5000; and at the close of the words of appropriation, and applicable to each of them, is this language: "Such appropriations and the delivery of said bonds to be made from time to time *pro rata* as said notes shall be disposed of." The notes were all disposed of, and so, within the letter of this stipulation, the time had arrived for the appropriation and delivery of all of the bonds. The purchasers of the notes, as well as Brown, unquestionably took title to the bonds "appropriated" to them; why did not the company, the second of the three parties named, in like manner obtain title?

Not only had the time arrived for the "appropriation" of these bonds to the Finance Company, but in fact they had been delivered. Each bond carried on its face a proviso that it should not become valid or obligatory until authenticated by the signature of the trustee. As no question is made of the validity of these bonds, it must be assumed that they were thus each duly authenticated. Negotiable bonds — and these were negotiable bonds — may be transferred by the holder to a *bona fide* purchaser so as to vest in the latter a good title as against all equities between the maker and the original holder, and as a matter of fact the Finance Company did before this controversy appropriate all of these bonds as collateral security for loans made to it, and otherwise. Knowledge that these bonds could be thus used must be assumed, and as there is no pretence that the Finance Company surreptitiously or fraudulently obtained possession, it is a fair inference that they were delivered to it with the understanding on the part of all the parties of its full right to them.

There is no full disclosure of all the circumstances under which the several holders received these bonds from the Finance Company, and no testimony to impeach their good faith in the transactions by which they received them. It is, therefore, difficult to see why, even if any doubt existed as to the title of the Finance Company, they are not protected as *bona fide* holders.

Still, further, the tripartite agreement was, as we have seen, executed on September 24, 1884. Eight days before its execution, and on September 16, the president of the Finance Company wrote to Brown a letter, received by him on the next day, the 17th, in which letter it was stated: "Our company cannot afford, of course, for the little 2½ per cent commission on the loan only, to use its position and capital to set the road on its feet and take the risk of your death, and any contingency that might otherwise arise, and hence we, and Messrs. Jillson & Mason, are treating the negotiation as a sale of the bonds, but in doing this our company extinguishes all its claims for commissions, so far as the present portion of the road is concerned."

With such statement of the understanding of the Finance Company, Brown signed the tripartite agreement, providing for the appropriation of the $80,000 of bonds to the Finance Company in full payment of all its claims for commissions. It is hard to believe in the light of this letter, that the parties had any other idea than that, at least as soon as the notes were disposed of, the $80,000 should become the property of the Finance Company. *Brown* v. *American Loan &c. Co.*, 31 Fed. Rep. 516.

Finally, it is found by the master that "the Finance Company did in fact render important services to T. P. Brown under these agreements in the negotiating of said bonds and negotiating of loans, which enabled T. P. Brown to pay off the claims against the old Toledo and Indianapolis Railroad Company, and thereby secure possession and control of the bonds of said Toledo and Indianapolis Railroad Company which had been hypothecated to various parties to secure the claims for which said company was indebted."

Statement.

We think that the Circuit Court, in view of all these considerations, did not err in its conclusion, and, therefore, its decree is

Affirmed.

MR. JUSTICE BROWN took no part in the decision of this case.

SOUTH CAROLINA *v.* WESLEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 796. Submitted December 10, 1894. — Decided January 7, 1895.

W. brought an action in the Circuit Court for the District of South Carolina to recover possession of a lot of land. The defendants set up that they held for that State and had no individual rights in the premises. The Attorney General of the State, the day before the cause came on for trial, filed a suggestion that the property in controversy was used by the State for public uses, and, without submitting the rights of the State to the jurisdiction of the court, moved the dismissal of the proceedings for want of jurisdiction. The record did not show that the averments in the suggestion were either proved or admitted. The trial resulted in a verdict and judgment for the plaintiff. After the verdict and before the entry of judgment the court overruled the motion of the Attorney General. The record showed no bill of exceptions to this ruling, but it appeared by agreement of counsel that the motion was overruled and exception taken. The State sued out this writ of error. *Held*,

(1) That the course pursued below as to the suggestion by the Attorney General could not be recognized as regular and sufficient;

(2) That as the record did not show that the averments of the suggestion were either proved or admitted, the Circuit Court could not properly arrest the proceedings;

(3) That as the State was not a party to the record, and refused to submit to the jurisdiction of the court, its writ of error should be dismissed.

Reference cannot properly be made to a transcript of record in a case pending in another court, to supply defects in the record of a case in this court.

MOTION to dismiss. The case is stated in the opinion.

Opinion of the Court.

Mr. Robert W. Shand for the motion.

Mr. Samuel W. Melton opposing.

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

This was an action brought in the Circuit Court of the United States for the District of South Carolina by Edward B. Wesley, a citizen of the State of New York, against J. E. Tindal and J. R. Boyles, citizens of the State of South Carolina, to recover the possession of a certain lot of land situated in the city of Columbia and State of South Carolina. The answer of defendant Tindal comprised a general denial of the allegations of the complaint, and, as a second defence, the averment that the property was in the custody of the defendant as the Secretary of State of the State of South Carolina and that he as an individual had no right, title, interest, or estate to or in the premises of any kind whatsoever. The answer of defendant Boyles, in addition to the general denial, set up that he was engaged in the employment of the Secretary of State in watching, guarding, and taking care of the premises on behalf of the State.

The action was brought to trial April 4, 1894, and resulted in a verdict for plaintiff April 7, 1894, upon which judgment for the recovery of possession, and costs, was entered May 7, 1894. On April 3, 1894, the following suggestion was filed: "And now comes O. W. Buchanan, Attorney General of the State of South Carolina, and suggests to the court and gives it to understand and be informed that the property in controversy in this action is held, occupied, and possessed through its officer and agent charged in behalf of the State of South Carolina with the custody and control of the property by virtue of the statute in such case made and provided and who is custodian of the same for and in the name of the State of South Carolina, which said property is now used by the State of South Carolina for public uses. Wherefore, without submitting the right of the State to the jurisdiction of

the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the complaint in said action be set aside and all the proceedings be stayed and dismissed and for such other orders as may be proper in the premises."

April 16, 1894, an order was filed by the Circuit Judge overruling the motion of the Attorney General "to dismiss the proceedings for want of jurisdiction," and giving his reasons in that behalf. On the application of the Attorney General of the State of South Carolina, a writ of error to review the order of April 16, 1894, was allowed June 18.

It is difficult to deal with such a record as this. The order of April 16 was entered nine days after the return of the verdict, and apparently no exception was preserved to its entry. What passed upon the trial does not appear, as no bill of exceptions was taken, and it is only by resort to an agreement of counsel, dated July 12, 1894, that it can be ascertained that the Circuit Judge declined upon the trial to accede to the suggestion and that exception was taken. By the same stipulation the charge to the jury is inserted in the record, and we are referred to that for information as to the controversy. We cannot recognize the course pursued in this regard as regular and sufficient.

In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion. *United States* v. *Peters*, 5 Cranch, 115; *The Exchange*, 7 Cranch, 116; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *United States* v. *Lee*, 106 U. S. 196; *Stanley* v. *Schwalby*, 147 U. S. 508.

Our attention is called to the transcript of the record in the case of *Tindal* v. *Wesley*, pending on error in the Circuit Court of Appeals for the Fourth Circuit, attached to the brief of counsel for the State, but reference cannot properly be had to a transcript of the record in a case pending in another court to supply defects in the record of a case in this court. If we could take notice of it, however, the pendency of that writ of error would afford an additional reason, if this

were a matter within our discretion, why we ought not to retain the case and affirm the order on the ground of want of error when the record is insufficient to present the question sought to be raised. And, although not discretionary, we are relieved from the necessity of reaching that result.

The error assigned is as follows: "For that his honor erred in not dismissing the case upon the suggestion of the Attorney General of South Carolina that this is really an action against said State, brought without her consent, the defendants denying having possession of the property in suit and claiming to have custody of said property for the said State, said State not being a party to the record, though a party in fact, the alleged cause of action being contractual in its nature, in that whatever rights the plaintiff has are derived from his contract with the State and the property involved in this litigation being claimed by the State." The State does not complain that it was refused leave to intervene, but that the Circuit Court without the intervention of the State refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The State was not a party to the record in the Circuit Court and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States* v. *Lee*, 106 U. S. 196, 197; *Georgia* v. *Jesup*, 106 U. S. 458.

Writ of error dismissed.

WESTMORELAND v. UNITED STATES.

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

No. 765. Submitted December 10, 1894. — Decided January 7, 1895.

An averment in an indictment for murder that the defendant is "a white person and not an Indian" is sufficient to show that he is outside of the first two clauses of Rev. Stat. § 2146.

Statement of the Case.

An averment in an indictment that the defendant was not a citizen of the Indian Territory will be sustained as a sufficient averment that he does not come within the provisions of article 38 of the treaty of April 28, 1866, with the Choctaws and Chickasaws, 14 Stat. 769, 779, when no challenge of the indictment in this respect is made prior to the trial, and the question is only made by motion in arrest of judgment.

A charge in an indictment which charges that the defendant administered to the deceased strychnine and other poisons with the unlawful and felonious intent to take his life, and that so administered they did have the effect of causing death, is sufficient.

In charging the causing of death by poisoning, it is unnecessary to aver that the poison was taken into the stomach of the deceased.

On June 16, 1894, the plaintiff in error was adjudged guilty of the crime of murder by the Circuit Court of the United States for the Eastern District of Texas, and sentenced to be hanged. This sentence has been brought to this court for review by writ of error. The record contains only the indictment, the judgment, and the motion in arrest thereof. The indictment charges —

"That one Thomas Westmoreland, a white person and not an Indian, nor a citizen of the Indian Territory, late of Pickens County, Chickasaw Nation, Indian Territory, in the district and circuit aforesaid, on the fifteenth day of June in the year of our Lord eighteen hundred and ninety-three, in Pickens County, in the Chickasaw Nation, in the Indian Territory, the same being annexed to and constituting a part of the said fifth circuit, and annexed to and constituting a part of the Eastern District of Texas for judicial purposes, and being within the jurisdiction of this court, did unlawfully, fraudulently, and feloniously, and with his malice aforethought, and with certain drugs and poisons, to wit, strychnine and certain poisons to the grand jurors unknown, then and there given and administered by the said Thomas Westmoreland to one Robert Green with the unlawful and felonious intent of the said Thomas Westmoreland then and there to take the life of him, the said Robert Green.

"And he, the said Thomas Westmoreland, did then and there, by administering the said poison, as aforesaid, unlawfully, knowingly, and feloniously poison him, the said Robert

Green, from the effects of which said poison he, the said Robert Green, did languish, and languishing did then and there die on the fifteenth day of June, A.D. eighteen hundred and ninety-three, and within a year and a day from said date.

"And the said grand jurors aforesaid, upon their oaths aforesaid, do say that upon the day aforesaid, at the place aforesaid, with said poison aforesaid, used as aforesaid, and in the manner aforesaid, the said Thomas Westmoreland did unlawfully, feloniously, and with his malice aforethought, kill and murder the said Robert Green. The said Thomas Westmoreland and he, the said Robert Green, being then and there white persons and not Indians, nor citizens of the Indian Territory, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America."

Mr. C. L. Herbert for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

It is not denied that the Circuit Court for the Eastern District of Texas has jurisdiction over offences against the laws of the United States committed in that portion of the Indian Territory described in the indictment, Act of March 1, 1889, c. 333, § 17, 18, 25 Stat. 783, 786; but it is insisted that by section 2146, Rev. Stat., such jurisdiction does not "extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively," and that no indictment can be held sufficient which does not expressly negative the exceptions contained in this section. See also the Act of

May 2, 1890, c. 182, § 30, 26 Stat. 81, 94; *In re Mayfield*, 141 U. S. 107. The defendant and the deceased are described as "white persons, and not Indians, nor citizens of the Indian Territory." The first clause in section 2146 is taken from the twenty-fifth section of the Act of June 30, 1834, c. 161, 4 Stat. 729, 733, and it was held in *United States* v. *Rogers*, 4 How. 567, 573, that adoption into an Indian tribe did not bring the party thus adopted within the scope of such exception, the court saying: "Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not within the exception in the act of Congress." The term "Indian" in section 2146 is one descriptive of race, and therefore the defendant, described as a white man and not an Indian, is shown to be outside the first two clauses of section 2146.

But it is insisted that article 38 of the treaty with the Choctaws and Chickasaws, of April 28, 1866, 14 Stat. 769, 779, provides that "every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicil, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw;" and that, therefore, the indictment should also negative the conditions of this article. But it is charged that the defendant and the deceased were not "citizens of the Indian Territory." Force must be given to this term in the indictment, and while it may be conceded that it is not the most apt to describe citizenship in an Indian tribe, yet it is not an unreasonable construction to hold that it refers to all citizenship which could possibly be acquired in the Indian Territory, including therein citizenship in any Indian tribe domiciled within such limits. At least, as no challenge was made of the indictment prior to the trial, and the question was only

raised by motion in arrest, and as, further, that which was intended is obvious, it is fair to rule that any merely technical defect in this language was cured by the verdict.

Again, it is objected that the indictment is insufficient in that it fails to allege that the defendant knew that that which he is charged to have administered to the deceased was a deadly poison, and also that the poison was taken into the stomach of the deceased. Neither of these objections is well taken. It is charged that he administered the strychnine and other poisons with the unlawful and felonious intent to take the life of the deceased, and that, so administered, they did have the effect of causing death. It matters not whether he knew the exact character of the strychnine or other poisons. It was murder if he unlawfully and feloniously administered any poison with the design of taking life, and that which he so administered did produce death. At the common law, though it was necessary to allege the kind of poison administered, nevertheless proof of the use of a different kind of poison was regarded as an immaterial variance. "If A. be indicted for poisoning of B., it must allege the kind of poison, but if he poisoned B. with another kind of poisoning, yet it maintains the indictment, for the kind of death is the same." 2 Hale P. C. 185; 2 Bishop Crim. Pro. §§ 514 and 555. So, also, it is unnecessary to aver that the poison was taken into the stomach of the deceased. The crime would be complete if the poison was by hypodermic injection, or otherwise, introduced into the body of the deceased, and affecting the heart, or other organ, caused the death. The indictment need not specify in detail the mode in which the poison affected the body, or the particular organ upon which its operation was had. It is enough to charge that poison was administered, and that such poison, so administered, caused the death.

These are all the objections made to the indictment, and as its sufficiency is the only question presented for consideration, it must be held that no error is apparent in the record, and the judgment is

Affirmed.

McCABE *v.* MATTHEWS.

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

No. 109. Argued and submitted December 13, 1894. — Decided January 7, 1895.

A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case.

A. contracted with B. in writing for the sale to him of a part interest in lands in Florida then worth about $300 to be acquired by B. A. paid B. one dollar, and after that did nothing to assist B. He waited nine years after the contract was made, nearly as much after he had good reason to believe that B. repudiated all liability under it, nearly five years after B. had filed his deed of the property in the public records, two years after he received actual notice of that fact, and then, when the property had reached a value of $15,000, without any tender of money or other consideration filed a bill for specific performance. *Held*, that the long delay was such laches as forbade a court of equity to interfere.

On March 1, 1889, the appellant, as plaintiff, filed in the Circuit Court his bill to compel the specific performance of a contract for the sale of real estate. The defendant demurred to this bill, on the ground of a lack of equity, which demurrer, on April 13, 1889, was sustained and the bill dismissed. 40 Fed. Rep. 338. From this decree the plaintiff appealed to this court.

The facts as disclosed by the bill were that on February 9, 1880, Mrs. F. G. Montgomery, the owner of a tract of land, containing 1635 acres, in Volusia County, State of Florida, entered into a written contract for the conveyance thereof to the defendant Matthews. This contract recited a consideration of one dollar, the receipt whereof was acknowledged, and the further "consideration of a tract of land situated near Orange Lake, containing five acres, the same to be planted out with five hundred orange stumps and the stumps budded with sweet buds and warranted to grow, and the party of the

second part is to fence the lands and keep the trees from being damaged by stock of any kind," and provided that the purchase should be at the refusal of the defendant for a period of forty-five days. On February 10 the defendant executed a written instrument, purporting to sell and assign to plaintiff an undivided half interest in the agreement and the land; and thereafter, on the same day, a further contract for the subsequent conveyance of such half interest. This latter instrument was in the following language:

"Whereas Frances G. Montgomery, of St. John's County, Florida, has, on the 9th day of February, 1880, agreed in writing to grant and convey to me by deed all her estate and interest in section 40, in T. 13 S., of R. 32 east, and section 37, in T. 14 S., of R. 32 east, containing 1635 acres, in Volusia County, Florida, subject to my refusal for forty-five days, for the consideration named in her agreement:

"Now, therefore, in consideration of the sum of one dollar to me in hand paid by William McCabe, of Tallahassee, Florida, the receipt whereof is hereby acknowledged, of the further sum of one hundred dollars, for which I am to draw upon said William McCabe with my deed to him, his heirs and assigns, for a one-half undivided interest in said lands attached, when I deliver to said Montgomery the deed to her referred to in said agreement and she makes to me the deed of said lands therein referred to in her said agreement, and of the further sum of fifty dollars to be paid by said William McCabe after the issue of the patent for said lands and the completion of any proceedings founded on said patent, when issued, deemed necessary, in connection with said patent, to fortify the title to said lands and render it more marketable, the expenses connected with which issue and said proceedings connected therewith are to be borne solely by said McCabe, I do hereby sell and assign to said William McCabe, his heirs and assigns, a one-half undivided interest in said agreement of said Montgomery and in said lands so to be conveyed by her to me as aforesaid, and agree to make to the said McCabe, his heirs and assigns, a deed for said interest in said lands and to

attach the same to said draft on him as aforesaid within three months from the date hereof, it being understood that the expenses connected with the claim of one Stephen Snow to said lands or a part of them and all other expenses shall be borne equally by said McCabe and myself as joint equal owners of said lands so to be conveyed as aforesaid.

"In witness whereof I hereto set my hand and seal, at Jacksonville, Fla., this 10th day of February, A.D. 1880.

"(S'd) J. O. MATTHEWS. [SEAL.]"

Before the expiration of the forty-five days the defendant notified Mrs. Montgomery of the acceptance of the contract. The plaintiff after the execution of his contracts with the defendant went to the county seat of Volusia County for the purpose of investigating the claims of Stephen Snow, said to be in possession of the lands, or a part thereof. In such investigation he expended his time and money, and obtained valuable information concerning the lands and the title thereto, which he communicated to defendant, and shortly thereafter returned to his home in Toronto, Canada, instructing the defendant to send the deed with the draft as provided in the contract. There he attempted to open a correspondence with defendant, but the last letter received from him was dated June 20, 1880, and though plaintiff subsequently wrote several times he received no answer, and finding that defendant so failed to answer, he caused, on December 23, 1880, his contract to be recorded in the office of the clerk of the Circuit Court of that county. Subsequently the defendant procured a deed for the lands from Mrs. Montgomery, which deed bears date July 1, 1882, and was recorded in the office of the clerk of the Circuit Court of Volusia County on July 14, 1884, and in pursuance of such deed he entered into and has continued in possession. In fraud of plaintiff's rights, and with the purpose to defraud him, defendant kept the fact of the deed and the possession of the lands a secret from plaintiff, who was not informed thereof until the spring of the year 1887, when he received notice thereof from the clerk of the Circuit Court for Volusia County. Plaintiff thereupon

obtained an abstract of the title, whereon appeared the deed from Mrs. Montgomery to defendant. As soon as it was practicable thereafter for him to leave his business affairs, and in February, 1888, he went to Florida to take steps for asserting his rights, and employed counsel, who at once demanded a conveyance to plaintiff of the undivided half interest, and at the same time notified the defendant of the plaintiff's readiness to perform his obligations.

The bill also alleged that plaintiff had always been ready and willing to comply with all the terms of the contract by him stipulated to be kept and performed, but that the defendant wholly refused and still refuses to comply on his part, and further, on information and belief, that defendant had conveyed or attempted to convey, and mortgaged or attempted to mortgage, certain unknown pieces or parcels of the tract. There was no allegation in the bill of any tender of either of the two sums of one hundred dollars and fifty dollars, stipulated by said contract to be paid by plaintiff to defendant, nor was there any allegation of the present value of the property, but after the entry of the decree of dismissal two affidavits were filed by consent of the defendant, showing the value of the tract as a whole at the date of the decree, April 13, 1889, to be over $15,000.

Mr. Henry Wise Garnett for appellant.

Mr. H. Bisbee for appellee submitted on his brief.

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

A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand in view of all the circumstances of the case. *Pratt* v. *Carroll*, 8 Cranch, 471; *Holt* v. *Rogers*, 8 Pet. 420; *Willard* v. *Tayloe*, 8 Wall. 557; *Hennessy* v. *Woolworth*, 128 U. S. 438.

Tested by this rule, the decision of the Circuit Court was

unquestionably correct. There is no averment in the bill of a tender of any money by plaintiff to defendant, and while it may be that the stipulations in the contract of conveyance by defendant and payment by plaintiff are independent covenants, (*Loud* v. *Pomona Land and Water Company*, 153 U. S. 564,) and that the obligation of conveyance precedes that of payment, yet the omission of a tender is significant upon the question of how much the plaintiff suffers by reason of a refusal to decree specific performance. The only sum which defendant has received is one dollar, and that is the only definite amount which it is shown the plaintiff has expended. It is true the bill alleges that after the contract he went to the county seat of Volusia County, and expended time and money in obtaining information concerning the title, but how much time and money is not disclosed. In other words, the plaintiff, having invested a dollar in this speculation, waits nine years before he comes into a court of equity to ask a decree for the performance of his contract of purchase.

On the other hand, by the agreement between the defendant and Mrs. Montgomery, he was to convey to her a tract of land containing five acres, which he was to plant with five hundred orange stumps, the stumps budded with sweet buds, and guaranteed to grow; to fence the land and keep the trees from being damaged by stock of any kind. By the first instrument executed by the defendant, to wit, the assignment of a half interest in the agreement, the plaintiff was doubtless under obligation to assume the burden of half the consideration to be paid by defendant to Mrs. Montgomery. The second instrument, the contract to convey, upon which this suit is brought, executed the same day, was apparently in substitution of the assignment, and perhaps made the payment of the $150 the equivalent of such half of the consideration. As the defendant obtained a deed from Mrs. Montgomery, it is to be presumed that he fully complied with the terms of his contract with her; that he conveyed the five acres and performed all the work required thereon. Such was his investment over against the plaintiff's one dollar.

While plaintiff was not informed by defendant that the

latter repudiated the contract, he had the very same year good reason to believe that such was the fact, because his letters to defendant were unanswered; indeed, his suspicions were aroused, and in consequence thereof he caused his contract to be recorded before the close of the year 1880. The deed to defendant was duly recorded in July, 1884, and the plaintiff had actual knowledge of this in the spring of 1887. Notwithstanding all this he waits until March 1, 1889, before filing his bill, and, upon the entry of a decree against him, on April 13, 1889, he waits until March 9, 1891, before taking his appeal to this court.

Nowhere on the face of the bill is the value of the property disclosed; nothing to show a value sufficient to give jurisdiction to the Circuit Court, but by the affidavits filed after the decree of dismissal it appears that the entire property was worth at the time of the decree (which was less than a month and a half after the filing of the bill) the sum of $15,000. Great has been the change in the value of the premises! The half interest was worth at the date of his contract, as shown by the stipulated price, but $150, while at the time he brings his suit it is worth $7500. It does not appear that he has done anything towards bringing about such increase of value, and no excuse is shown for his ignorance of the exact condition of affairs, or his inattention to the matter, except his residence in a remote province.

So that we have presented the case of one who, investing a dollar in a proposed purchase of lands, and doing nothing to assist his vendor in furnishing the property or performing the work necessary to be furnished and performed by such vendor to acquire the title to the lands, waits nine years after his contract has been entered into, nearly nine years after he has good reason to believe that such vendor repudiates all liability under the contract, nearly five years after notice has been given by such vendor of his acquisition of the title by filing the deed in the public records, two years after he receives actual notice of that fact, and then without the tender of any money, or other consideration, appeals to a court of equity to compel such vendor to deed to him an interest in land worth

at the time of his contract only $150, and now $7500. It seems to us to be a case of a purely speculative contract on the part of the plaintiff; doing nothing himself, he waits many years to see what the outcome of the purchase by defendant shall be. If such purchase proves a profitable investment, he will demand his share; if unprofitable, he will let it alone. Under those circumstances the long delay is such laches as forbids a court of equity to interfere. The decision of the Circuit Court is right, and it is

Affirmed.

EVANSVILLE BANK *v.* GERMAN-AMERICAN BANK.

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

No. 85. Argued November 20, 1894. — Decided January 7, 1895.

In June, 1887, the Fidelity Bank of Cincinnati had a contract with the German-American Bank of Peoria "to credit sight items on any point in the United States east of Illinois, where there are banks, at par; and to make collections on same points" and "to credit the same at par when collected." At that time there also existed an arrangement between the Fidelity Bank and the Bank of Evansville in Indiana for mutual and reciprocal collection business. On the 14th of that month the German-American Bank sent to the Fidelity Bank for collection a sight draft on a firm in Terre Haute, endorsed "for collection." On the 16th this draft was forwarded to the Evansville Bank for collection. On the 18th the draft was sent by the Evansville Bank to a bank in Terre Haute for collection, and was collected by the latter bank on the 20th of June. On the morning of the 21st, before banking hours, the Evansville Bank received news of the collection, and after crediting the Fidelity Bank with it, as of June 20th, notified the Fidelity Bank of the payment and of the entry to credit by a letter which was received there on the 22d. On the 20th the Fidelity Bank was, and for ten days before it had been, insolvent. It was not open for business after the 20th, and on the 27th passed into the hands of a receiver. *Held*, that the Fidelity Bank, though it acquired the mere legal title to the draft, never became its equitable owner; that the notice on the draft that it was for collection bound all parties into whose hands it came; that the Evans-

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ville Bank could not by its entry of credit to the Fidelity Bank release itself of its obligation to the German-American Bank; and that the mere fact that news of the condition of the Fidelity Bank had not reached the Evansville Bank at the time it made the entry was immaterial.

Commercial Bank of Pennsylvania v. *Armstrong*, 148 U. S. 50, shown not to conflict with this decision.

THIS case was tried by the court, a jury having been waived. A special finding of facts was made. From this it appears that during the month of June, 1887, the Fidelity National Bank of Cincinnati, Ohio, (hereinafter called the Fidelity Bank,) and the German-American Bank of Peoria, Illinois, (hereinafter called the German-American Bank,) the plaintiff in the court below, were mutually transacting the business of collecting mercantile paper each for the other, and were keeping ledger accounts with each other, under a contract entered into in the month of September, 1886. This contract was made by correspondence, which resulted in an acceptance by the German-American Bank of the following proposition of the Fidelity Bank: "We will credit sight items on any point in the United States east of Illinois, where there are banks, at par; and make collections on same points, which, when paid, will credit at par."

On June 14, 1887, the German-American Bank purchased from the Great Western Distilling Company of Peoria a draft, of which the following is a copy:

"Great Western Distilling Co., Distillers and Refiners of Spirits.

"$6926.15.

"PEORIA, ILLS., June 14th, 1887.

"At sight pay to the order of Weston Arnold, cashier, sixty-nine hundred twenty-six 15-100 dollars.

"J. B. GREENHUT,

"Sec. and Treas.

"To Terre Haute Distilling Co., Terre Haute, Ind.

"No. 4357."

and on the same day transmitted it to the Fidelity Bank in the following letter:

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"PEORIA, ILLS., June 14th, 1887.

"Ammi Baldwin, Esq., cash., Cin'ti, O.

"DEAR SIR: Enclosed find for collection and credit items as stated below. Respectfully yours,

"WESTON ARNOLD, Cashier.

"Return at once if unpaid, giving reasons; protest all paper unless otherwise instructed.

"Terre Haute Dist. Co.....No pro.....$6926 15."

At the time of its transmission it was endorsed:

"Pay Fidelity National Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills.

"W. ARNOLD, Cash."

this endorsement being made by a rubber stamp, which had been forwarded to the German-American Bank by the Fidelity Bank. At the time the German-American Bank transmitted this draft to the Fidelity Bank it credited cash with the full amount of said draft and charged the same to the said Fidelity Bank in its ledger account with said bank as a debit against the said Fidelity Bank. Such entries were made in pursuance of the right which the plaintiff claimed to have under its said contract and the custom of bankers, a custom expressly found to exist throughout the United States, to enter, at the time of transmission, sight paper transmitted to the said Fidelity Bank for collection upon its ledger account with the said Fidelity Bank, and were provisional in that the plaintiff at the time of making said entries intended to exercise the right which it also claimed to have under its said contract with the said Fidelity Bank and the like custom of bankers to cancel each of said entries by a counter-entry in case the draft was not paid. The making of such entries was not communicated to the Fidelity Bank. The draft was also before its said transmission to the Fidelity Bank entered on the remittance register of the German-American Bank as remitted to the Fidelity Bank.

The German-American Bank never at any time drew drafts

upon the Fidelity Bank against collections transmitted to it until it had received from the latter notice of payment thereof. Upon the receipt of this draft on June 15, 1887, no entry representing it was made by the Fidelity Bank in its general ledger account with the German-American Bank, but only on the collection register. Between the Fidelity Bank and the Old National Bank of Evansville, Indiana, (hereinafter called the Old National Bank,) the defendant in the court below, there then existed an arrangement for mutual and reciprocal collection business, and on June 16 the draft was forwarded by the former to the latter bank with this additional endorsement: "Pay Old National Bank, Evansville, Ind., cashier, or order, for collection. Please report by this number, 66,923. Fidelity National Bank, Cincinnati, O. Ammi Baldwin, Cashier." The letter enclosing the draft was in these words:

"CINCINNATI, 6 | 16, 1887.

"Old National Bank, ———, cashier, Evansville, Ind.

"Dear Sir: I enclose for collection and credit as below stated.

"Very respectfully yours,

"AMMI BALDWIN, Cashier.

* * * * *

"Do not hold, but protest against all collections not accepted or paid, unless otherwise instructed by us. Advise by date of letter. Please report collections by numbers."

On June 18 the Old National Bank acknowledged receipt by a postal card as follows:

"EVANSVILLE, IND., June 18th, 1887.

"I have received your favor of the 16th, with stated enclosure.

"Entered for coll.

"Yours respectfully, HENRY REIS, Cashier."

No entry was made by it at the time on its ledger account with the Fidelity Bank, but only in its collection register. On June 18 the draft was forwarded to the First National Bank of Terre Haute, received by the latter on June 20, and paid to

it by the Terre Haute Distilling Company on the afternoon of that day between two and three o'clock. On the same afternoon a letter was written by the First National Bank to the Old National Bank, advising the latter of the payment of the draft, and that its amount had been credited to the account of the latter, which letter was posted at about four o'clock of the same afternoon. The letter was received by the Old National Bank at or about eight o'clock on the morning of June 21. During the month of June, 1887, the banking hours of these banks were from nine o'clock in the forenoon continuously until three o'clock in the afternoon, and the letter having been received before banking hours of the 21st, the amount of the draft was, in accordance with its general practice, entered by the Old National Bank in its account with the Fidelity Bank as a credit to the latter as of June 20, 1887.

On June 21, 1887, the Old National Bank wrote and mailed to the Fidelity Bank a letter, notifying the latter of the payment of the draft and the entry to its credit. This letter was received by the persons in charge of the Fidelity Bank on June 22.

"On June 20, 1887, and for ten days prior thereto, the Fidelity Bank was insolvent, but neither the German-American Bank, the Old National Bank, nor the First National Bank had knowledge of this fact, nor did either of said banks have knowledge of such fact until after the failure of the Fidelity Bank, as hereinafter stated. On the morning of June 20, 1887, Mr. Eugene Powell, bank examiner, came to the Fidelity Bank for the purpose of making an examination. He did so, to a certain extent. In the afternoon of June 20, 1887, the board of directors of the Fidelity Bank had a meeting at the office of the bank, which continued in session until after the close of banking hours. After the close of banking hours the board of directors adjourned, and immediately thereafter Mr. Powell, as bank examiner, took possession of the Fidelity Bank, and that night had the combination of the safe changed, of which combination he took possession. The Fidelity Bank kept its doors open for the transaction of bank-

ing business until the close of banking hours on June 20, 1887, and transacted such banking business as offered until that time. The board of directors of the Fidelity Bank met early in the morning of June 21, 1887, and about 8.30 o'clock, half an hour before the beginning of bank hours, it was announced to its officers that the bank would not open. The Fidelity Bank did not open for business on June 21, 1887, and has never opened for business since June 20, 1887.

"Mr. Eugene Powell, bank examiner, continued in possession of the Fidelity Bank, after taking possession of it in the manner aforesaid, until June 27, 1887, when Mr. David Armstrong was appointed receiver, which position he held at the beginning of this suit.

"No remittance of money or any tangible representative of money representing this draft was ever made by the First National Bank to the Old National Bank or by the Old National Bank to the Fidelity Bank or by the Fidelity Bank or its receiver to the German-American Bank, and the proceeds of this draft never passed between said banks, if at all, otherwise than by the debit and credit entries above mentioned.

"Prior to the institution of this suit the Old National Bank and the First National Bank made a mutual settlement of their collection accounts up to and including the above-mentioned entries representing said draft. The mutual collection accounts between the Old National Bank and the Fidelity Bank have not been settled on account of the insolvency of the Fidelity Bank, but the Old National Bank claims upon such settlement the benefit of the amount of said draft as a debit on its account with the Fidelity Bank.

"On the books of the Fidelity Bank, as they stood at the beginning of this suit, the Fidelity Bank owed the German-American National Bank $17,844.77. On the books of the Fidelity Bank and of the Old National Bank, as they stood at the beginning of this suit, the Fidelity Bank owed the Old National Bank $14,391.57. The above balances are made by debiting the Old National Bank with the amount of said draft and crediting the German-American Bank with the like amount."

Upon these facts judgment was entered in favor of the plaintiff for the amount of the draft and interest, to reverse which judgment the defendant brought this writ of error.

Mr. Alpheus H. Snow, (with whom was *Mr. John M. Butler* on the brief,) for plaintiff in error.

Mr. Charles W. Smith, (with whom were *Mr. Thomas B. Paxton*, *Mr. John W. Warrington*, and *Mr. John S. Duncan* on the brief,) for defendant in error.

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

The Fidelity Bank did not purchase this draft from the plaintiff, and, although it acquired the mere legal title, never became its equitable owner. It received it as an agent, and the endorsement, "for collection, for German-American National Bank of Peoria, Illinois," was notice to it and every subsequent holder that it was forwarded simply for collection. Neither by the express terms of the contract between the plaintiff and the Fidelity Bank, nor by the course of business between them, nor by the custom of bankers, did the receipt of the draft by the Fidelity make it a debtor for the amount thereof, neither would it become such debtor until after collection and possession of the proceeds of the draft, either actually or by settlement of accounts between the parties. *Sweeny* v. *Easter*, 1 Wall. 166; *White* v. *National Bank*, 102 U. S. 658; *Commercial Bank* v. *Armstrong*, 148 U. S. 50.

The draft was collected and the proceeds thereof received by the defendant. While it was at first collected by the First National Bank of Terre Haute, yet it was by that bank credited to the defendant, notice of the credit given, and the amount settled between the two banks in the adjustment of their accounts.

The case, therefore, is presented of a receipt of the proceeds of the draft by the defendant, a sub-agent or agent of the collector, and the non-receipt of the proceeds by the plaintiff,

the owner, and the question is whether the former has discharged itself of liability for the moneys which it has thus received.

The contention of the defendant is that it paid the moneys which it received to the party from which it received the draft, to wit, the Fidelity Bank, which was the agent of the owner. It is not pretended that it ever forwarded to the Fidelity Bank the cash therefor, but the claim is that it credited such amount on the account of the Fidelity Bank, the Fidelity being at the time indebted to it, and that this is equivalent to an actual payment of money. The difficulty with this contention is, that, at the time this credit was entered by the defendant, the Fidelity was not in a condition to receive credit or make any settlement; it was insolvent, and in the custody of the officers of the law. The defendant received no notice of the collection by the Terre Haute bank, made no entry on its books, took no other action looking to a settlement with the Fidelity until the morning of the 21st, and it is found not only that the Fidelity had been insolvent for ten days theretofore, but that on the 20th the bank examiner had taken possession — a possession which he maintained until the appointment of the receiver Armstrong. At the time this examiner took possession the business of the bank stopped, and the authority of the directors and officers ceased. They could not thereafter make any settlement with the defendant to the prejudice of the rights of third parties. If on the morning of the 21st the defendant had brought to the Fidelity Bank in cash the amount which it had collected on this draft and tendered it to the officers of the Fidelity Bank in payment of a balance due to such bank, the latter could not have lawfully received that cash for such purpose, so as to relieve the defendant from its liability to the plaintiff. And, *a fortiori*, if it could not accomplish this by an actual tender of the money, it cannot by a mere entry on its own books. The only way in which the defendant could, after receiving the amount of this check, discharge itself from liability to the plaintiff was by a payment to the Fidelity Bank, its endorser, at a time when the Fidelity Bank was authorized

to receive it for the plaintiff, and the authority to so receive it terminated when it stopped business.

There is nothing in the case of the *Commercial Bank of Pennsylvania* v. *Armstrong*, 148 U. S. 50, which conflicts with this. On the contrary, it was said in that opinion, in reference to a transaction similar to the one before us: "The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity."

Language found later in the opinion, upon which the defendant relies, must be understood in relation to the particular facts of that case. Certain drafts had been received by the Fidelity Bank and forwarded for collection to other banks, and by the latter collected. Of these collections some had been made by banks indebted to the Fidelity, and others by banks to whom the Fidelity was indebted, and the amount of such collections credited on their accounts with the Fidelity. The former were paid by such banks to Armstrong, the receiver of the Fidelity, and after its failure. The suit was one brought by the original owner of these drafts against the receiver, to charge the funds in his hands with a trust in respect to all these collections, and it was adjudged that he was such trustee as to the former, and not as to the latter; the former, because the collection had not been completed by the Fidelity before its failure, and, therefore, the amounts thereof subsequently received by the receiver were received for the benefit of the original holder; whilst, as to the latter, the collection by the Fidelity was complete and the original holder stood simply as a general creditor of the Fidelity for such amounts. There was in respect to these latter collections no question as to the precise time at which the transaction between the Fidelity and the collecting banks was completed, and no suggestion that an entry on the books of the Fidelity, or some other act indicating its assent to the action of the collecting banks in crediting the amount, was necessary to complete the settlement. On the contrary, it was assumed that the settlement between

the Fidelity and its agents was complete at the time of the failure.

It is unnecessary, in this case, to consider what would be the rights of the parties if a settlement between the defendant and the Fidelity Bank had been consummated while the latter was actually engaged in business, although in fact insolvent; for, as stated, no action was taken by the defendant until after the Fidelity had stopped business, and was in possession of the officers of the law. The mere fact that news of the condition of the Fidelity had not reached the defendant at the time it made this entry is immaterial. The condition of insolvency was "disclosed" because it was known to the officers of the law, and action had been taken by them in consequence thereof, and that is all that is necessary. We think the conclusions of the Circuit Court were correct, and its judgment is

Affirmed.

COUPE *v.* ROYER.

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

No. 53. Argued November 7, 1894. — Decided January 7, 1895.

In letters patent No. 77,920, granted to Herman Royer and Louis Royer, May 12, 1868, for "an improved machine for treating hides," the first claim, viz., for "a vertical shaft," and the second claim, viz., for a "grooved weight," are restricted to a shaft and crib in a vertical position, and to a weight operating by the force of gravity aided by pressure; and they cannot be extended so as to include shafts and cribs in a horizontal position, and pressure upon the hides by means of false heads, actuated and controlled by gearing wheels, springs, and a crank.

In jury trials in actions for the infringement of letters patent, it is the province of the court, when the defence denies that the invention used by the defendant is identical with that included in the plaintiff's patent, to define the patented invention, as indicated by the language of the claims; and it is the province of the jury to determine whether the invention so defined covers the art or article employed by the defendant.

The measure of recovery in a suit in equity for such infringement is the gains and profits made by the infringer, and such further damage as the

proof shows that the complainant sustained in addition to such gains and profits; but in an action at law the damages are measured only by the extent of the plaintiff's loss, as proved by the evidence, and, when the evidence discloses the existence of no license fee, no impairment of the plaintiff's market, no damages of any kind, the jury should be instructed, if they find for the plaintiff, to find nominal damages only.

THIS was an action of trespass on the case, brought in October, 1889, in the Circuit Court of the United States for the District of Massachusetts, by Herman and Louis Royer against William Coupe and Edwin A. Burgess for an alleged infringement of letters patent of the United States, No. 77,920, dated May 12, 1868, for an "improved machine for treating hides."

The patent expired on May 12, 1885, and this suit was entered July 14, 1885. The trial resulted, on November 10, 1886, in a verdict for the plaintiffs in the sum of $18,000, and judgment was entered, on November 26, 1889, for the sum of $21,288 damages and $164.25 costs.

The defendants below sued out a writ of error to this court.

Mr. Wilmarth H. Thurston and *Mr. Edmund Wetmore* for plaintiffs in error.

Mr. M. A. Wheaton, (with whom was *Mr. F. J. Kierce* on the brief,) for defendants in error.

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

The plaintiffs describe their invention as a new and improved machine for converting raw hides into leather, of that class which is used for belting, lacings, and other purposes where it is necessary to preserve the native strength and toughness without destroying or impairing the natural fibres or grain of the leather.

The machine is composed of a vertical slotted shaft provided with set-screws, which said shaft is capable of being revolved, by suitable mechanism, first in one direction and then in the other; a circularly-arranged set of pins or rollers set in rings or fixed heads, the same constituting a vertical

cylindrical cage or crib surrounding the vertical slotted shaft; and a weight adapted to be inserted within the crib or cage at its upper end, said weight being provided with a central aperture for the passage of the upper end of the vertical slotted shaft.

The specification, claims, and drawings appear at full length in the report of the case of *Royer* v. *Schultz Belting Company*, 135 U. S. 319, and need not be reproduced here.

The operation of the machine is described in the specification as follows: "The end of the raw hide to be softened is inserted in the slot of the vertical shaft and champed therein by the set-screws. The shaft is then revolved and the hide is wound tightly upon said shaft, forming a roll or coil thereon, and being held in this form by the surrounding cylindrical cage. After the hide has been thus wound upon the shaft, the shaft is revolved in the opposite direction, which has the effect to rewind or recoil the hide upon the shaft in a reverse direction, this reverse winding commencing at the inner end of the coil, the outer circumference of the coil being pressed against the pins or rollers of the surrounding cage. This winding and rewinding of the hide upon the shaft is repeated as many times as may be desired."

The function of the weight is twice described in the specification, as follows: "An iron weight or press is employed for crowding the coil of hide down *after it has received the forward and back action around the shaft*," and "an iron weight, having an opening through its centre for the vertical shaft, and vertical grooves in it to prevent its turning, is placed upon the inside of the pins or rollers, and by pressing upon this weight, the hide is compressed edgewise, *after the forward and backward stretching or pressing is performed lengthwise.*"

One of the matters in dispute in the case is whether the weight is to operate during the winding and rewinding of the hides, or after the revolving of the shaft has ceased. The language of the specification, just cited, does not seem to describe the operation of the weight as cotemporaneous with the winding process, but as successive. Herman Royer, one of the patentees, testified that the weight is to operate while the cylindri-

cal shaft is revolving, and that its use is to regulate or confine the space in which the hides have to move forward and backward.

We are willing to assume, in our disposition of this case, the correctness of the plaintiffs' contention in this particular, and we shall also accept as indisputable the testimony of Herman Royer, that "the machine without the pressure would not effect such a motion and heat as are necessary to loosen the fibres of the hide. It would not work any effect. *The machine would be a failure without the weight.*"

It was further made to appear that, as early as 1863, Louis Royer, one of the patentees, had produced a machine for the purpose of treating hides, the characteristics of which were thus described in the testimony of Herman Royer: "The machine had a horizontal crib; it had a shaft central through its axis; it had bars circularly arranged around that central shaft; it had the same kind of motion to the right or left as the patented machine; it had everything that is in the present machine except the pressure weight." And on cross-examination the following questions and answers appear: "Now, when you and your brother came to the joint business of improving the machine you turned it from a horizontal position to a vertical position, did you not?" Answer. "Yes, sir." "And in that connection you used the weight so that the weight would press down by gravity upon the hides inside the crib; is that correct?" Answer. "The weight and pressure applied to the weight; yes, sir."

The plaintiffs also put in evidence a model of the defendants' machine, and testimony tending to show that defendants' machine consists of a horizontal shaft around which, when in operation, the hides are wound and unwound, of a horizontal crib or cage enclosing the shaft, and of two parts termed "false heads," connected together and adapted to be simultaneously moved toward or from each other, by means of right and left hand screws arranged one at each side of the crib, and engaging with traversing nuts connected with the false heads and with two gear-wheels which intermesh with a third gear-wheel mounted so as to turn loosely on the centre

shaft, said third gear-wheel being provided with a crank, so that by simply turning this crank gear-wheel in one direction or the other, the two false heads will be moved from or towards each other, and so as to diminish or increase the space for holding the coil of hides during the operation of the machine.

The defendants gave evidence tending to show that a machine made in conformity with plaintiffs' specifications and claims would not operate as a successful machine, to which the plaintiffs replied by evidence tending to show that a machine made after the description contained in the patent would and did operate successfully.

Upon the foregoing state of the evidence, the defendants requested the court to charge the jury as follows:

"That the plaintiffs' patent and the claims thereof on its face should be construed as requiring the presence, in the combinations required therein, of a vertical shaft and a correspondingly arranged vertical crib, and that, as it appeared from the evidence, and was undisputed that the machines complained of as used by the defendants were provided with horizontal shafts and horizontal cribs, the jury should return a verdict for the defendants.

"That if they should find as a fact that the substitution by the defendants of a horizontal shaft and a surrounding horizontal crib, in place of a vertical shaft and a surrounding vertical crib, and the substitution of two end-pressure plates, arranged to approach toward or recede from each other by a positive movement, under the control of the operator, in place of the single pressure weight described and shown in the plaintiffs' patent, produced an effect different in kind from the effect produced when a vertical crib and pressure weight is employed in the operation of fulling hides, then it would be their duty to find a verdict for the defendants.

"That a mechanical equivalent for a device shown in letters patent is a thing which performs the same result in substantially the same way, or by substantially the same mode of operation as the device described in the patent, and that if the jury should find from the evidence in the cause that under

this rule the pressure plates controlled as to their movements and as to the degree of pressure to be exerted by them, by right and left-hand screws, at the pleasure of the operator, were not the equivalents, in a horizontal hide-fulling machine, of the pressure weight in a vertical machine, then the jury ought to find a verdict that the defendants do not infringe the second claim of the plaintiffs' patent."

These requests the court answered as follows:

"You will come, however, gentlemen, to another and further consideration, which you must determine upon the testimony which is laid before you. In order to explain that, perhaps, I ought to preface by saying what you are to take this patent to mean; what it is, in brief terms, that it covers. In order that I may bring my observations within the technical requirements, what is the interpretation which you are to put upon this patent? This, gentlemen, is a patent, and the invention of the plaintiffs is an invention which is to be described as follows: It consists of a shaft which contains or has attached to it means by which hides can be fastened to its periphery. Around that shaft and leaving that shaft in the centre are arranged a number of bars which shall contain the roll of hides after it has been wrapped around the central shaft. In the third place there is a plunger or false head or contracting device, whatsoever you may call it — a piece of metal or of wood — which so moves as to reduce the space within which the hides are contained for the purpose of squeezing them sidewise. That is all there is in the machine, and any machine which contains these elements is an infringement of the plaintiffs' device and is a violation of law. I need not say to you that the defendants' machine is such a machine. It contains a central shaft and a device for fastening hides to it. It has other devices also for fastening other hides, but that constitutes no excuse for the use of the one single device for fastening hides. It has the bars surrounding the central shaft and which confine the hides after they are wound about that shaft. Those bars also have conveniences and means for adjusting them inwardly and outwardly. It also has a movable head, which operates to reduce the space in which the hides

are, or, in more popular phrase, to squeeze the hides together, and it also has another corresponding head on the other side, two instead of one.

"There is one difference as to which there is other testimony and to which I have not made reference. There is a difference in the position of the attitude of the machines. One of them is said to be vertical and one of them is said to be horizontal. One of them, as it might be said, stands upright and the other lies down on its side. Now, from that change which the defendant Coupe made, taking this" (the plaintiffs') "machine (for, as I say, we assume that he knew of the existence of it) and conceiving it to be an advantage to lay it down on its side, to make it horizontal instead of vertical, it followed that there must be a change made in the operation of the head or plunger which pressed the hides, because when it stood upright it would remain in its place by its own weight. If it was laid down on its side the weight would be likely to fall out of its place, and the weight of the plunger itself might be an inconvenience instead of a convenience in the operation. It was, therefore, necessary if this machine was to be changed into a horizontal machine, or if, to speak more accurately, the attitude of the mechanism was to be changed, it was necessary to make a different device for the purpose of compressing the hides. That is done in a very simple and ingenious way here by using a comparatively thin false head or plunger and moving it by a screw which moves it forward and back as may be required. Those two changes, therefore, go together, as it were — one is consequence of the other, and they form the most obvious difference to the eye between the two machines. Regarding that change this claim is made by the defendant: He claims that the change results in a radically different method of operation of the two machines. To state it in the language used in the patent law, he claims that there is a difference of function, which means simply that there is a difference in the manner and result of the operation of the two machines caused by laying one of them on its side. You are not to assume, gentlemen, that that is not possible. The change is slight in its general aspect. There is no change in

the structure of the machine — it is simply a change in the attitude of the machines in relation to the plane of the horizon. Nevertheless, you are to consider that changes smaller than that have sometimes resulted in very large differences in the method of operation. You must, therefore, with unprejudiced minds enter upon the consideration of the question, when you retire to your room, whether there be any difference in the operation of these two machines, the one standing vertical or erect, the other standing horizontal or lying upon its side.

"Now, what is the nature of the difference which the defendant claims? He claims that the difference is this: that the machine in a horizontal position will break the hides so that they can be used for useful purposes in the arts, and that the machine standing in a vertical position will not accomplish this work. To use his phrase, the phrase of the patent law, the machine is not operative; or, to use a phrase equally accurate and perhaps more easily comprehended, that this machine will not do the work which it is appointed to do. If that be so, gentlemen, there is not only a radical difference in operation, but there is evidently a defect in the original patent, so that if that claim made by him is true he has two defences, either one of which is a sufficient answer to this case — that is to say, while the machine described by the plaintiff as being a vertical machine will include horizontal machines also, and while it is true that a horizontal machine will infringe this patent for a vertical machine if it appears that the operation of the machine is substantially the same in the one position or the other; on the other hand, you will understand that if it appears that a horizontal machine will work and is operative, and that a vertical machine will not work and is not operative, then you must confine the plaintiff to that interpretation and meaning of his patent which confines him to vertical machines alone.

"It is not necessary for me to elaborate the legal principle contained in this. It would not interest you, and perhaps would tend rather to confuse than to elucidate what I have to say, and I therefore make one statement which, for practical purposes, for your purposes, covers the whole question.

If you find that a machine made with this shaft, crib, and weight, and standing so that the shaft is vertical — that is to say, is upright, will not break hides, will not do the work which it is expected to do — then, in that case, the defendant is entitled to your verdict. If you find that it will do that work, then the plaintiff is entitled to your verdict so far as this question is concerned. You are not to consider, gentlemen, which does it the best; you are not to choose between the two machines; you are not to consider whether one machine makes more trouble than the other, whether one makes work more uniform than the other and more desirable in the market, whether one is better able to perform the work, whether one does it with a less amount of power, whether it is easier in one to load or to unload than in the other, whether the machine is more under the control of the operator in one case than in the other, or whether the crib in one case is more adjustable than in the other. These considerations are of no consequence. To put it more shortly, the question to be determined by you is not which of these machines is the better machine, but simply and solely, will a machine made with a vertical shaft do the work at all? Now, as to that, you must consider the large amount of testimony that has gone in here."

The definition thus put upon the plaintiffs' patent was the following: "It consists of a shaft which contains or has attached to it means by which hides can be fastened to its periphery. Around that shaft and leaving that shaft in the centre are arranged a number of bars which shall contain the roll of hides after it has been wrapped around the central shaft. In the third place there is a plunger or false head, or contracting device, whatsoever you may call it — a piece of metal or of wood — which so moves as to reduce the space within which the hides are contained, for the purpose of squeezing them sidewise."

Having thus defined the plaintiffs' machine, the learned judge added: "That is all there is in the machine, and any machine which contains these elements is an infringement of the plaintiffs' device, and is a violation of law. I need not

say to you that the defendants' machine is such a machine." This instruction must have been understood by the jury as peremptorily directing a verdict for the plaintiffs, so far as the question of infringement was concerned.

It may be thought that the action of the court below, in instructing the jury that, upon the court's construction of the patent and upon the undisputed character of the defendant's machine, the plaintiffs were entitled to the verdict, was inconsistent with its subsequent action, in which the jury were told that " while the machine described by the plaintiffs as being a vertical machine will include horizontal machines also, and while it is true that a horizontal machine will infringe the patent for a vertical machine if it appears that the operation of the machine is substantially the same in the one position or the other, on the other hand, you will understand that if it appears that a horizontal machine will work and is operative, and that a vertical will not work and is not operative, then you must confine the plaintiffs to that interpretation and meaning of their patent which confine them to vertical machines alone. . . . If you find that a machine made with this shaft, crib, and weight, and standing so that the shaft is vertical — that is to say, is upright, will not break hides, will not do the work which it is expected to do — then, in that case, the defendant is entitled to your verdict. If you find that it will do that work, then the plaintiff is entitled to your verdict, so far as this question is concerned. . . . To put it more shortly, the question to be determined by you is not which of these machines is the better machine, but, simply and solely, will a machine made with a vertical shaft do the work at all."

But this apparent inconsistency in the two instructions will disappear if we understand the latter to be based on the suggestion that the plaintiffs' patent would be void if it were without utility. A patented machine that will not do what it is intended to do could not sustain an action against one who was shown to use a successful and operative machine.

While we think that the learned judge was right in regarding the case as one that depended on a construction of the

plaintiffs' patent and on undisputed evidence of the character of the defendants' machine, we yet think that he erred in his definition of the plaintiffs' patent, and in withdrawing the question of infringement from the jury.

The patent calls for, first, "a vertical rotary shaft, with means by which hides can be fastened to its periphery." The learned judge's reading is, "that the invention consists of a shaft with means by which hides can be fastened to it," omitting the term "vertical." The patent calls, in the second place, for "a vertical frame or crib, with vertical pins or rollers." The instruction given was "there are arranged a number of bars which shall contain the roll of hides after it has been wrapped around the central shaft;" again omitting the term "vertical" in connection with the crib, the bars, and the shaft. The plaintiffs' claim, thirdly, is for "an iron weight, having an opening through its centre for the vertical shaft, and vertical grooves in it to prevent its turning, which is placed upon the inside of the pins or rollers, and, by pressing upon this weight, the hide is compressed edgewise, after the forward and backward stretching or pressing is performed lengthwise." The definition given was: "In the third place, there is a plunger, or false head, or contracting device, whatsoever you may call it — a piece of metal or wood — which so moves as to reduce the space within which the hides are contained for the purpose of squeezing them sidewise." This definition again omits the reference to the shaft as a vertical one, and omits the grooves described in the patent as vertical, and erroneously describes what the patent calls "an iron weight" as "a plunger or false head or contracting device," terms not used in the patent, but terms that are used in describing defendants' machine. This part of the definition is also faulty because it describes the weight as "so moving as to reduce the space within which the hides are contained." There is nothing said in the plaintiffs' patent about the weight "moving" or "reducing the space in which the hides are contained," but such language is used to describe the operation of the false heads in the defendants' machine. The function attributed in the patent to this feature is evidently that of

pressure by weight, and not that of moving to and fro, so as to widen or narrow the path through which the hides are to pass.

The importance attributed in the patent to the position of the machine as a vertical one is seen in the fact that the term "vertical" is used no less than ten times, while in the definition of the patent given by the learned judge to the jury the word does not once appear.

That the iron weight and its function are important are shown by the testimony of Herman Royer, wherein he stated that the machine would be a failure without the weight.

The principle of construction which we think applicable to the plaintiffs' patent is that such construction must be in conformity with the self-imposed limitations which are contained in the claims. Such claims are the measure of their right to relief.

Keystone Bridge Co. v. *Phœnix Iron Co.*, 95 U. S. 274, 278, was a case where the manufacture of round bars, flattened and drilled at the eye, for use in the lower chords of iron bridges, was held not to be an infringement of a patent for an improvement in such bridges, where the specification described the patented invention as consisting in the use of wide and thin drilled eye bars applied on edge; and Mr. Justice Bradley, delivering the opinion of the court, said: "It is plain, therefore, that the defendant company, which does not make said bars at all, [that is, wide and thin bars,] but round and cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. . . . But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct, (as they should always be,) the patentee, in a suit brought upon the patent, is bound by it. . . . He can claim nothing beyond it."

So in *Burns* v. *Meyer*, 100 U. S. 671, 672, it was said: "The courts should be careful not to enlarge by construction the claims which the Patent Office has admitted, and which the patentee has acquiesced in, beyond the fair interpretation of its terms." And in *McClain* v. *Ortmayer*, 141 U. S. 419, 425, the principle we are considering was thus expressed: "It is true that, in a case of doubt, when the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but if the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention."

The patentees in the present case having, therefore, chosen to carefully restrict their claims for the shaft and crib to such in a vertical position, and for the weight, to one operating by the force of gravity, aided by pressure, the question to be determined is, whether they can be permitted to extend their claims so as to include shafts and cribs in a horizontal position, and pressure upon the hides by means of false heads, actuated and controlled by gearing wheels, springs, and a crank.

Whether, in thus choosing to restrict themselves to a vertical machine, the patentees were influenced by their knowledge that the prior machine of Louis Royer, which was a horizontal one, had been a failure, or whether, what is more likely, the necessity of adopting the vertical position in order that the iron weight might operate by gravity and simple pressure, dispensing with other instrumentalities, controlled them, is matter of mere conjecture.

It remains only to consider whether the conclusion we have thus reached, and which renders a new trial necessary, should be given to the jury in the form of a peremptory instruction, or whether the question of infringement should be left to the jury to pass on as one of fact.

This court has had occasion, more than once, to reverse the trial courts for taking away from the jury the question of infringement, which they have sometimes done by rejecting

evidence of earlier patents offered to show anticipation, and sometimes by a peremptory instruction that a patent relied on by the defence was or was not infringement of the plaintiff's patent.

Thus in *Tucker* v. *Spalding*, 13 Wall. 453, 455, where an action at law was brought to recover damages for the infringement of a patent for the use of movable teeth in saws, and where the defendant offered in evidence, as covering the subject-matter of the plaintiff's patent, a patent prior in date and invention to that of plaintiff, the action of the court below in rejecting this offer of evidence because, in its judgment, the patent offered did not anticipate the one in suit, was held to be erroneous by this court, and Mr. Justice Miller, speaking for the court, used this language: "Whatever may be our personal opinions of the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all;" and reference was then made to the case of *Bischoff* v. *Wethered*, 9 Wall. 812, 814, as one in which the subject had been fully considered. In the case so referred to the subject was discussed at length, including a review of the English cases, and the conclusion reached was that, in a suit at law involving a question of priority of invention, counsel cannot require the court to compare the two specifications and to instruct the jury, as matter of law, whether the inventions therein described are or are not identical. In expressing the views of the court, Mr. Justice Bradley said: "A case may sometimes be so clear that the court may feel no need of an expert to explain the terms of art or the descriptions contained in the respective patents, and may, therefore, feel authorized to leave the question of identity to the jury, under such general instructions as the nature of the documents seems to require. And in such plain cases the court would probably feel authorized to set aside a verdict unsatisfactory

to itself, as against the weight of evidence. But in all such cases the question would still be treated as a question of fact for the jury, and not as a question of law for the court."

In the case of *Keyes* v. *Grant*, 118 U. S. 25, 36, where the defendant set up a prior publication of a machine anticipating the patented invention, and where there appeared obvious differences between the two machines in the arrangement and relation of the parts to each other, and where experts differed upon the question whether those differences were material to the result, and where the court below instructed the jury to return a verdict for the defendants, this court, reversing the judgment, said, through Mr. Justice Matthews: "Clearly it was not a matter of law that the specifications of the plaintiff's patent and the publication of Karsten, taken in connection with the drawings appended in illustration, described the same thing. . . . In our opinion this was a question of fact properly to be left for determination to the jury, under suitable instructions from the court upon the rules of law, which should guide them to their verdict."

And in the case of *Royer* v. *Schultz Belting Co.*, 135 U. S. 319, which arose upon an alleged infringement of the same patent here in suit, and where the question was chiefly to be determined by a comparison of two machines, this court held that the Circuit Court erred in not submitting to the jury the question of infringement under proper instruction.

The doctrine of the cases is aptly expressed by Robinson in his work on Patents, vol. 3, page 378, as follows: "Where the defence denies that the invention used by the defendant is identical with that included in the plaintiff's patent, the court defines the patented invention as indicated by the language of the claims; the jury judge whether the invention so defined covers the art or article employed by the defendant."

We perceive no error in the comments of the learned judge upon the question whether the plaintiffs' patent described a practically useful machine.

Our conclusion upon this part of the case, therefore, is, that the question of infringement, arising upon a comparison of the Royer patent and the machine used by the defendants, should

be submitted to the jury, with proper instructions as to the nature and scope of the plaintiffs' patent as hereinbefore defined, and as to the character of the defendants' machine.

Besides the differences in the character and operation of the two machines, arising out of their difference in position, and out of the distinctive methods of compressing the hides while undergoing treatment, there are other differences to which the attention of the jury should be called. Thus it is claimed by the defendants that with the slotted shaft of the patented machine the hides can be attached at most at only two points upon the periphery of the shaft, while in the defendants' machines the hides may be attached at numerous points about the periphery of the shaft. As a result of this difference, it is claimed that if a number of hides be attached to the shaft of the patented machine, they must overlie each other at the point of attachment, thereby causing a big bunch at the end; whereas it is claimed that in the defendants' machine, the points of attachment being distributed around the periphery of the shaft, there is instead a series of small bends, resulting in a much more nearly cylindrical coil.

So, too, it is claimed by the defendants that in the patented machine, with the elongated slot, if many hides are to be attached to the shaft, they must necessarily be distributed along the length of the shaft and near the ends thereof, and that, as a result, when the weight is pressed down it is liable to come in contact with the point of attachment of the upper hide and tear it away from its fastening, and this defect, it is claimed, is not found in defendants' machines.

It is true that these minor differences may not be relied on as, of themselves, taking the defendants' machine out of the reach of the plaintiffs' patent, but they are the subject of legitimate consideration by the jury, as part of the evidence upon which they must pass in determining the question of infringement.

Our attention is next directed, by the assignments of error, to the instructions given on the subject of damages. Of course, it will not be necessary for the jury to enter into this inquiry unless they find the question of infringement in favor

of the plaintiffs. But as, from the nature of a trial by jury, the court will be unable to anticipate the conclusion which the jury may reach on that question, explanations will have to be given to the jury as to the measure of damages applicable in such cases.

The evidence upon which the plaintiffs relied tended to show that the defendants had treated, upon their own machines, sixty-six thousand hides. They also called Herman Royer, one of the plaintiffs, who testified that in his opinion there would be a saving of $4 or $5 a hide by using his machine over what it would cost to soften hides by any other method, and that he knew that the difference between the cost of softening the rawhide by mechanical action in his machine and doing the same work by hand or by any other devices known would be more than one dollar a hide.

This was all the evidence offered on the subject by the plaintiffs. The defendant Coupe testified that there was no advantage in the use of the plaintiffs' mechanism, and that he would not take such a machine as a gift.

Upon this evidence the court instructed the jury as follows:

"The course taken by the plaintiffs to show the amount of damages is a proper course. They undertake to show the value of this invention to any person using it, and the law deems it a fair inference that whatever value has been received by the defendants through the use of this invention, so much has been taken from the plaintiffs, and they are entitled to have it restored to them. Upon the amount of those damages you have the testimony, if I remember right, of only one witness. Mr. Royer himself has made an estimation, as he states, of the amount of money which would be saved by the use of this particular mechanism for the performance of this particular operation in the course of the production of rawhide leather. . . . If you believe his testimony to be sound and in accordance with the truth, then you may make up your verdict on that basis, that being, I think, the only testimony in the case as to the amount of damages."

He subsequently added:

"My attention is called to the fact that there is other testi-

mony regarding the amount of damages besides that of Mr. Royer. It is true, no doubt, that the defendant Coupe has testified that there is no advantage in the use of this patented mechanism; that it is not worth anything to him who uses it. His testimony is that it is not worth anything to anybody, and cannot be made to make leather, according to his understanding of it, according to his testimony. Of course, if that be true, it not only reduces the damages to nothing, it is not only conclusive that there should not be any damages at all, but that there should be a verdict for the defendants. So, that what I said before is strictly true, that, assuming that there are to be any damages at all, assuming that the plaintiffs are entitled to a verdict, the only testimony upon the subject of the amount of the verdict is that of Herman Royer."

We cannot approve of this instruction, which we think overlooked the established law on the subject.

The topic is one upon which there has been some confusion and perhaps some variance in the cases. But recent discussion has cleared the subject up, and the true rules have become well settled.

There is a difference between the measure of recovery in equity and that applicable in an action at law. In equity, the complainant is entitled to recover such gains and profits as have been made by the infringer from the unlawful use of the invention, and, since the act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained, in addition to the profits received. At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts — the measure of recovery in such cases being not what the defendant has gained, but what plaintiff has lost. As the case in hand is one at law, it is not necessary to pursue the subject of the extent of the equitable remedy; but reference may be had to *Tilghman* v. *Proctor*, 125 U. S. 137, where the cases were elaborately considered and the rule above stated was declared to be established.

But even in equity the profits which the complainant seeks to recover must be shown to have been actually received by the defendant. As was said in the case just referred to, "the infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits." And in *Keystone Manufacturing Co.* v. *Adams*, 151 U. S. 139, this court reversed the decree of the Circuit Court, because, in assessing the damages, that court based the amount on evidence showing, not what the defendant had made out of the invention, but what third persons had made out of the use of the invention.

It is evident, therefore, that the learned judge applied the wrong standard in instructing the jury that they should find what the defendants might be shown to have gained from the use of the patented invention. Nor, even if the defendants' gains were the measure of their liability, did the evidence justify the instruction, because that evidence tended to show what Royer estimated that the defendants' profits might have been, and not what they actually were.

Upon this state of facts, the evidence disclosing the existence of no license fee, no impairment of the plaintiffs' market, in short, no damages of any kind, we think the court should have instructed the jury, if they found for the plaintiffs at all, to find nominal damages only.

Error is alleged in the instruction of the court as to the duty of the plaintiffs, in order to lay a foundation for the recovery of damages, to give the notice required by section 4900 of the Revised Statutes.

It is claimed that the plaintiffs have neither alleged nor proved that the machines constructed under the patent have been marked as the statute requires; that hence the only

ground upon which they can recover damages is by proof of actual notice of infringement given to the defendants; and that the court erred in instructing the jury that no notice was necessary, and in thus taking away entirely the question whether any actual notice of infringement ever was given.

The plaintiffs contend that this point was not made at the trial; that it was not brought to the attention of the court by any proper request; and that the defendants should have set this matter up either by a plea or in a notice of special matter, so that the plaintiffs could have been prepared to meet the issue with evidence; and they cite *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 801, and *Sessions* v. *Romadka*, 145 U. S. 29, 50, as holding that, in equity cases, notice of such ground of defence ought to appear in the answer, and that it is too late to raise such a question after the case has gone to a master for an account.

But in *Dunlap* v. *Schofield*, 152 U. S. 244, 247, also a case in equity, it was said: "The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article 'patented,' or to the particular defendants by informing them of his patent and of their infringement of it. One of these two things, marking the article, or notice to the infringers, is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him. Whether his patented articles have been duly marked or not is a matter peculiarly within his own knowledge; and if they are not duly marked the statute expressly puts upon him the burden of proving the notice to the infringers, before he can charge them in damages. By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff."

As, then, in the present case, there was evidence in the form of interviews between Royer and Coupe, from which the plaintiffs sought to infer the fact of actual notice, and the defendants offered evidence tending to show that they had never

received any notice, either actual or constructive, of the Royer patent, or of any infringement thereof by them, we think the court ought to have submitted that question to the jury for their decision.

This view, however, is based on the assumption that the provisions of section 4900, Revised Statutes, are applicable to a case where the patentee has not sold any machine, nor licensed others to use his invention, but has chosen to enjoy his monopoly by a personal and sole use of the patented machine. In such a case, if the articles produced by the operation of the patented machine are not themselves claimed as new and patented articles of commerce, there may be a question whether the statute has any applicability. As, however, this cause has, for other reasons, to go back for another trial, and as this suggestion was not discussed in the briefs or at the hearing, we now express no opinion upon it.

The judgment of the Circuit Court is reversed, and the record remanded with directions to set aside the verdict and award a new trial.

MR. JUSTICE BROWN concurred in this opinion on the question of damages only.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* INTERSTATE TRANSPORTATION COMPANY.

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

No. 95. Argued December 3, 1894. — Decided January 7, 1895.

When a bridge is lawfully built over a navigable river within the limits of a State, and is maintained as a lawful structure, its owners may at all times have recourse to the courts to protect it; and any relief which may be granted by the court on such application is not a regulation of commerce.

When a court of equity is satisfied that irreparable injuries may be occasioned to such a structure by careless or wanton action on the part of navigators, the ordinary rule that the court will not act where there

Statement of the Case.

is a dispute about the title or the extent of the legal rights of the parties does not apply, but it may grant relief by injunction before a trial at law. In this case, as the exigency created by the existence of an unusual flood, which was made the principal foundation for the bill, has long since passed away, and as the decree below dismissing the bill reserved the right of the complainant to bring an action for the recovery of its damages, the decree below is amended so that it shall be without prejudice generally, and is otherwise affirmed.

THE Texas and Pacific Railway Company was organized under an act of Congress, approved March 3, 1871, and several supplementary acts. In 1881 it acquired the railroad and franchises of the New Orleans Pacific Railway Company, a corporation of the State of Louisiana. Its main line of railroad extends from New Orleans to El Paso, Texas, and, as part of it, has a bridge costing $300,000 across the Atchafalaya River, which river is wholly within the State of Louisiana. The bridge has a draw of about 253 feet in the span, making a channel on each side of the centre of the draw of about 126 feet. The bridge is a legal structure, and is essential to enable the railway company to perform its public duties.

The Interstate Transportation Company, a corporation of the State of Louisiana, owned and controlled certain steam towboats and barges on the lower Mississippi River and tributaries, and carried on, for hire, the business of towing said barges loaded with coal and other heavy cargoes.

On March 29, 1890, the railway company filed in the Circuit Court of the United States for the Eastern District of Louisiana its bill of complaint against the transportation company. The allegations of the bill substantially were that on February 19, 1890, when the waters of the Atchafalaya River were at an unusually high stage, which condition still continued, the towboat Lambert, owned and controlled by the defendant company, while undertaking to pass through the draw of said bridge, which draw had been duly opened for the passage of the steamer, struck with its tow of barges the bridge seat at the eastern end of the draw, inflicting considerable injuries on the bridge, and threatening its destruction; that said accident was caused by the attempt of the towboat to

carry through said draw upon the unusual flood waters of the river more barges than at one time could be safely and surely handled in such circumstances; that the railway company at once notified the defendant company of the accident and warned it of the danger of such conduct and the manifestly irreparable injury that would come from the same if the bridge should be in anywise disabled; that the officers and agents of the defendant company would make no effort to prevent a repetition of said conduct nor give any assurance that the said conduct and method, which were manifestly tortious and unlawful, would not be repeated; that within the previous week, while the flood waters of the river were still higher and the current still swifter and more dangerous, defendant's towboats had been passing or attempting to pass through said draw with six barges in one tow, threatening to strike and destroy said bridge, and this at a time when none of said towboats have power to control and guide any tow, exceeding two barges, with safety.

The bill further averred that at high water, like that which prevailed at the time of the filing of the bill, it was unlawful, dangerous, and unnecessary for the towboats of the defendant company to pass through the draw with more than two barges in tow; that while the draw is of ample width for all the navigation of the stream, yet that if the defendant company, for its own convenience and profit, undertakes to carry through more than said number of barges, the high water and currents will or may at any moment swing the long tows in a direction across the opening of the draw and tend to strike and destroy the bridge; that the injury thus inflicted could not be compensated by actions for damages at law, nor could the defendant company, owing to the inadequacy of capital, respond in damages for the great loss that would be occasioned by the destruction of the bridge and the consequent suspension of traffic on the line of the railroad; that said high water and violent currents and flood were continuing and might increase and will exist for a long time, and that the towboats of defendant have not the power to safely guide each more than two of said barges through the draw at a time.

The complainant, reserving its claims for pecuniary damages for injuries theretofore or thereafter done, prayed that an injunction might issue restraining and prohibiting the defendant, its officers, agents, and servants, from passing any towboat through the draw of the bridge, at high water, with more than two barges in tow of such towboat, and from in any way striking and injuring said bridge, and that a restraining order might be issued, and that such injunction might be made perpetual.

On the same day that the bill was filed a temporary restraining order was issued. On April 26, 1890, the motion for a preliminary injunction was made and argued, and on May 13, 1890, the injunction was refused, and the restraining order was dissolved, Judge Pardee, the Circuit Judge, filing an opinion.

On June 2, 1890, the defendant company filed a general demurrer to the bill and, after argument, the demurrer was, on January 16, 1891, sustained, and the bill was dismissed without prejudice to complainant's right to institute any action it may have at law. An opinion was filed by Judge Billings, the District Judge.

From this decree an appeal was allowed to this court.

Mr. John F. Dillon for appellant. *Mr. William Wirt Howe* filed a brief for same.

Mr. George A. King for appellee. *Mr. Charles W. Hornor* and *Mr. Guy M. Hornor* were on his brief.

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

In this case the only limitations on the exercise of the power granted to the railway to construct and maintain its bridge, pointed to, are that "the said company shall preserve any water course which its said railway may pass upon, along, or intersect, touch, or cross, so as not to impair its usefulness to the public unnecessarily, . . . and the said company shall not be required to construct a draw in any bridge

over and across any stream or bayou, except streams navigable by enrolled and licensed vessels, and when required by law." And as it appears that the company has constructed a draw of ample width in its bridge over the Atchafalaya River, and as it is not alleged or shown that the bridge as constructed has impaired the usefulness of the river to the public unnecessarily, it follows that the structure must be deemed a lawful one.

The defendant company having elected to stand upon a general demurrer, we must treat the bill as establishing the fact that the bridge, as constructed and maintained, is a lawful structure, and that the same does not impair unnecessarily the usefulness of the river to the public.

We cannot agree with the proposition of the court below and pressed on us here in the argument of the appellees, that the relief asked for is in the nature of a regulation of commerce, such as could only be prescribed by Congress.

If built and maintained as a lawful structure, of importance to the public, the company owning it can at all times have recourse to the courts to protect the same. If injuries have been negligently or wantonly inflicted upon the bridge, an action at law can be maintained against the wrongdoers for the damages suffered; and if such injuries are threatened, and a court of equity can be satisfied that irreparable injuries may be occasioned by careless or wanton action on the part of navigators, a remedy by injunction can surely be had. Nor do we think that, in a case like that presented in the bill, a court of equity would be constrained to refuse relief by injunction till there had been a trial at law. The ordinary rule that courts of equity will not act where there is a dispute about the title or the extent of the legal rights of the parties, until there has been a trial at law, does not apply to a case like the present one.

Nevertheless we do not feel constrained, upon the facts that appear in this case, to reverse the decree below and send the case back for further proceedings on answer and evidence.

Nearly four years have elapsed since the filing of the bill, and the exigency created by the existence of an unusual flood, which was made the principal foundation of the bill, has long

since passed away. To now entertain the bill would be to deal with a state of affairs no longer existing, and which possibly may never recur. The decree dismissing the bill reserved the rights of the complainant to bring an action for the recovery of its damages. The bill does not in terms allege that the defendant company, in towing six barges at once, was doing anything unusual, or out of the course of reasonable navigation. Nor does there appear to have been but a single instance of collision with the bridge in the long period during which it has existed, and in that instance it does not appear, by any allegation in the bill, that the towboat was guiding as many as six barges.

It is argued, however, on behalf of the appellants, that the course of the defendants, in demurring generally to the bill, and of the court in sustaining the demurrer and dismissing the bill, will, as a matter of precedent, leave them in a remediless position; that the decree of the court, particularly when the grounds upon which it was based are considered, would seem to wholly shut the gates of a court of equity against them, no matter how great an exigency might arise.

There is force in this view, and we think the decree dismissing the bill should be without prejudice generally, and not be restricted to saving the complainant's right to bring an action at law only.

Although we think that the appellants are entitled to such an amendment of the decree, yet, as they do not seem to have made any motion to that effect in the court below, when it may be presumed that court would have readily conceded such amendment, and as they have not confined their contention here to that matter, we shall not relieve them from the costs of this appeal.

The decree of the court below dismissing the bill is directed to be amended so that the same shall be without prejudice generally, and is otherwise *Affirmed.*

UNITED STATES *v.* ALLRED.

APPEAL FROM THE COURT OF CLAIMS.

No. 552. Submitted December 3, 1894. — Decided January 7, 1895.

A commissioner of a Circuit Court is an officer of the court, authorized by law, and is entitled to his fees in the following cases when certified by the court as correct:

(1) For entering on warrant the judgment of final disposition of a case, when required by rule of court;

(2) For making transcripts of proceedings, when required by rule of court, to be sent up to court;

(3) For making and certifying copies of subpœnas for marshal to serve on witnesses, when required by rule of court;

(4) For making report to clerk of court and commissioner of internal revenue of cases heard and disposed of under the internal revenue laws, when required by rule of court;

(5) For making entries on the docket in various cases of the name of an affiant, his official position, if any, date of issuing warrant, name of defendant and witnesses, and final disposition of the case, when required by rule of court.

He is also entitled to his fees for administering oaths to deputy marshals to verify their accounts of service, when the regulations of the Department of Justice require such officers to certify on oath that their accounts rendered to the marshal are correct.

THIS was a claim for fees as commissioner of the Circuit Court for the Northern District of Georgia. Appended to the petition was a statement of the items of the petitioner's account. The Court of Claims, upon the evidence, found the facts to be as follows:

1. The claimant, John M. Allred, was a commissioner of the Circuit Court of the United States for the Northern District of Georgia from May 28, 1889, to March 31, 1892, duly qualified and acting.

2. During said period he made up his accounts for services, duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and an order approving the same as being just and according to law was entered of record. Said accounts were then pre-

sented to the accounting officers of the United States Treasury Department for payment. Part was paid, but payment of the items embraced in finding 3 was refused.

3. (1) For entering on warrant the judgment of final disposition of the case, as required by rule of court, one folio each, at 15 cents each, $53.55.

Rule 6 of the Circuit Court requiring this service is as follows: . . . "And, after holding an examination, he must enter in the blank on the back of the warrant his final action, in which, if bound or committed, he shall specify the particular offence or offences for which the party is held."

(2) For making transcript of proceedings in various cases, as required by rule of court, to be sent up to court, at 15 cents per folio, $62.65.

(3) For hearing and deciding on criminal charges in various cases where the proceedings consisted of taking bail and passing on the sufficiency thereof, six days, at $5.00 per day $30.00.

(4) For issuing separate warrants of arrest for certain defendants charged with separate and distinct offences committed at different times and places, at $1.00 each, entering return, 15 cents, and filing, 10 cents, $67.40.

(5) For drawing reports of attendance and mileage of witnesses, and orders for the marshal to pay each witness in duplicate, in excess of 60 cents in each case, and administering oath to witness, as to attendance and mileage, at 10 cents each, $37.00.

(6) For making copy of each subpœna for marshal to serve on the witness, at 10 cents per folio, with certificate, at 15 cents each as required by rule of court, $24.35.

(7) For issuing warrant of commitment of defendants to jail for further examination in default of bail, entering return of marshal, and filing same, at $1.25 each, $5.30.

The jailer would not receive a prisoner without a warrant of commitment, and the marshal had no place to confine the prisoner outside of the jail.

(8) For making report to clerk of court and Commissioner of Internal Revenue of cases heard and disposed of under the

internal revenue laws, as required by rule of court, at 15 cents per folio, $7.20.

(9) For administering oaths to deputy marshals to verify their accounts of service, as required by the Attorney General and accounting officers of the Treasury, at 10 cents each, and drawing jurats to same, at 19 cents, $18.25.

(10) For making entries on the docket in various cases, consisting of name of affiant, his official position, if any, date of issuing warrant, name of defendant and witnesses, and final disposition of case, as required by rule of court, at 15 cents per folio, $43.50.

(11) For filing and entering 131 separate papers filed in various cases, at 10 cents each, $13.10.

(12) For administering oaths to witnesses to testify in various cases, at 10 cents each, $4.40.

Upon the foregoing findings of fact the court determined as a conclusion of law that the claimant should recover, except for item 5 of finding 3, the sum of three hundred and twenty-nine dollars and seventy cents, ($329.70,) for which amount judgment was entered and defendant appealed.

Mr. Assistant Attorney General Dodge and *Mr. Charles W. Russell* for appellants.

Mr. Charles C. Lancaster for appellee.

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

Error is assigned only to the allowance of items 1, 2, 6, 8, 9, and 10 of the third finding.

1. All these items, except the ninth, relate to fees claimed to be authorized by a rule of the court requiring the service to be performed, and, therefore, allowable within the case of *United States* v. *Van Duzee*, 140 U. S. 169, 173. In that case we held, in reference to clerks' fees, that an order of court requiring a service to be performed was sufficient authority as between the clerk and the government for the performance of the service, and for the allowance of the proper fee there-

for. No question is made but that the services in question were performed in obedience to such an order.

A distinction, however, is claimed between the case of a clerk, who is strictly a subordinate officer of the court, and a commissioner, who, it is said, is a separate judicial officer, over whom the court has no control. Acting under the constitutional provision, Art. 2, Sec. 2, authorizing it to vest the appointment of inferior officers in courts of law, Congress provided, as early as 1793, for the appointment by Circuit Courts of "one or more discreet persons, learned in the law, in any district for which said court is holden," for the taking of bail for the appearance of persons charged with crime, which authority, however, was "revocable at the discretion of such court." These officers took the name of "Commissioners," and from time to time their duties were extended by different acts of Congress, until they have become an important feature of the Federal judicial system. The present authority for their appointment is found in Rev. Stat. § 627, which authorizes each Circuit Court to appoint, "in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called 'commissioners of the Circuit Courts,' and shall exercise the powers which are or may be especially conferred by law upon commissioners of Circuit Courts." The authority given to the Circuit Courts by the original act of 1793, to revoke these appointments at the discretion of the court, is not found in the revision, but we held in *Ex parte Hennen*, 13 Pet. 230, that in the absence of a law fixing the tenure of an office, and of any statutory provision as to the removal of the officer, the power of removal was incident to the power of appointment. A similar construction has been given in other cases. *Blake* v. *United States*, 103 U. S. 227; *In re Eaves*, 30 Fed. Rep. 21.

The duties of these officers are prescribed by law, and they are, in general, to issue warrants for offences against the United States; to cause the offenders to be arrested and imprisoned, or bailed, for trial, and to order the removal of offenders to other districts, (Rev. Stat. § 1014;) to hold to

security of the peace and for good behavior, (§ 727;) to carry into effect the award or arbitration, or decree of any consul of any foreign nation; to sit as judge or arbitrator in such differences as may arise between the captains and crews of any vessels belonging to the nations whose interests are committed to his charge; and to enforce obedience by imprisonment until such award, arbitration, or decree is complied with, (§ 728;) to take bail and affidavits in civil causes, (§ 945;) to discharge poor convicts imprisoned for non-payment of fines, (§ 1042;) to take oaths and acknowledgments, (§ 1778;) to institute prosecutions under the laws relating to crimes against the elective franchise, and civil rights of citizens, and to appoint persons to execute warrants thereunder, (§§ 1982 to 1985;) to issue search warrants authorizing internal revenue officers to search premises, where a fraud upon the revenue has been committed, (§ 3462;) to issue warrants for deserting foreign seamen, (§ 5280;) to summon masters of vessels to appear before him and show cause why process should not issue against such vessel, (§ 4546;) to issue warrants for and examine persons charged with being fugitives from justice, (§§ 5270 and 5271,) and to take testimony and proofs of debt in bankruptcy proceedings, (§§ 5003 and 5076.)

While their duties are thus prescribed by law, and while they are, to a certain extent, independent in their statutory and judicial action, there is no law providing how their duties shall be performed; and so far as relates to their administrative action, we think they were intended to be subject to the orders and directions of the court appointing them. As was said by this court in *Griffin* v. *Thompson*, 2 How. 244, 257, "there is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process. Without this power courts would be wholly impotent and useless." While no express power is given over these officers by statute, their relations to the court are such that some power of this kind must be implied. Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to its supervision and control.

What shall be the nature of the requirements in each particular case, must be left largely to the discretion of the court. Certainly we cannot presume that the court will abuse its discretion, or will act otherwise than is deemed conducive to the public good.

As the items in question were approved by court, they are presumptively correct, *United States* v. *Jones*, 134 U. S. 483, and the Court of Claims did not err in allowing them.

2. This ruling covers all but the 9th item, "for administering oaths to deputy marshals to verify their accounts of service, as required by the Attorney General, and the accounting officers of the Treasury."

In the case of *United States* v. *McDermott*, 140 U. S. 151, we held a commissioner and chief supervisor of elections to be entitled to fees for drawing affidavits of supervisors as to the actual performance of the services for which compensation was claimed by them, and for administering the oath and drawing the jurat to such affidavits, upon the ground that the Attorney General required these affidavits for the protection of the government, and that it was no more than right and just that it should pay for them. So also in *United States* v. *Van Duzee*, (140 U. S. 169, 171, item 3,) we held that where there was an express act of Congress requiring clerks, marshals, and district attorneys to render their accounts to the court, and to prove in open court by oath, to be attached to such account, that the service had been actually and necessarily performed, such officer had performed his duty by rendering his account in proper form to the court with proper affidavit or oath, and was not further concerned with the method of verification adopted by the government for its own convenience, and was not liable for the expense of entering the orders of approval of such accounts.

As the regulations of the Department of Justice require deputy marshals to certify on oath that the accounts rendered to the marshal are correct, we think this case is controlled by those above cited, and that the court committed no error in allowing the item.

The judgment of the court below is, therefore, *Affirmed.*

POTTS *v.* CREAGER.

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

No. 94. Argued November 23, 1894. — Decided January 7, 1895.

The machine patented to Clayton Potts and Albert Potts by letters patent No. 322,393, issued July 14, 1885, for a new and useful improvement in clay disintegrators, and the machine patented to them by letters patent No. 368,898, issued August 23, 1887, for an improvement upon the prior patent, contained new and useful inventions, and the letters patent therefor are valid, and are infringed by the machines manufactured and sold by the defendants in error.

The cases treating of letters patent for new applications of old devices considered, and as a result of the authorities, it is *held* that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it *may* involve an exercise of the inventive faculty — much depending upon the nature of the changes required to adapt the device to its new use.

This was a bill in equity by C. & A. Potts & Co., an Indiana corporation, against the firm of Jonathan Creager's Sons, of Cincinnati, for the infringement of patent No. 322,393, issued July 14, 1885, to Clayton Potts and Albert Potts for a clay disintegrator; and also of patent No. 368,898, issued August 23, 1887, to the same inventors for an improvement upon the prior patent. A third patent to George Potts, No. 384,278, was originally included in the bill, but by stipulation between the parties all reference to this patent was cancelled, and the bill treated as if formally amended by alleging infringement of the first two patents only.

In the first patent, No. 322,393, the patentees stated the object of their invention to be "to disintegrate the clay by means of a revolving cylinder, which shall remove successive portions from a mass of clay which is automatically pressed against the cylinder."

This was accomplished by a cylinder containing a series of steel bars, fitted into longitudinal grooves in the periphery of

the cylinder, where they were secured by flush screws at each end, by means of which they were adjusted, so as to present a sharp corner, projecting above the surface of the cylinder. Opposite the cylinder was a strong vibratory plate mounted on a shaft, so as to swing in its bearings, by the aid of an eccentric wheel. The opposed sides of the cylinder and the upper and central portions of the plate formed a trough, one side of which approached and receded from the other at intervals, and which had at the bottom a narrow opening of constant width. In the operation of the machine, the plate was swung back, so as to leave as large an opening as possible, and the moist untempered clay was thrown into the trough between the cylinder and the upper portion of the plate. By a rapid revolution of the cylinder, successive portions of the clay were removed from the mass, carried through the narrow opening by means of the scraping bars, and at the same time the upper portion of the plate moved slowly toward the cylinder, thus keeping the mass of clay in close contact with the cylinder, as successive portions were removed.

The only claim alleged to be infringed was the sixth, which reads as follows:

"6. In a clay disintegrator, the combination with cylinder A, having a series of longitudinal grooves, of the scraping bar *c*, and adjustably secured in said grooves for the purpose specified."

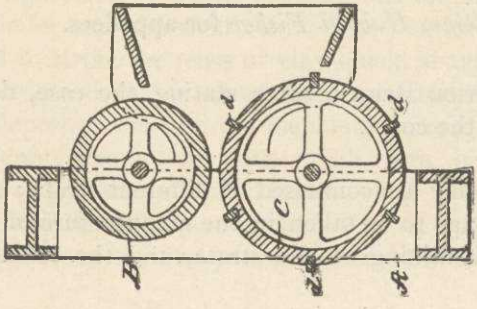
In the second patent, No. 368,898, which was for an improvement upon the first, there was substituted in lieu of the swinging plate, shown by the first patent, as coöperating with the revolving cylinder, a plain cylinder set opposite the cutting cylinder, and revolving therewith in close proximity, so that the raw clay might be fed, shredded, and discharged in an even and continuous manner, in readiness to be taken directly to the pug or other mill. The patentees further stated in their specification:

"The machine shown in our letters patent No. 322,393 was provided with a swinging or vibrating plate to coact with the cutting cylinder in effecting the shredding of the clay which was fed between them. In such machine the abutting surface

of the vibrating plate furnished a rest or bearing for the clay in presenting the same to the action of the cutter knives. This abutting surface was limited in extent and unchanging in position, so that it became rapidly worn. By substituting the revolving roll for the vibrating plate, this objection is greatly lessened. The roll constantly presents new surfaces to the cutters, so that the wear is even and regular throughout its circuit. If any inequalities exist in the roll at the outset these become rapidly reduced, so that by use the cylinder wears more and more true, and acts thus with constantly better effect. Aside from cheapness in construction, the revolving roller or cylinder machine will work wet or sticky clays with perhaps one-third of the power necessary in treating such clays in the vibratory-plate machine. Such plate tends constantly to crowd or squeeze the passing clays, whereas the revolving roll yields continuously, so that clogging is less apt to occur at the same time that the clay is finely and evenly shredded, the cutter cylinder moving, by preference, more rapidly than the companion feed-roll in order to accomplish this effect.

"Prior to our invention it has been very common to employ in clay mills, sugar mills, and the like a set of rolls between which the material passed as the rolls were revolved; but in such machines the operation of the rolls was merely to break up the clogs of clay and squeeze or crush the same, whereas, by our invention the clay is positively cut into fine shreds or clippings in much better condition to be tempered and moulded than by the old forms of disintegrating machines."

The following drawing illustrates the main features of the machine, so far as the same are material to the present case:



Defendants were charged with infringing the first and second claims of this patent, which read as follows:

"1. In the supporting frame of a clay disintegrator, a rotating cylinder longitudinally grooved and carrying cutting bars in and projecting beyond the grooves, in combination with a smooth-faced rotating cylinder adapted to carry and hold the clay against the cylinder having the cutting bars thereon, which latter cut or shred the clay and pass the same between the cylinders, substantially as set forth.

"2. In clay disintegrators, the combination with the main supporting frame and with a rotating cylinder fixed therein and having longitudinal cutting bars projecting beyond the face thereof, of a positively-revolving companion cylinder fixed opposite thereto in said frame and having a smooth face or surface, with which said cutting bars directly coöperate to shred or clip the clay as the same is fed by and passed between said cylinders, substantially as described."

The answer denied any patentable novelty in these patents, in view of the prior art as shown by numerous earlier patents, to which reference was made; and also denied infringement, alleging that defendants were manufacturing clay pulverizers under authority of patents granted to Jonathan and Harry M. Creager in 1888.

The case came on for hearing upon pleadings and proofs, and the court directed a decree dismissing the bill. 44 Fed. Rep. 680. From this decree plaintiff appealed to this court.

Mr. Chester Bradford and *Mr. Ernest W. Bradford* for appellants.

Mr. William Hubbell Fisher for appellees.

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

Beds of clay are composed of different strata; and the first step necessary to be taken in the manufacture of such clay is a thorough mixing of the strata, and the reduction of the

clay to a suitable condition. Otherwise, the product will contain laminations, will shrink unevenly and check in burning, scale or peel off in use, and be less valuable than products made of clays which are first thoroughly mixed and tempered, and reduced to a homogeneous mass before being manufactured into the product. Prior to the Potts inventions various methods seem to have been employed to secure this result. The clay had been sometimes spaded up in the autumn, subjected to the action of the frost during the winter, and then to the operation of the old-fashioned grinding pit. A mud-wheel had also been used. The "soak pit" was another means used to accomplish the same result — the clay being deposited in a pit of water and allowed to remain until the soaking process had reduced it to the desired condition. These methods were slow and expensive. Both grinding machines and crushing rolls had been adopted in comparatively recent years. Their action was simply to crush the clay, the different strata being pressed together and made more compact, and the clay discharged from the rolls in cakes or sheets, a condition that made the tempering very difficult, as the clay thus treated would not readily receive or absorb the water.

The object of the Potts inventions was not to crush the clay, as had been previously done, but to disintegrate and pulverize it, leaving it in a loose condition, fitted to absorb the water readily. Their machines consisted substantially of a cylinder moving at a high speed, having longitudinal bars fixed in its periphery with sharp projecting corners, and a fixed abutment in close proximity thereto — in the first patent a swinging plate — in the second a smooth cylinder — and a positive feeding device by which the clay was forced between the main cylinder and the abutment. The longitudinal bars thus operated to strike the mass of clay quick, sharp blows in rapid succession, and cut or shred small portions therefrom, which were deposited beneath the machine, thoroughly mixed in their different strata, and with rough, torn, or ruptured edges — a condition best adapted to receive or absorb water, and be easily and thoroughly tempered.

The only feature of the first patent material to be considered

is the cylinder described in the sixth claim as a cylinder "having a series of longitudinal grooves, of the scraping bars *c*, adjustably secured in said grooves, for the purpose specified."

This cylinder is alleged to have been anticipated in devices shown in eight prior patents, each of which will be briefly mentioned.

1. A patent of 1865, to Robert Butterworth, for an improvement in machines for grinding apples, exhibits a cylinder with cutting knives or blades on its periphery. These knives have serrated or toothed edges, which form chisel-shaped cutting projections, and are provided with means for adjustment so as to protrude more or less beyond the periphery of the cylinder. When the cylinder is rotated, the apples are cut or ground by the knives between the cylinder and a plate somewhat similar to the swinging plate of the first Potts patent, provided with springs adapted to throw the plate back, whenever any stones or hard foreign substances have passed through the machine. While these knives are set upon the periphery of the cylinder in much the same way as the scraping bars of the Potts patents, it is really the only point of resemblance between the two devices. The Butterworth patent could not possibly have been used as a clay disintegrator without changes which would involve more or less invention.

2. A patent granted in 1880, to one Ennis, exhibits a machine for preparing paper pulp, and consists of a revolving cylinder armed with longitudinal knives, and a stationary plate also armed with knives, mounted beneath it in close proximity thereto. Rags fed between the revolving and stationary knives are thus cut in pieces. The reasons given why the Butterworth patent does not anticipate the Potts inventions apply with equal force to this.

3. A patent granted in 1866 to one Frost exhibits another grinding cylinder for paper engines, and consists of a skeleton cylinder armed with sharp cutting blades, secured adjustably, so as to be moved out from the axis of the cylinder, as they wear. The cylinder is manifestly inapplicable to the disintegration of clay, and nothing besides the cylinder is shown.

4. A patent to one Van Name, granted in 1884, shows a roller for grinding mills, provided with blades arranged in longitudinal grooves around the surface parallel with the axis. These blades are made of hardened steel, and of soft iron, hardened paper or wood, placed alternately with the steel blades. The surface of the roller is practically smooth, except that in use, the soft material will wear more rapidly than the hard. This results in maintaining a corrugated roller until the strips are worn out. It can be of no possible service to the defendant in this connection.

5. The patent issued in 1869 to one Peabody for a cotton-seed huller also exhibits a rotary cylinder armed with knives set in grooves, each having a chisel-shaped cutting edge, and adjustable for the purpose of increasing or diminishing the cut. It is evidently not adapted to the working of clay.

6. The same remark may be made of the patent to Mayfield of 1871 for a grinding mill, such as are adapted for general use among farmers. It also consists of a cylinder provided with knives or plane bits set in longitudinal grooves. These knives are also adjustable.

7. A patent to J. W. Smith, granted in 1881, is for an apparatus for preparing wheat for grinding, in which a cylinder is employed similar to that of the Mayfield patent, with a series of plane bits projecting from the periphery. These plane bits are adjustably bolted by screws and slots within the cylinder, while their cutting edges protrude from slots outwardly from the rim of the cylinder. They do not differ in principle from the knives of Peabody and Mayfield.

8. A patent to one Rudy granted in 1875 for an improvement in clay pulverizers is the only one which is used in connection with the preparation or manufacture of clay, and consists of a pulverizing roller in combination with separate concave springs, or an elastic bed for supporting the clay while the roller revolves therein, after which it falls through a sieve and descends to a second cylinder, and then to a third. The patent does not describe distinctly how the rollers are made, but they would seem to be fluted, and cast in a series of sections. The process employed seems to have been rather

a grinding than a disintegrating process, and it would seem that such a machine would be inoperative except perhaps where the clay was dry and of light consistency. The cylinder evidently operates upon a wholly different principle from that of the Potts patents.

Other patents are shown bearing a greater or less resemblance to these, but generally used for wholly different purposes, such as for straw cutters, machines for pressing tobacco, pulp engines, peat machines, feed boxes for roller mills, and machines for removing hair from hides. So far as they are used for working clay, they would appear to differ radically in principle from the Potts patent. An exhibit much relied upon, known as the Creager Wood Polishing Machine, shows a cylinder, provided on its periphery with a series of projecting strips or bars of glass, not differing materially in form from plaintiffs' scrapers, and like them fitted into longitudinal grooves. The machine was used for polishing boards, which were run between the cylinder and a support and pressure roller journalled underneath, and connected with an automatic adjustable contrivance. Had this machine been used for an analogous purpose, it would evidently have been an anticipation of the Potts cylinder, since the substitution of steel for glass strips would not of itself have involved invention. This device was constructed in 1874, was used for only half an hour when by an accident several of the scrapers or polishers were broken, and before others could be moulded the building took fire and burned down. That it was not considered a success is evident from the fact that the machine was never reconstructed, but in 1878 Creager took out a patent for a similar machine, in which a *smooth* or corrugated roller of wood, glass, bone, ivory, or metal was the distinctive feature. In short, the machine of 1874 appears to have been merely an abandoned experiment.

As already stated, the second Potts patent is for the combination of the cylinder described in the first patent with another smooth-faced rotating cylinder, adapted to carry and hold the clay against the first cylinder, which cuts and shreds it as it passes between them. It seems that the swinging plate,

described in the first patent as coacting with the cutting cylinder in shredding the clay, was limited in the extent of its cutting surface, and was unchangeable in position, so that it became rapidly worn. To obviate this difficulty a revolving roller was substituted for the plate. As this roller constantly presented a new surface to the cutter, the wear was even and regular over its entire circumference. If any inequalities existed in the roller at the outset they became rapidly reduced, so that by use the cylinder constantly wears truer, and thus cuts with better effect. There was also an advantage in greater cheapness of construction, and in the ability of the roller to work in wet and sticky clays, with much less power than was necessary in treating such clays with the vibratory plate.

The employment of two parallel cylinders to coöperate in the performance of a certain task is so common and well known that the court may take judicial notice of such examples as are found in the ordinary clothes wringer, fluting rollers, straw cutters, printing presses, paper manufacturing machines, and grinding mills of various kinds. Indeed, this combination of two rollers had been before used for the purpose of grinding and crushing clay, as shown in a patent to Alexander, granted in 1872, wherein the clay was passed between double spiral-toothed grinding and crushing rollers, and then between plain, cylindrical rollers, and in the patent to Alsip and Drake of June 30, 1885, which exhibits a fluted or corrugated cylinder in combination with a smooth-faced companion cylinder, between which the clay is passed and crushed, though not disintegrated. In view of these devices it is too clear for argument that the Potts would not be entitled to a patent simply for passing the clay between two grinding or crushing cylinders, and it is at least open to doubt whether, in view of the first patent, there is any novelty in substituting a smooth-faced roller for the swinging plate of the first patent. But, as the sixth claim of the first patent covers only the cylinder, the second patent may be read in connection with it to show what the machine was as completed. The question whether the second patent was anticipated by the first is not presented by this record.

What, then, did the patentees do? They took the cylinder shown in the Creager wood-polishing exhibit, removed the glass bars, and substituted bars of steel; provided it with an abutting surface in the form of a revolving roller, and used it for a totally distinct and different purpose. Putting aside, for the purposes of this discussion, the fact that the Creager cylinder was an abandoned experiment, did this involve invention? Certainly, if this exhibit does not anticipate, none of the others do. The answer to this requires the consideration of the often-recurring question, which has taxed the ingenuity of courts ever since the passage of the patent acts, as to what invention really is. When a patented device is a mere improvement upon an existing machine, and the case is not complicated by other anticipating devices, the solution is ordinarily free from difficulty. But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries; what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use — particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him; but the person who has taken his device and, by improvements thereon, has adapted it to a different industry, may also draw to himself the quality of inventor. If, for instance, a person were to take a coffee-mill and patent it as a mill for grinding spices, the double use would be too manifest for seri-

ous argument. So, too, this court has denied invention to one who applied the principle of an ice-cream freezer to the preservation of fish. *Brown* v. *Piper*, 91 U. S. 37; to another who changed the proportions of a refrigerator in such manner as to utilize the descending instead of the ascending current of cold air, *Roberts* v. *Ryer*, 91 U. S. 150; to another who employed an old and well-known method of attaching car trucks to the forward truck of a locomotive engine, *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490; and to still another who placed a dredging screw at the stem instead of the stern of a steamboat, *Atlantic Works* v. *Brady*, 107 U. S. 192. In *Tucker* v. *Spalding*, 13 Wall. 453, the patent covered the use of movable teeth in saws and saw plates. A prior patent exhibited cutters of the same general form as the saw teeth of the other patent, attachable to a circular disk, and removable as in the other, the purpose of which patent was for the cutting of tongues and grooves, mortices, etc. The court held that if what it actually did was in its nature the same as sawing, and its structure and action suggested to the mind of an ordinarily skilful mechanic this double use to which it could be adapted without material change, then such adaptation to a new use was not new invention, and was not patentable.

Upon the other hand, we have recently upheld a patent to one who took a torsional spring, such as had been previously used in clocks, doors, and other articles of domestic furniture, and applied it to telegraph instruments, the application being shown to be wholly new. *Western Electric Co.* v. *La Rue*, 139 U. S. 601. So, also, in *Crane* v. *Price*, Webster's Pat. Cas. 409, the use of anthracite coal in smelting iron ore was held to be a good invention, inasmuch as it produced a better article of iron at a less expense, although bituminous coal had been previously used for the same purpose. See also *Steiner* v. *Heald*, 6 Exch. 607.

Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made

available in another, as would be necessary to create the device *de novo*. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practised eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one. As was said by Mr. Justice Bradley, in *Loom Company* v. *Higgins*, 105 U. S. 580, 591: "Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention."

As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one, that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use, but if the relations between them be remote, and especially if the use of the old device produce a new result, it *may* at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use.

Applying this test to the case under consideration, it is manifest that, if the change from the glass bars of the Creager Wood Exhibit to the steel bars of the Potts cylinder was a mere change of material for the more perfect accomplishment of the same work, it would, within the familiar cases of *Hotchkiss* v. *Greenwood*, 11 How. 248; *Hicks* v. *Kelsey*, 18 Wall. 670; *Terhune* v. *Phillips*, 99 U. S. 592, and *Brown* v. *District of Columbia*, 130 U. S. 87, not involve invention. But not only did the glass bars prove so brittle in their use for polishing wood that they broke and were dis-

carded after a half an hour's trial, but they would undoubtedly have been wholly worthless for the new use for which the Potts required them. Not only did they discard the glass bars, and substitute others of steel, but they substituted them for a purpose wholly different from that for which they had been employed. Under such circumstances, we have repeatedly held that a change of material was invention. *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486; *Goodyear Dental Vulcanite Co.* v. *Davis*, 102 U. S. 222. None of the cylinders to which our attention has been called resembled the Potts cylinder so closely as does this. None of them were used for the purpose of disintegrating, as distinguished from crushing or grinding clay. The result appears to have been a new and valuable one—so much so that, within a short time thereafter, defendants themselves obtained a patent upon a machine of their own to accomplish it. As we said in *Smith* v. *Goodyear Dental Vulcanite Co.*, 93 U. S. 486, and *Magowan* v. *New York Belting Co.*, 141 U. S. 332, 343, where the question of novelty is in doubt, the fact that the device has gone into general use, and displaced other devices employed for a similar purpose, is sufficient to turn the scale in favor of the invention. Our conclusion is that the patents in question are valid.

The question of infringement presents less difficulty. Defendants' machine, in its construction and operation, is substantially the same as plaintiffs'. Instead, however, of casting the shredding roller with a solid face, forming longitudinal grooves therein, and fixing the steel bars in the grooves, defendants cast the cylinder in the form of a skeleton or spider, the knives being respectively fastened to the several arms projecting from the hub, one knife to each arm, and forming the periphery by filling in metal plates between the knives. The cylinder, when its numerous parts are bolted together, is a perfect roll with a solid face, having cutting bars projecting from the slots or grooves thus formed, and adjustably secured therein by means of bolts passing through them. The operation is the same as that of the Potts machine, and it accomplishes practically the same result by practically the same means.

Defendants, in their trade circular advertising their own machine, state: "Unlike the ordinary roller process, the action of the disintegrator is to remove small portions, by cutting from the clay fed into the hopper on the same principle as shaving and whittling, and does not roll the clay into sheets, thus making it unfit for proper manipulation. The past season we have put out many of these machines in difficult clays, and made it an obligation to work the clay both wet and dry, and each machine has done its work well and to the entire satisfaction of the purchasers." This is a frank and apparently a just tribute to the merits of the plaintiffs' invention, as well as a distinct admission that their own machine accomplishes the same result.

The decree of the court below is, therefore,

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

CAMPBELL *v.* HAVERHILL.

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

No. 87. Argued November 21, 22, 1894. — Decided January 7, 1895.

Where a party excepts to a ruling of the court, but, not standing upon his exception, elects to proceed with the trial, he thereby waives it.

The statutes of limitation of the several States apply to actions at law for the infringement of letters patent.

THIS was an action at law for the infringement of letters patent No. 42,920, issued May 24, 1864, to James Knibbs for an improvement in fire-engine pumps, of which patent plaintiffs were the assignees. The patent expired May 24, 1881. The action was begun May 20, 1887, in the name of Ruel Philbrook and several others, among whom was Christopher

Counsel for Plaintiff in Error.

C. Campbell, the plaintiff in error, claiming to be at different times assignees of the patent and of claims for infringements of the same.

Defendant pleaded among other things that "the cause of action mentioned in the plaintiffs' declaration did not occur within six years before the suing out of the plaintiffs' writ."

Upon the trial, the plaintiffs introduced evidence to show that Philbrook, by assignments, had received all the title, as assignee, held by the several assignors to him during the life of the patent, and claimed the right to proceed in one suit in the name of all his prior assignors.

The court ruled that the action could not be maintained, and that Philbrook could not sue in the name of all the assignors, but only in the name of the party or parties who held the entire title to the patent in suit for the time being.

To this ruling the plaintiff Philbrook excepted, and his exception was then and there allowed; and thereupon, by leave of the court, the plaintiff, for the purposes of that trial, discontinued as to all the plaintiffs named in the writ, except Christopher C. Campbell, and proceeded in his name. It was admitted for the purposes of the trial that the entire title in the patent vested in Christopher C. Campbell, individually or as trustee, from the 10th day of October, 1877, to the 20th day of December, 1880, and for the purposes of the trial no claim for damages was made in behalf of said Campbell after December 20, 1880.

The defendant then asked the court to direct a verdict for the defendant on the ground that the action was barred by the statute of limitations of the Commonwealth of Massachusetts, as all claims for action under the admission terminated December 20, 1880, and the writs were dated May 20, 1887, and were served on the 23d day of May, so that more than six years had elapsed. The court acceded to this view, decided that the Massachusetts statute of limitations was a defence to the suit, and directed a verdict for the defendant. Whereupon plaintiff Campbell sued out this writ of error.

Mr. Harvey D. Hadlock for plaintiff in error.

Mr. Frederick P. Fish, (with whom was *Mr. W. K. Richardson* on the brief,) for defendant in error.

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

1. Although the plaintiffs upon the trial excepted to the ruling of the court that Philbrook could not sue in the name of all the assignors, but only in the name of the party or parties who held the title to the patent for the time being, they did not stand upon such exception, but elected to discontinue as to all the plaintiffs except Campbell, and proceeded in his name. We think the plaintiff must be held to abide by his election, and to have waived the first error assigned by him. We have repeatedly held that, where a party upon a trial excepts to a ruling of the court, but does not stand upon such exception, and acquiesces in the ruling and elects to proceed with the trial, he thereby waives his exception. *Grand Trunk Railway* v. *Cummings*, 106 U. S. 700; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527; *Robertson* v. *Perkins*, 129 U. S. 233; *Columbia & Puget Sound Railroad* v. *Hawthorne*, 144 U. S. 202.

These were all cases in which the defendant moved at the conclusion of the plaintiff's case to take the case from the jury, and upon the court refusing, acquiesced in the ruling and introduced testimony in defence. But in *United States* v. *Boyd*, 5 How. 29, there was a demurrer to a rejoinder, which was sustained by the court below, and the defendant by leave of the court filed an amended rejoinder, and went to trial. Upon writ of error defendant asked this court to revise the judgment of the court below in sustaining the demurrer to the original rejoinder, but it was held that the withdrawal of the demurrer, and going to issue upon the pleading, operated as a waiver of the judgment. "If," said the court, "the defendants had intended to have a review of that judgment on a writ of error, they should have refused to amend the pleadings, and have permitted the judgment on the demurrer to stand." To the same effect are *Cook* v.

Castner, 9 Cush. 266, in which the plaintiffs voluntarily changed their form of action, and in the appellate court attempted to show that the original action had been properly begun; *Brown* v. *Saratoga Railroad*, 18 N. Y. 495, wherein the defendant's demurrer to the complaint was overruled with leave to withdraw the demurrer and put in an answer, which was done, and the court said: "When a pleading is amended, the original pleading ceases to be a part of the record, because the party pleading, having the power, has elected to make the change;" *Campbell* v. *Wilcox*, 10 Wall. 421, wherein this court held that the filing of a plea to the merits after a demurrer was overruled, operated as a waiver of the demurrer. To the same effect are *Clearwater* v. *Meredith*, 1 Wall. 25, 42; *Aurora City* v. *West*, 7 Wall. 82, 92; *Young* v. *Martin*, 8 Wall. 354; *Marshall* v. *Vicksburg*, 15 Wall. 146; *Stanton* v. *Embrey*, 93 U. S. 548.

These rulings apply to this case, and render it unnecessary for us to consider the alleged error of the court below in holding that the action could not be maintained by Philbrook.

2. The case then is reduced to the naked question whether the statutes of limitations of the several States apply to actions at law for the infringement of patents.

The question has arisen in a large number of cases, and the Circuit Courts have been nearly equally divided. This is the first time, however, that it has been directly presented to this court. It was most carefully considered by the Circuit Court of Massachusetts, holding in favor of the applicability of the statute, in *Hayden* v. *Oriental Mills*, 15 Fed. Rep. 605, and by the Circuit Court of Connecticut, in *Brickill* v. *City of Hartford*, 49 Fed. Rep. 372, against it. In view of this conflict of opinion, which seems to be wholly irreconcilable, we shall dispose of it as an original question.

Prior to 1870, no Federal statute existed limiting the time in which actions for the infringement of patents must be brought. In the general patent act of that year, however, a clause was inserted in section 55 to the effect that "all actions shall be brought during the term for which the letters patent shall be granted or extended, or within six years

after the expiration thereof." 16 Stat. 206, c. 230. This clause was omitted, however, in the compilation of the Revised Statutes, and therefore expired after the passage of the Revision, June 22, 1874 — section 5596 enacting that all acts prior to December 1, 1873, any portion of which was embraced in any section of the revision, should be repealed. But under section 5599, the statute was left in force as to all rights of action in existence at the date of its repeal. It follows that the Federal statute of limitation has no application to any infringement committed since June 22, 1874. As no claim was made for infringements in the present case except such as occurred between October 10, 1877, and December 20, 1880, it is obvious that the statute has no application. Does the statute of Massachusetts, requiring actions of tort to be begun within six years from the time the cause of action accrued, operate as a defence to this action?

The argument in favor of the applicability of state statutes is based upon Revised Statutes, § 721, providing that "the laws of the several States, except, etc. . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." That this section embraces the statutes of limitations of the several States has been decided by this court in a large number of cases, which are collated in its opinion in *Bauserman* v. *Blunt*, 147 U. S. 647. To the same effect are the still later cases of *Metcalf* v. *Watertown*, 153 U. S. 671, and *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.

It is insisted, however, that, by the express terms of section 721, the laws of the several States should be enforced only "in cases where they apply," and that they have no application to causes of action created by Congressional legislation and enforceable only in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state courts, and that the recognition given by Congress to the laws of the several States does not

make such laws applicable to suits over which the state courts have no jurisdiction, because for want of jurisdiction over the subject-matter of the suit, the tribunals of the State are powerless to enforce the state statutes with respect to it; in other words, that the States, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter. But this is rather to assert a distinction than to point out a difference. Doubtless such an argument would apply with peculiar emphasis to statutes, if any such existed, discriminating against causes of action enforceable only in the Federal courts; as if they should apply a limitation of a year to actions for the infringement of patents, while the ordinary limitation of six years was applied to all other actions of tort. In such case it might be plausibly argued that it could never have been intended by Congress that section 721 should apply to statutes passed in manifest hostility to Federal rights or jurisdiction, but only to such as were uniform in their operation upon state and Federal rights and upon state and Federal courts. This question was touched upon incidentally in *Metcalf* v. *Watertown*, 153 U. S. 671, in which it was claimed that the statute of limitations of Wisconsin discriminated against judgments rendered in the Federal courts, but the case went off upon the point that no such discrimination existed. Perhaps under the final words of section 721, "in cases where they apply," the court may have a certain discretion with respect to the enforcement of state statutes such as was exercised by this court in several cases arising under § 914, respecting pleadings and forms and modes of proceeding. *Nudd* v. *Burrows*, 91 U. S. 426; *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291; *Phelps* v. *Oaks*, 117 U. S. 236. So, too, it has been held that statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void. *Koshkonong* v. *Burton*, 104 U. S. 668; *Wheeler* v. *Jackson*, 137 U. S. 245; Cooley on Const. Limitations, c. 11. But as no such discrimination is attempted by this statute,

and no claim made that the time was unreasonably limited, the point need not be further noticed.

Recurring then to the main proposition above stated, it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general that the laws of the several States shall be regarded as rules of decision in every case to which they apply, and it is at least incumbent upon the plaintiff to show that, for some special reason in the nature of the action itself, the section does not apply. But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defences to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams* v. *Woods*, 2 Cranch, 336, 342, of a similar statute: "This would be utterly repugnant to the

genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (*Bell* v. *Morrison*, 1 Pet. 351, 360) : "It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses." This language is peculiarly applicable to patent cases, in which questions of anticipation frequently rest in oral testimony only, and are required to be proved to the satisfaction of the court by something more than a mere preponderance of evidence.

If these actions be exempted from the state statute of limitations, it would undoubtedly follow that other statutes of a similar nature, adopting the local practice for certain purposes, would be equally inapplicable. Yet it was held by this court in *Vance* v. *Campbell*, 1 Black, 427, *Haussknecht* v. *Claypool*, 1 Black, 431, and in *Wright* v. *Bales*, 2 Black, 535, that, under section 721, rules of evidence prescribed by the laws of the States were obligatory upon the Federal courts in patent cases, and that the plaintiff was a competent witness in his own behalf where, by the law of the State, parties may be sworn.

Indeed, if the local statutes of limitations be not applicable to these actions, it is difficult to see why the process, declarations, and other pleadings in the code States should not be in common law form, notwithstanding section 914, adopting the state practice in that particular; or why attachments should

be permitted, though authorized by state laws, (sec. 915;) nor why a *capias ad respondendum* should not issue immediately upon rendition of a judgment, notwithstanding sec. 916, entitling parties recovering judgments to remedies similar to those authorized by state laws; or why parties, arrested or imprisoned upon execution issued in these cases, should be entitled to discharge under sec. 991; or why, in every other respect, the suit should not be conducted regardless of the laws of the particular State.

The truth is that statutes of limitations affect the remedy only, and do not impair the right, and that the settled policy of Congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several States. As was said by Mr. Justice Wayne in *McElmoyle* v. *Cohen*, 13 Pet. 312, 327: "Is it [the statute of limitations] a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists upon this point, we think it well settled to be a plea to the remedy, and consequently that the *lex fori* must prevail." It was held in that case that the statute of limitations of the State of Georgia could be pleaded in an action brought in the Circuit Court of the United States for the District of Georgia, on a judgment recovered in South Carolina.

Not only is this so, but we have repeatedly held that rights created by Congress are subject to the police power, as well as to the taxing and licensing laws of the several States. In *Patterson* v. *Kentucky*, 97 U. S. 501, it was held that a party to whom letters patent were issued for "an improved burning oil," whereof he claimed to be the inventor, was properly convicted in Kentucky for selling the oil, it having been condemned by the state inspector as unsafe for illuminating purposes, and that the enforcement of the statute interfered with no right conferred by the letters patent. In *Webber* v. *Virginia*, 103 U. S. 344, it was held that the tangible property in which an invention or discovery may be exhibited or carried into effect was properly taxable under the laws of the

State, although a statute requiring an agent for the sale of articles manufactured in other States to obtain a license was unconstitutional, as in conflict with the commerce clause of the Constitution. So, in *Ager* v. *Murray*, 105 U. S. 126, 128, it was held that a patent right might be subjected by bill in equity to the payment of a judgment debt of the patentee. "The provisions of the patent and copyright acts," said the court, "do not exonerate the right and property thereby acquired by him [the patentee] . . . from liability to be subjected by suitable judicial proceedings to the payment of his debts." The rights of a patentee have also been held to pass to an assignee in insolvency under the state law, if the court so orders. *Ashcroft* v. *Walworth*, 1 Holmes, 152; *Barton* v. *White*, 144 Mass. 281; *In re Keach*, 14 R. I. 571. In *Beatty's Administrators* v. *Burnes's Administrators*, 8 Cranch, 98, 107, 108, an action was brought in the Circuit Court for the District of Columbia to recover moneys paid defendant by the city of Washington for land taken by the government. Plaintiffs sought to support their action under a statute of Maryland of 1791. Defendant pleaded the statute of limitations of the State of Maryland. "It is contended," said Mr. Justice Story, "that the present suit, being a statute remedy, is not within the purview of the statute of limitations. But we know of no difference in this particular between a common law and statute right. Each must be pursued according to the general rule of law, unless a different rule be prescribed by statute, and where the remedy is limited to a particular form of action, all the general incidents of that action must attach upon it. Upon any other construction it would follow that the cases would be without any limitation at all. . . . Now the statute of limitations has been emphatically declared a statute of repose, and we should not feel at liberty to break in upon its general construction by allowing an exception which has not acquired the complete sanction of authority." Still nearer in point is *McCluny* v. *Silliman*, 3 Pet. 270, 277, in which the plaintiff sued the defendant, as register of the United States land office in Ohio, for damages for having refused to note on his books applica-

tions made by him for the purchase of land within his district. Defendant pleaded the statute of limitations. Upon writ of error from this court, plaintiff claimed that the statute of limitations of the State was not pleadable in an action brought for malfeasance in office, *especially where the plaintiff's rights accrued to him under a law of Congress.* The statute was held to be a good defence. "In giving a construction to this statute," said the court, "where the action is barred by its denomination, the court cannot look into the cause of action. . . . By bringing his action on the case, the plaintiff has selected the appropriate remedy for the injury complained of. This remedy the statute bars. Can the court then, by referring to the ground of the action, take the case out of the statute?" So, too, causes of action arising under acts of Congress permitting suits to be brought by importers against collectors of customs to recover duties illegally assessed, have always been treated by this court as subject to the statutes of limitations of the several States. *Andreae* v. *Redfield*, 98 U. S. 225; *Barney* v. *Oelrichs*, 138 U. S. 529.

Indeed, it is only within the present century that Congress has vested exclusive jurisdiction of patent causes in the Circuit Courts, since by the act of February 21, 1793, c. 11, § 5, 1 Stat. 318, 322, it was provided that damages in patent suits might be recovered by "action on the case founded on this act, in the Circuit Court of the United States, or any other court having competent jurisdiction." This remained the law until April 17, 1800, when Congress for the first time vested exclusive jurisdiction in the Circuit Courts, but of actions at law only, act of April 17, 1800, c. 25, 2 Stat. 37; and finally by act of February 19, 1819, c. 19, 3 Stat. 481, extended the same jurisdiction to cases in equity. Even upon the theory of the plaintiffs in this case, the statutes of limitations of the States would have been a good defence so long as the jurisdiction was concurrent, but would cease to be so as soon as the jurisdiction of the Federal courts became exclusive. The bare statement of this proposition is sufficient to show its untenableness.

Statement of the Case.

In fine, we are all of the opinion that the statute of limitations was a good plea to this action, and the judgment of the Circuit Court is, therefore,

Affirmed.

MARKET STREET CABLE RAILWAY COMPANY *v.* ROWLEY.

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

No. 161. Submitted December 13, 1894. — Decided January 7, 1895.

If, upon the state of the art as shown to exist by prior patents, and upon a comparison of older devices with the patent sued on in an action for infringement, it appears that the patented claims are not novel, it becomes the duty of the court to so instruct the jury.

The claims in letters patent No. 365,754, issued June 28, 1887, to Benjamin W. Lyon and Reuben Munro for "improvements in automatic top-feed lubricators for railroad car axle-box bearings," must be construed to cover any lubricator composed of an oil cup, an outlet pipe connecting the oil cup with the axle-box containing the axle and bearing, a plug or stopper, which closes the pipe when the vehicle is at rest and opening it when there is a jolting motion, and a gauge adapted to control and limit the movement of the stopper, and to thus regulate the flow of the oil; and, being so construed, the letters patent are void for want of novelty in the invention covered by them.

A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way by substantially the same means, but with better results, is not such an invention as will sustain a patent.

In the Circuit Court of the United States for the Northern District of California, at the February term, of the year eighteen hundred and ninety-one, B. N. Rowley brought an action at law against the Market Street Cable Railway Company, a corporation under the laws of the State of California, wherein he alleged that on the 28th day of June, 1887, Benjamin W. Lyon and Reuben Munro, as inventors of an improvement in car-axle lubricators, obtained letters patent therefor, bearing said date, and numbered as No. 365,754, and that subsequently,

in 1890, said patentees assigned and transferred to the said plaintiff all their right, title, and interest in and to the invention and the letters patent, in and within the State of California, together with all past accrued claims and demands thereunder in said State; that the defendant company had, since the issuance of such letters patent, without the consent of the plaintiff or that of his assignors, wrongfully and unlawfully made and used, and were continuing to make and use, car lubricators containing and embracing said invention.

The defendant appeared in said action and pleaded the general issue, and a further plea that said Lyon and Munro were not the inventors of the device described in the letters patent, nor was the said invention their joint invention, and likewise a further plea that the defendant procured at all times a license from the said patentees, authorizing their use of said patented device, and likewise a further plea that many of the car-axle lubricators complained of as infringing devices were put upon the cars of the defendant company, and used with the knowledge and consent of said Lyon and Munro prior to their application for the said letters patent, and that thereby the said defendant became possessed of the right to use said car-axle lubricators so put and used upon its cars prior to said application during the life of said patent.

The bill of exceptions discloses that the plaintiff put in evidence letters patent of the United States, No. 365,754, issued on June 28, 1887, to Benjamin W. Lyon and Reuben Munro, and a written assignment thereof, and of rights of action thereunder to the plaintiff by Lyon and Munro dated November 26, 1890. The plaintiff put in evidence a model representing the device sued on, and called witnesses to show the use by the defendant on its lines of the said lubricator, and evidence bearing upon the measure of damages.

The bill of exceptions further shows that it was admitted and understood by the parties on both sides that the cable cars used by the defendant are constructed differently from other street and railroad cars in this: The cars, instead of having an axle extending across near each end with its journal bearing in boxes, as ordinary horse and street cars are

Statement of the Case.

carried, are supported and carried on two swivel trucks, one near each end of the car, similar to a railway car. The wheels which support these trucks are quite small in diameter, in order to bring the body or floor of the car as near the ground as possible; that the defendant was the first to construct and run cars built in that way, and that all the cable cars used by the defendant are built in this way. It was also understood that the only method of oiling the journals of defendant's cars in use before the invention of Lyon and Munro was to make a chamber in the box around the journal and fill it with cotton or other waste. The oil was then poured into this chamber and allowed to run down through a hole which connected the chamber with the journal bearing, and be delivered upon the journal. That method caused much trouble and annoyance, because the oil would often run out before the trip of the car was completed, and the car would finish its trip with a hot journal, and would have to run into the engine-house to have its journals cooled off. It was also admitted that the defendant controls and operates five distinct lines of cable cars in its system, viz., the Valencia Street line, the McAllister Street line, the Haight Street line, the Hayes Valley line, and the Castro Street line, each one being a distinct line, but each running on Market Street a portion of its length, and branching therefrom at different points; that the patentees, Lyon and Munro, placed their oil cups on the cars of the Hayes Valley line before the patent was applied for; also that the specific oil cups placed upon the Hayes Valley line of defendant's cars by the patentees before their application for a patent had wooden bottoms, and that after being in use for a few months the wooden bottoms were swelled by the absorption of oil and burst. The bill of exceptions further discloses that the plaintiff called Lyon and Munro, by whose testimony it appeared that they were in the employ of the defendant company at the time they made their invention and still were; that the materials used, which were of small value, belonged to the company; that the cups put on the Hayes Valley line were experimental, and at the time of the trial were no longer in use, having burst by reason of having wooden bottoms; that

Counsel for Plaintiff in Error.

the defendant was using the patented device on its various lines with the knowledge of the patentees; that the patentees had never demanded or received from the defendant company any compensation for the use of the patented device, either directly or by way of increase in salary or additional privileges.

The bill of exceptions further discloses that the defendant put in evidence Patent Office copies of several letters patent for oil cups and lubricators prior in date to those granted to Lyon and Munro.

After the testimony was closed the counsel for defendant made a motion that the court direct the jury to return a verdict for the defendant on the ground that the patent sued on was void for want of novelty. This motion was, after argument, overruled; and the defendant's counsel took an exception which the court allowed.

The defendant's counsel then requested the court to charge the jury as follows: "If you believe from the evidence that Benjamin W. Lyon and Reuben Munro were at the time they made this invention in the employ of the defendant, and that they constructed or acquiesced in the construction of the car-axle lubricators used by the defendant while in its employ, in its time and at its expense, and that they put them or allowed them to be put upon defendant's cars and allowed them to be used, no compensation being made or demanded, then these facts fully justify the presumption of, and of themselves constitute, an implied license to the defendant to use and to continue to use said car-axle lubricators, and you will return a verdict for the defendant." This request the court refused.

And the defendant's counsel took an exception, before the jury retired, to the court's refusal to give the instruction as requested.

The jury found a verdict in favor of the plaintiff in the sum of one hundred dollars, and on March 13, 1891, judgment was entered for that sum and costs. To which judgment a writ of error was sued out.

Mr. Harvey S. Brown and *Mr. William F. Booth* for plaintiff in error.

Opinion of the Court.

Mr. John H. Miller and *Mr. John L. Boone* for defendant in error.

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

Did the court below err in refusing to instruct the jury to find a verdict for the defendant on the ground that the patent sued on was void for want of novelty?

The defendant put in evidence a number of patents prior in date to the plaintiff's, and asked the court to compare the inventions and devices therein described with those claimed by the plaintiff. No extrinsic evidence was given or needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. The question was, then, one of pure construction and not of evidence, and consequently was matter of law for the court, without any auxiliary fact to be passed upon by the jury.

If, upon the state of the art as shown to exist by the prior patents, and upon a comparison of the older devices with those described in the patent in suit, it should appear that the patented claims are not novel, it becomes the duty of the court to so instruct the jury. *Powder Co.* v. *Powder Works*, 98 U. S. 126; *Heald* v. *Rice*, 104 U. S. 737, 749; *Fond du Lac County* v. *May*, 137 U. S. 395.

Looking, first, to the patent sued on, we find that its object is stated to be "to prevent the oil from dripping on the axle when the car stands still, and to feed the oil to the axle and bearing whenever the car moves and jolts." The essential parts are a cup holding the oil, a pipe with exterior thread-screws at each end, a stopper or plug, and a gauge. The arrangement is as follows: The upper end of the pipe is screwed into a disk which forms the bottom of the oil cup. The lower end of the pipe is screwed into the car-axle box or bearing. Seated in the upper end of the pipe is the plug or

stopper, and the gauge is placed within the oil cup, with one end fastened to a side of the cup, and the other extending to and pressing on the head of the plug. In operation, the oil cup is filled with oil, and when the car is standing still the gauge, pressing on top of the plug, keeps the plug in close contact with the pipe, and thus prevents the oil from passing out of the cup into the pipe. When the car jolts, from being in motion, then the plug or stopper likewise jolts and rises, whereby an opening is made between the head of the plug and the upper end of the pipe, through which opening or crevice the oil passes out of the cup into the pipe, and runs down the pipe into the axle box, and thus lubricates the axle and the bearing.

There is a single claim in the following terms: "In a car-axle lubricator, the combination, with the axle bearing of the oil cup, connected thereto by means of the screw-threaded pipe, stopper or plug, located in the channel of said pipe, and gauge, limiting the upward movement of the said stopper or plug, substantially as set forth." In the specification the patentees disclaim any particular shape or form of the cup, plug, or gauge, saying, "We prefer to make the stopper of the shape as shown in the drawing, but we do not confine ourselves to that shape or form, as any other suitable shape may effect the same result. We do not confine ourselves to the shape or form of the gauge, as shown in the drawing, as any other suitable device by which the gauging of the rise for the plug or stopper is effected will answer our purpose. We do not confine ourselves to the shape of the oil cup, as described, as any other oil cup may be changed readily to admit of the use and application of our stopper and gauge."

It thus appears that the claim of this patent must be construed to cover any lubricator composed of an oil cup, an outlet pipe connecting the oil cup with the axle-box containing the axle and bearing, a plug or stopper, which closes the pipe when the vehicle is at rest and opening it when there is a jolting motion, and a gauge adapted to control and limit the movement of the stopper, and to thus regulate the flow of the oil.

Opinion of the Court.

These separate devices and the combination described are found in letters patent of the United States of a date prior to the invention of Lyon and Munro, and for a similar purpose.

We do not deem it necessary to analyze in detail all the prior patents put in evidence by the defendant, but shall describe two or three.

A patent to C. J. Pinkney, No. 267,584, dated November 14, 1882, whose object was to lubricate the slides of locomotive engines, exhibits a combination of an oil cup, a screw pipe connecting the oil cup with the part sought to be lubricated, a stopper in the shape of a ball, the object of which is stated to be to serve as cut-off to the opening and prevent the passage of oil while the cup is at rest. The operation is thus described in the specification: "By the jarring of the ball, which is caused by the movements of the machinery to which the cup may be attached, the opening is sufficiently uncovered to allow of the escape of small quantities of oil sufficient for lubricating purposes. . . . This oil cup is especially designed for lubricating the slides of locomotive engines, the jarring of the ball by the movements of the locomotive being quite sufficient to allow the cup to discharge the required quantity of oil without waste. It is an economical oiler, for when the machinery is at rest there is no discharge of oil."

This patent discloses the same purpose and all the mechanical features of the claim in suit, except the gauge.

In a patent to G. C. Herrick, No. 247,057, dated September 13, 1881, we find described an oil cup, connected with the part to be lubricated by a pipe with thread screws, a stem or plug on which is a piston which acts as a valve or stopper to control the oil passage, and the operation is thus described in the specification: "The cup being applied to the bearing by inserting the threaded portion of the pipe in a socket provided for it, the piston or puppet-valve rises and falls by the motion and vibration of the machinery, and thus allows the oil to flow intermittently from the cup around the piston and stem and down through the bore of the plug to the bearing."

Here are all the elements of the patent in suit, except the gauge, and the specification shows that the function of the

gauge is performed by the arrangement which prevents the piston from rising further than the wall or end above it. Letters patent to J. E. Worswick, No. 297,483, dated April 22, 1884, describe the device as consisting of an oil cup, a screw pipe, a pin or plug; and it is stated that the movement of the plug is controlled by an overlying shoulder or projection.

In the patent to S. Chamley, No. 80,833, dated July 28, 1868, are to be found all the parts of the plaintiff's machine, used for a similar purpose.

There is an oil cup connected with the bearing to be lubricated by a screw pipe. In the pipe or passage is a valve or stopper. In the upper part of the passage is a screw which lies just above the plug or stopper, and its function is described in the specification as follows: "The regulating screw works through the top of the cage or passage, and controls the movement of the valve. By turning this screw up or down the valve will be allowed to rise more or less, and consequently feed the oil faster or slower;" and the specification states: "This invention consists in so arranging a valve in an oil cup that it can be raised by the motion of the part to which the cup is attached, and closed by its own gravity, so that the discharge of the oil will depend on the rapidity of the motion up and down."

The patent to R. A. Fischer, No. 293,237, dated February 12, 1884, shows similar devices — an oil cup, with a screw pipe to attach it to the part to be lubricated, a ball stopper in the oil passage, and an adjustable screw stem, controlling the movements of the ball or stopper. The function of the screw stem is stated to be to limit the upward movement of the valve when the machinery is in motion, and that it can be so adjusted as to shut down over the ball valve and limit its movement.

The last patent we shall refer to is that granted to F. Humphrey, July 27, 1886, and numbered 346,205. Here again are found an oil cup, a screw pipe, a plug, and an overlying adjustable screw gauge. The specification is as follows: "In operation the oil cup is moved with greater or less rapid-

ity, according to the movement of the part to which it is applied, and this movement imparts momentum to the valve, sufficient to cause the valve to be lifted from its seat, once at least at each revolution of the crank. This movement of the valve allows a small quantity of lubricant to escape through the passage pipe to the crank pin or part to be lubricated. The extent of the lift of the valve is limited by the extension of the plug, the under surface of which acts as a stop in limiting or controlling the upward movement of the valve. If the cup is moving comparatively slowly no stop is required, as the momentum communicated to the valve is not sufficient to throw it far enough from its seat to make one necessary. If, however, the movement of the cup is rapid, then it is desirable to locate the stop in relation to the valve to limit the extent of its throw produced by the momentum; and it will be observed that this stop is made vertically adjustable in relation to the valve. The cup acts to deliver lubricant only while in motion, and at all other times the valve is held to its seat by gravity; and the cup can, of course, be used on any movable bearing or part which will communicate motion to the loose valve, and cause the operation of the cup."

It is impossible to read these several patents without perceiving that the patent in suit has been clearly and repeatedly anticipated in its parts, function, and purpose.

The descriptions and drawings disclose some differences in the shape of the several parts, but the plaintiffs declare in their patent, in respect to the cup, the stopper, and the gauge, that they do not confine themselves to the shape or form described in their drawings, "as any other suitable shape may effect the same result."

The case is obviously within the principle, so often declared, that a mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. *Roberts* v. *Ryer*, 91 U. S. 150; *Belden Manufacturing Co.* v. *Challenge Corn Planter Co.*, 152 U. S. 100.

There is no room to contend that there was invention in

devising oil feeders for cars of a peculiar construction, like those used by the Market Street Cable Railway Company. The patent in question does not claim to be intended to cover an application to cars of any special form or structure; and the devices of several of the anticipating patents could be readily applied to the defendant's cars.

In view, then, of the state of the art as manifested by several prior patents, we think it is plain that the patent of Lyon and Munro is void for want of patentable novelty, and that the court below erred in not so instructing the jury.

This conclusion renders it unnecessary for us to consider the question whether there was error in the court's instruction on the question of an implied license.

The judgment is reversed and the case is remanded to the Circuit Court, with a direction to set aside the verdict and grant a new trial.

Mr. Justice Brown dissenting.

In the case of *Battin* v. *Taggert*, 17 How. 74, it was held by this court that it was for the jury to judge of the novelty of an invention, and of the identity of the machine used by the defendant, with that of the plaintiffs, and whether they were constructed and acted upon the same principle. And in *Bischoff* v. *Wethered*, 9 Wall. 812, it was also held that in a suit at law involving a question of priority of invention, where the patent under consideration was attempted to be invalidated by a prior patent, counsel could not require the court to compare the two specifications and to instruct the jury, as matter of law, whether the inventions described therein were or were not identical. Indeed, I understand it to be a general rule, applicable to all trials by jury, that if there be any conflict of testimony with regard to a particular fact, or if, the facts being admitted, men in the exercise of reasonable judgment may derive different inferences from such facts, the question is for the jury. Comparing the patent in suit with the various prior patents claimed to anticipate it, it seems to me that the ques-

tion of novelty is by no means so clear as to authorize the court to take the case from the jury, and that the court did not err in submitting it to them.

DAVIS *v.* SCHWARTZ.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, EASTERN DIVISION.

No. 75. Argued November 12, 13, 1894. — Decided January 7, 1895.

In a case referred to a master to report the evidence, the facts and his conclusions of law, there is a presumption of correctness as to his finding of facts similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat. § 469, or in an admiralty cause appealed to this court.

In Iowa, an insolvent debtor may make a mortgage or other conveyance of his property to one or more of his creditors, with intent to give them preference, and, in the absence of fraud, such mortgage or conveyance will not operate as a general assignment for the benefit of creditors, unless intended so to operate.

The fact that the property so conveyed was much in excess of the debts secured by the conveyance is not necessarily indicative of fraud; but in such cases the question of good faith is one of fact, and a mere error of judgment will not be imputed as a fraud.

The different transfers assailed in this suit examined, and, in the light of these rulings, held to be valid.

The different mortgages assailed in this suit were for several and separate interests; and the one to Kent not being of the amount requisite to give this court jurisdiction, the appeal as to him is dismissed.

THIS suit was originally begun by a petition filed December 29, 1884, upon the equity side of the District Court of Lee County, Iowa, by certain creditors, who had previously attached the stock in trade at Fort Madison, Iowa, of one John H. Schwartz, to set aside and vacate four chattel mortgages upon such property, and subject the same to the payment of their debts.

Upon the following day the suit was removed, upon the

petition of the plaintiffs Samuel C. Davis & Co. of St. Louis and E. S. Jaffray & Co. of New York, to the Circuit Court of the United States for the Southern District of Iowa, in which court the record was filed January 9, 1885. Subsequently, and on January 17, a receiver was appointed, who took possession and made an inventory of the property, and soon thereafter sold the same for the net sum, after deducting costs and expenses, of about $50,000, which was placed at interest by order of the court, and, with the accumulated interest, amounts now to upwards of $66,000, held by the court to abide its order herein.

To this petition of the attaching creditors separate answers were interposed by Catharine Schwartz, John H. Hellman, Frank B. Kent, and the German-American Bank, the four mortgagees, wherein each defendant set up his mortgage and notes; and as these answers also set up certain affirmative facts, which could not be met by replication, the petitioners, under leave of the court, filed an amended bill in equity, to which not only Schwartz and the four mortgagees were made parties, but a large number of other attaching creditors, whose interests plaintiffs averred to be inferior and subject to their own liens. Answers were filed to this bill by John H. Schwartz and the four mortgagees. Several of the other attaching creditors also interposed by answer and cross-bill. One Katie Kraft also intervened, setting up a promissory note for $5000, and claiming the benefit of a mortgage, not only upon the stock of goods at Fort Madison, but upon another stock at Chariton, Iowa. A supplemental bill was also filed setting up judgments obtained by the plaintiffs in the actions at law in favor of Samuel C. Davis & Co. in the sum of $14,358.20, and in favor of E. S. Jaffray & Co. in the sum of $6168.07. Subsequently, another amended bill was filed, alleging that Catharine Schwartz and Frank B. Kent had caused to be inserted in their respective mortgages a large amount of property owned by Schwartz in Chariton, which property they had seized and converted to their own use. The prayer of the bill was that the mortgagees be required to account for and pay into court the value of the property

so seized and converted, and that it be distributed under the order of the court.

It appeared that this Chariton stock was sold out by the mortgagees, and the proceeds, amounting to some $7000, placed in the German-American Bank. Of this amount, $4075 was paid over to Catharine Schwartz, and a certificate of deposit for the sum of $2500 delivered to the bank for the use of Kent.

A large amount of testimony was taken, and finally on January 16, 1889, the case was referred, by consent of parties, to a master "to hear said causes and report to this court his findings of facts and conclusions of law."

The following is a summary of the most important facts: John H. Schwartz, a citizen of Iowa, residing at Fort Madison, had for some years been a retail dry goods and clothing merchant, carrying on his principal business at Fort Madison, with an estimated stock of about $100,000, and with a branch store at Chariton estimated at about $16,000, and another at Dallas City, Illinois, estimated at $17,000. In addition to this, he owned real estate in Fort Madison valued at $17,000, together with notes and accounts, stock in a ferry company, and in a building association, the value of which was somewhat uncertain. There were a mortgage and mechanic liens upon the real estate to the amount of about $13,000, under which the property was sold, and the values therein involved figure only indirectly in this controversy.

At this time, December 29, 1884, Schwartz was indebted to plaintiffs Samuel C. Davis & Co. to the amount of some $14,000, and to E. S. Jaffray & Co. to the amount of some $6000, for goods sold, and to a somewhat greater amount to various other creditors in smaller sums. He was also indebted to one of his mortgagees, John A. Hellman, his father-in-law, to the extent of $22,180.37, evidenced by seven promissory notes of different dates given from time to time during the eight previous years, for money borrowed and put into the business; and was further indebted to the German-American Bank in the sum of $8168.35; to Catharine Schwartz, his mother, in the sum of $11,306.51, and to Frank B. Kent in the sum of $2665. His

total indebtedness appears then to have been about $84,000 and his assets about $144,000. Late in December, some $6000 of his indebtedness to Jaffray & Co. falling due, he wrote to his father-in-law for his endorsement upon a promissory note for that amount. Hellman, desiring to investigate his son-in-law's business before becoming responsible for a further amount, went to Fort Madison, learned the amount of his debts and assets, refused to advance any more money or sign the notes, and advised Schwartz to send for the representatives of Davis & Co. and Jaffray & Co., tell them of his situation and intentions, and ask for an extension of time.

Schwartz accordingly telegraphed for these representatives, who arrived at Fort Madison on Saturday morning, December 27, and held a conference with him at his house in the presence of Hellman. Schwartz gave a full account of his debts and assets, and asked for an extension of the Davis and Jaffray claims. Schwartz and Hellman claim that they were given to understand that the extension would be granted, and that the representatives of these firms would return after dinner with the extension notes prepared for Schwartz to sign. There is some dispute as to what was done that day, but instead of returning to Schwartz, it appears that the two representatives prepared petitions for attachments upon his stock, though the writs were not issued, apparently because they were awaiting indemnity for the surety upon the attachment bond. It seems that Schwartz and Hellman became suspicious at the failure of the representatives of the two firms to return with the extension notes, and on Sunday evening met at the residence of one of their counsel, Casey & Casey, at which were present John H. Hellman, John H. Schwartz, H. D. McConn, cashier of the German-American Bank, and Joseph B. Schwartz, a brother. After midnight and before dawn of Monday morning the 29th, the four chattel mortgages in question were drawn up, taken to the bank, acknowledged before a notary, and delivered to the recorder of deeds and filed by him about 5 o'clock in the morning.

A demand was immediately made by the mortgagees upon Schwartz for payment. The latter, expressing regret that he

was unable to comply with such demand, presented to each one of the mortgagees a key to his store in Fort Madison, where the largest part of the goods was. Whereupon the mortgagees at once, and at a very early hour in the morning, entered into possession, put up notices that the goods were being sold under mortgage, and by the time the attachments were levied, had made sales of about $70 worth of property.

As soon as it was known that the mortgages were made and the mortgagees were in possession, Davis & Co. and Jaffray & Co. sued out their writs of attachment, and at once levied the same upon the stock of goods and upon the real property owned by Schwartz in Fort Madison. Under indemnity bonds given by the attaching creditors, the sheriff, as provided by the statutes of Iowa, continued in possession, the mortgagees relinquishing their claim to the property and falling back upon the present suit to enforce their debts.

The master made his report on January 1, 1890, finding the mortgage to Hellman valid, and the others invalid, upon the ground that they embraced notes or accounts claimed to be owing by Schwartz to the mortgagees, which were not in fact debts due to such mortgagees; that the amount so secured had been fraudulently exaggerated for the purpose of defrauding the general creditors; and adjudging that, so far as such mortgagees had received payment on their debts derived from sales of the property mortgaged, they should account to the attaching creditors, who had garnished such mortgagees, according to the priority of such creditors, in effecting these garnishments.

To this report exceptions were filed by both parties, and, the case coming on to be heard before the court, certain exceptions of the defendants were sustained, and a final decree entered adjudging the several mortgages to be valid conveyances and first liens, and dismissing the bill so far as the same attacked the validity and priority of such mortgages. The decree then proceeded to find the several amounts due the mortgagees, ordered that they should be paid out of the fund in court, and the surplus, over and above paying mortgage debts and receiver's costs and expenses, was ordered distrib-

uted to the general creditors *pro rata;* that is, in proportion to the amount shown to be due and owing said parties from the insolvent debtor. It was further decreed that the mortgage defendants served as garnishees be discharged as such garnishees, and as the fund in court had been loaned upon bond and security to the Polk County Savings Bank of Des Moines, that the clerk withdraw the money from such bank, and make payment to the several parties adjudged to be entitled thereto. From this decree plaintiffs appealed to this court.

Mr. John W. Noble, (with whom were *Mr. James C. Davis* and *Mr. Eben Richards* on the brief,) for appellants.

Mr. David Sheean for appellees.

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

This is a contest between the attaching creditors and the chattel mortgagees of the property of John H. Schwartz, an insolvent debtor formerly engaged in business at Fort Madison and Chariton in the State of Iowa, and at Dallas in the State of Illinois. These two classes of creditors are in reality competitors in a race of diligence, the object of which was to obtain a lien upon and possession of the property in question.

1. As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. Stat. § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart* v. *D'Auchy*, 3

Dall. 321; *Bond* v. *Brown*, 12 How. 254; *Graham* v. *Bayne*, 18 How. 60, 62; *Norris* v. *Jackson*, 9 Wall. 125; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 249; *The Abbotsford*, 98 U. S. 440.

The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly* v. *Arms*, 129 U. S. 512, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one patry, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. "Its findings," said the court, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise." As the reference in this case was by consent to find the facts, we think the rule in *Kimberly* v. *Arms* applies, and as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are *Crawford* v. *Neal*, 144 U. S. 585, 596; *Furrer* v. *Ferris*, 145 U. S. 132.

2. The real question in this case is, whether the mortgages, which were awarded priority of payment by the decree of the court below, were valid securities at the time of the Schwartz failure, or were fraudulent and void as against his general creditors. If they were in fact given *bona fide* and for a valuable consideration, it is difficult to see why they should not be upheld, notwithstanding they were given for precedent debts, were executed and acknowledged under an impending fear of

attachment, at a most unusual hour of the day, and were immediately foreclosed by the mortgagees and possession taken of the property. There are undoubtedly *indicia* of fraud connected with the transaction, but, after all, they are only items of testimony bearing upon the main question, and if there be nothing to impeach the consideration and the good faith of the parties, the fact that the mortgagees intended to obtain a preference over other creditors should not invalidate the mortgages, since the very object of giving such securities is to give a preference to the creditors therein designated. *Hutchinson* v. *Watkins*, 17 Iowa, 475; *Chase* v. *Walters*, 28 Iowa, 460; *Stewart* v. *Mills County Bank*, 76 Iowa, 571.

The fact that the assignee or the preferred creditor of an insolvent debtor is a relative or intimate friend is doubtless calculated to excite suspicion; yet in reality there is nothing unnatural in a dealer or trader who is in need of credit, or a loan of money to carry on his business, first applying to his relatives for such loans, and if the evidence be undisputed that the money was advanced, the fact that the persons making the loan are relatives ought not to debar them from receiving security. Their rights are neither increased nor diminished by the fact of relationship. *Magniac* v. *Thomson*, 7 Pet. 348; *Prewit* v. *Wilson*, 103 U. S. 22; *Estes* v. *Gunter*, 122 U. S. 450; *Bean* v. *Patterson*, 122 U. S. 496; *Garner* v. *Second National Bank*, 151 U. S. 420, 432; *Aulman* v. *Aulman*, 71 Iowa, 124; *Van Patten* v. *Thompson*, (Iowa,) 34 N. W. Rep. 763; *In re Alexander*, 37 Iowa, 454; *Doyle* v. *McGuire*, 38 Iowa, 410. A general assignment to a relative as trustee for the benefit of creditors is open to more suspicion, since such are more often selected as instruments for creating a secret trust in favor of the assignor.

It is also true that the mortgages must have been given for a valuable consideration, and must have been executed and received in good faith and for an honest purpose. It has been the accepted law ever since *Twyne's Case*, 3 Coke, 80, that good faith as well as a valuable consideration is necessary to support a conveyance as against creditors. In that case Pierce, being indebted to Twyne in 400 pounds, was

sued by a third party for 200 pounds. Pending such suit he conveyed all his property to Twyne in consideration of his debt, but continued in possession, sold certain sheep and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made *bona fide*. Most of the cases illustrative of this doctrine, however, have been like that of Twyne, wherein a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by execution. In such cases the fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration. A like principle applies where a mortgage is given and withheld from record in order to give the mortgagor a fictitious credit. *Cadogan* v. *Kennett*, Cowp. 432; *Blennerhassett* v. *Sherman*, 105 U. S. 100, 117; *Sayre* v. *Fredericks*, 1 C. E. Green, (16 N. J. Eq.,) 205; *Sweet* v. *Wright*, 57 Iowa, 510, 514; 1 Story's Eq. Juris. § 353; *Klein* v. *Hoffheimer*, 132 U. S. 367; *Holt* v. *Creamer*, 34 N. J. Eq. (7 Stewart) 181; *Clements* v. *Moore*, 6 Wall. 299; *Wickham* v. *Miller*, 12 Johns. 320; *Pulliam* v. *Newberry*, 41 Alabama, 168; *Robinson* v. *Holt*, 39 N. H. 557.

In Twyne's case, the facts that the sale was accompanied by a secret trust in favor of the debtor, and that the vendor remained in possession, showed that it was not intended as a *bona fide* preference to the creditor, but merely as a trick to keep the property away from the other creditors.

But where a person, being lawfully indebted to several creditors, makes a mortgage or other conveyance to one for the open and avowed purpose of preferring him, then in the absence of a law of the forum prohibiting preferences, such mortgage or conveyance is valid, though it may operate to bar other creditors from obtaining satisfaction of their debts. A mortgage which may have the effect of hindering other creditors is not necessarily unlawful, though a mortgage given to defraud them is always so. *Stewart* v. *Dunham*, 115 U. S. 61; *Estes* v. *Gunter*, 122 U. S. 450; *Smith* v. *Craft*, 123

U. S. 436; *Huntley* v. *Kingman*, 152 U. S. 527; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399, and cases cited.

In this case the preferred creditors receive no more than they are entitled by law to have, and the fact that they know that other creditors will suffer by their preference does not show a want of good faith. The effect of every mortgage to a creditor as security for the payment of a preëxisting debt is to withdraw the value of the property covered by the security from the assets of the debtor, which would otherwise be available in satisfaction of his other debts. But unless a general bankrupt law, or a law of the particular State makes the preference illegal, it is difficult to see why mortgages given under the circumstances that these were given should be held to be invalid. The fact that they were given at night, under the instant apprehension of legal proceedings, and that their execution was followed by an immediate delivery of possession, only indicates that the insolvent debtor wished, in the selection of his creditors, to prefer his own friends, rather than the plaintiffs, who would have secured to themselves the position of preferred creditors by suing out attachments and levying upon his property. In short, they were attempting to do what the mortgagees themselves successfully carried out. The equities of the latter are at least equal to those of the plaintiffs. We do not understand it to have ever been doubted that a debtor may openly prefer one creditor to the rest, and may transfer property to him or give him security even after others have begun their actions. *Holbird* v. *Anderson*, 5 T. R. 235. In that case it was said by Lord Kenyon, p. 238: "The words of the statute, 13 Eliz., do not apply to this case, for this warrant of attorney was given on a good consideration; and the other words in the act, '*bona fide*,' only apply to those cases where possession is not delivered, or where it is merely colorable." See also *Estwick* v. *Caillaud*, 5 T. R. 420.

The fact that the execution of the mortgages was immediately followed by a delivery of possession of the property mortgaged, so far from being a badge of fraud, has rather a contrary tendency, and was evidently resorted to to avoid an implication of fraud from the retention of possession by the

mortgagor. A prompt and vigorous enforcement of an honest debt is by no means indicative of fraud, and it does not lie in the mouth of the plaintiffs, who were themselves taking steps in the same direction as the mortgagees, to cavil at their success.

It is also true that, by the law of Iowa respecting assignments for the benefit of creditors, preferences are forbidden; but the authorities in that State hold that a sale or mortgage to pay or secure the payment of preëxisting *bona fide* debts is not to be considered an assignment within the statute, even when made in contemplation of insolvency, or when the debtor, by the mortgage, intends to hinder other creditors who are about to obtain liens upon his property, unless, at least, the mortgage was intended to operate, not as a security, but as a general assignment for the benefit of creditors, or is made in such connection with a general assignment as to constitute both but one and the same transaction. *Farwell* v. *Howard*, 26 Iowa, 381; *Southern White Lead Co.* v. *Haas*, 73 Iowa, 399; *Gage* v. *Parry*, 69 Iowa, 605; *Kohn* v. *Clement*, 58 Iowa, 589; *Aulman* v. *Aulman*, 71 Iowa, 124.

It is sometimes difficult to determine whether a particular instrument is a mortgage or an assignment with preferences. The test most frequently applied is whether the conveyance is of all the property of the debtor, and is made to a trustee for the benefit of certain creditors. In such cases it is usually held to be an assignment, but if the conveyance be made directly to the creditor himself, it is ordinarily treated as a chattel mortgage. Jones on Chattel Mortgages, § 352 *a*; Burrill on Assignments, p. 11.

We do not regard the fact that the property conveyed was nominally more than double in value to the amount of debts secured thereby to be in itself indicative of fraud, since the property conveyed was a stock of goods of somewhat uncertain value, and when sold realized but little more than was necessary to pay off the mortgages. Indeed, this court held directly in *Downs* v. *Kissam*, 10 How. 102, 108, that it was not even a badge of fraud that a mortgage was made to cover more property than would secure the debt due.

The fact that goods were spirited away from the store on Sunday night would undoubtedly assume a serious importance were it shown to have been done directly or indirectly for the benefit of Schwartz; but the goods seem to have been taken away in a sleigh by some of the clerks, who took this method of paying themselves for the amounts due them for wages, aggregating $282.77. It appears that they took no more than sufficient to reimburse themselves, and that they were charged upon the books with the goods taken at cost price. Although, of course, the proceeding was irregular, there is no evidence to connect either Schwartz or the mortgagees with it, and the clerks did no more for themselves than Schwartz would have been at liberty to do for them if he had been present, viz., to prefer them to the amount of the wages severally due them.

The case, then, reduces itself to the simple question whether the mortgages were given for *bona fide* existing debts to the amount expressed upon their faces, and this involves an inquiry into the consideration of each mortgage separately.

3. So far as regards the mortgage to John H. Hellman, which covered only the stock at Fort Madison and the book accounts, both the master to whom the case was referred and the court, agreed in holding it to be valid. In this connection the master found Schwartz to be indebted to Hellman, his wife's father, as evidenced by his notes, for money borrowed, amounting with interest to $22,180.37; that Hellman before leaving Galena had prepared memoranda of these notes, which amounted upon their face to $20,380.98, together with another note for $1000, payable to his son John V. Hellman, in consideration of money loaned to Schwartz. This note had been assigned by the payee to his wife Wenona, but, being afraid that Schwartz was in a bad way financially, it was agreed between the father and son that the former should purchase the note, which was then in his safe; that Wenona should endorse it; that the father should be charged with it on his books, and the son, who was then owing the father to that amount or more, should be credited therewith. But the entry upon the books was not made until after John H. Hellman returned from Fort Madison, and was then entered as of December 29.

As the note really belonged to John H. Hellman, and was transferred to him before he left Galena, though the entry had not yet been made, there can be no just criticism upon his including it in his mortgage. Even if the purchase had not been made, there is nothing improbable in John V. Hellman's desiring that his wife's note should be secured, and if he suspected, as he doubtless did, that Schwartz was likely to fail, he would naturally put the note in his father's hands to be secured with the much larger amount due his father; and if the latter caused it in good faith to be included in his mortgage, supposing it to be lawful to do so, the mortgage would not thereby be invalidated.

4. The mortgage to the German-American Bank, which covered not only the stock at Fort Madison, but that at Chariton, and the book accounts at both places, was given on its face to secure two notes of $5000 and $500 made to the bank, as well as a note for $1500 made to H. Cattermole, president of the bank, and assigned to the bank, together with a note of $1000 to Pauline Schwartz, also assigned to the bank, — these notes aggregating $8000. This mortgage was found by the master to be fraudulent, as against the general creditors, by reason of the inclusion of the Cattermole and Schwartz notes.

So far as concerns the Cattermole note, the finding is that McConn, the cashier of the bank, who acted for it at the Sunday evening meeting at Schwartz's house, demanded not only security for the bank, but for Cattermole himself. As Cattermole was not present, no transfer of the note could have then been made by him, and there is no pretence that it was then transferred. The note was not produced at the time, and McConn knew that there was no entry upon the books of the bank to show that the bank owned the note. It appears that the bank afterwards became the owner of the note by giving therefor its own note in exchange, although it is not certain when this took place, since the books of the bank show no entry whatever of the transaction, either to charge the bank with the liability or to credit it with the Cattermole note as an asset. But putting a construction upon this transaction most favorable to the plaintiffs, it only appears that the bank did not actually own

the note at the time the mortgage was given. The Cattermole note had been given by Schwartz for money loaned, and had been in possession of the bank for two and a half months before the failure. The money had been loaned to Schwartz under a promise by him to give a real estate mortgage, and McConn, who was a cousin of Cattermole, upon the failure of Schwartz to give the mortgage, had agreed to take the note off of his hands.

The mortgage of $1000 to Pauline Schwartz was sold and delivered by John H. Schwartz to McConn for about two-thirds its face value and interest. It seems that the money represented by this note had been sent, in 1879, in the form of a draft, by Hellman to his daughter Pauline, who was the wife of John H. Schwartz, as a Christmas present. Schwartz appears to have used the money himself, and given his note therefor, dated December 27, 1879. When the mortgage was given, he turned it over to the bank for its face value upon his wife's request that he should realize upon it for her. No entry was made upon the books of the bank because, as McConn explained, "it was a small matter, and we thought it would be adjusted in a few days, and we did not want any more of John H. Schwartz's matters mixed up." The money to pay for the note was taken from an envelope in the bank by McConn. This was undoubtedly outside of the usual course of banking business and was open to some suspicion; but there is nothing to impeach the consideration for which the note is said to have been given, and nothing but the somewhat unusual nature of the transaction to contradict McConn's story with reference to this purchase by the bank.

Of both these notes it may be said that whether they were actually owned by the bank or not, there is nothing to indicate that they were not just debts of John H. Schwartz. It would also seem that McConn's inclusion of these notes in the mortgage to the bank was made in good faith, supposing that he had the right to cover them by the same security he was taking in favor of the bank. While the fact that a mortgage is given for a larger amount than is due, is doubtless a suspicious circumstance, raising a presumption of fraud, and may, under certain circumstances, avoid the whole mortgage, (*Wood*

v. *Scott*, 55 Iowa, 114; *Lombard* v. *Dows*, 66 Iowa, 243; *Taylor* v. *Wendling*, 66 Iowa, 562; *McNichols* v. *Rubleman*, 13 Mo. App. 515; *Holt* v. *Creamer*, 34 N. J. Eq. (7 Stewart) 181; *Heintze* v. *Bentley*, 34 N. J. Eq. (7 Stewart) 562; *Mead* v. *Combs*, 19 N. J. Eq. (4 C. E. Green) 112,) it will only have this effect when given wilfully, in connivance with the mortgagee, and with an actual design to impose upon and defraud the general creditors.

In all such cases the question of good faith is one of fact, and a mere error of judgment will not be imputed as a fraud. The fact that the debt so included was a *bona fide* debt, and that the act of the mortgagee in so including it was subsequently affirmed by the creditors interested, will be strong evidence that no actual fraud was intended. *Shirras* v. *Caig*, 7 Cranch, 34; *Lombard* v. *Dows*, 66 Iowa, 243; *Davenport* v. *Cummings*, 15 Iowa, 219; *Miller* v. *Lockwood*, 32 N. Y. 293; *Frost* v. *Warren*, 42 N. Y. 204; *Goff* v. *Rogers*, 71 Indiana, 459, 461; *Barkow* v. *Sanger*, 47 Wisconsin, 500, 505; *Van Patten* v. *Thompson*, (Iowa,) 34 N. W. Rep. 763.

5. The mortgage to Catharine Schwartz was given to secure one note for $2296.35; another for $500; a note for $5000, payable to Katie Kraft, Schwartz's sister, upon which Catharine Schwartz was surety; a note for $318, payable to A. S. Gage & Co., upon which Catharine was surety, and which had been paid by her; and also the sum of $2382.97 due upon an open account for goods and merchandise, and cash advanced and owing by John H. Schwartz. This mortgage is assailed as fraudulent, upon the ground that the last item consisted of merchandise and cash advanced to John H. Schwartz from another store in Fort Madison, the business of which was solely conducted by Joseph C. Schwartz in the name of his mother, Catharine. It seems that when the business began she loaned to Joseph $8000, which composed the capital of the concern, which loan was secured by note. He bought and sold the goods, paying all the bills, and not accounting to her, save to pay the interest due upon the note, and took the profits to himself. It thus appears that the debt really belonged to Joseph C. Schwartz and not to Catharine, although the three

parties swore that it was due to her as the nominal proprietor of the store. It does, however, appear conclusively that Joseph was indebted to his mother in a sum largely in excess of the account; that the consideration of the account was goods bought, nominally, at least, of Catharine, and that she was responsible to the creditors of that establishment. As the accounts were kept in her name, she had the legal title to the account, and Joseph only an equity in them. But as, in any event, the debt was *bona fide*, and, under the circumstances, must be presumed to have been included in the mortgage with the consent of Joseph, the mortgage ought not to be held void on that account. It was a debt honestly owing by John H. Schwartz; was intended to be included in his mortgage, and he had as much right to secure his brother Joseph as his mother Catharine. His creditors were not placed in any worse position by reason of the fact that the security was not given directly to Joseph. The form in which the security should be given was really a question between the parties themselves, and did not in any way concern the plaintiffs. So, also, it is quite immaterial whether the Katie Kraft note was originally made to her, or to her husband Joseph, and by him endorsed to her. There is very little, if anything, to indicate that it did not represent a *bona fide* debt, or that Catharine Schwartz, the mortgagee, was not held for its payment. In addition to this, however, Mrs. Kraft, herself, filed an intervening petition, claiming the amount of the note and the benefit of the mortgage to Catharine Schwartz, and a separate decree was made in her favor.

Upon the whole, we think the court below was correct in sustaining this mortgage.

6. The mortgage to Frank B. Kent covered the property both at Fort Madison and Chariton, and was given to secure the payment of a note for $2500, executed by Schwartz, March 1, 1884, and payable one year after date. His decree was for $3601.42.

In this connection a motion was made by Kent to dismiss the appeal from the allowance of his claim, upon the ground that the requisite amount is not involved to give jurisdiction

to this court. We think this motion should be granted. It is true, the four mortgagees were made joint defendants to the bill, but in reality their interests were several. The mortgages were separate, and a several and distinct decree was made in favor of each for the payment of his claim. A separate bill would have lain against each mortgagee, but as certain of the questions involved were common to all the mortgages, they were, as matter of convenience, all made parties to the same bill. The rulings of this court are uniform and consistent to the effect that, where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction, though the individual claims do none of them exceed the requisite amount, but when the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the case will be dismissed as to claims not exceeding $5000. *Schwed* v. *Smith*, 106 U. S. 188; *Hawley* v. *Fairbanks*, 108 U. S. 543; *Stewart* v. *Dunham*, 115 U. S. 61; *Estes* v. *Gunter*, 121 U. S. 183; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Henderson* v. *Carbondale Coal, &c. Co.*, 140 U. S. 25; *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42; *Chapman* v. *Handley*, 151 U. S. 443.

As it is clear in this case that the validity of each mortgage depended upon its own consideration, independent of the others, and the decree in favor of each mortgagee was several and distinct, the motion to dismiss must be granted.

And as we agree that there was no error in the court below holding the other mortgages to be valid securities, and entitled to preference as against the attaching creditors,

The appeal as to Kent must be dismissed, and as to the others the decree of the Circuit Court must be affirmed.

HOOPER *v.* CALIFORNIA.

ERROR TO THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA.

No. 7. Argued October 10, 1894. — Decided January 7, 1895.

Section 439 of the Penal Code of California, making it a misdemeanor for a person in that State to procure insurance for a resident in the State from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance, is not a regulation of commerce, and does not conflict with the Constitution of the United States, when enforced against the agent of a New York firm in California who, through his principals and by telegram, procured for a resident in California applying for it there, marine insurance on an ocean steamer, from an insurance company incorporated under the laws of Massachusetts, and which had not filed the bond required by the laws of California.

SECTION 623 of the Political Code of the State of California provides as follows:

"The [insurance] commissioner must require every company, association, or individual not incorporated under the laws of this State and proposing to transact insurance business by agent or agents in this State, before commencing such business to file in his office a bond to be signed by the person or firm, officer or agent, as principal, with two sureties to be approved by the commissioner, in the penal sum of two thousand dollars for each insurance company, association, firm or individual for whose account it is proposed to collect premiums of insurance in this State; the conditions of such bond to be as follows:

"1. That the person or firm, agent or officer named therein, acting on behalf of the company, association, firm or individual, named therein, will pay to the treasurer of the county or city and county in which the principal office of the agency is located, such sum per quarter, quarterly in advance, for a license to transact an insurance business or such other license

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as may be imposed by law so long as the agency remains in the hands of the person or firm, agent or officer named as principal in the bond;

"2. That the person or firm, officer or agent will pay to the State all stamp or other duties on the gross amounts insured by them, in the manner and at the time prescribed by law, inclusive of renewals on existing policies;

"3. That the person, firm, agent or corporation named therein will conform to all provisions of the revenue or other laws made to govern them."

Section 439 of the Penal Code of California is as follows:

"Every person who in this State procures or agrees to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor."

On the 29th day of September, 1888, the plaintiff in error was charged before a police court of the city and county of San Francisco with having, on the first day of April, 1888, "in the city and county of San Francisco," committed the misdemeanor of procuring insurance on account of foreign companies that have not complied with the laws of this State; with having "then and there procured for a resident of this State insurance from an insurance company not incorporated under the laws of this State, to wit, China Mutual Insurance Company of Boston, said company or its agents not then or there having filed the bond required by the laws of this State relative to insurance." A jury having been waived, the case was tried by the court, and the defendant having been found guilty was sentenced to pay a fine of $5, and, in default thereof, to be imprisoned in the city prison for twenty-four hours. Motions in arrest and for a new trial were made on several grounds, among which it is necessary only to state the following:

"Second. For that the statute, to wit, sec. 439 of the Penal Code of the State of California, amounts to and is a regulation of commerce between the several States and foreign

nations, and is therefore in violation of paragraph 3, sec. 8, of article 1 of the Constitution of the United States.

"Third. For that sec. 439 of the Penal Code of the State of California is in violation of the constitutional right of the defendant to transact any business in the State of California which is not opposed to the good morals or health of the community.

"Fourth. That the said statute is not a police regulation.

"Fifth. For that said statute is in violation of the Fourteenth Amendment."

The motions having been overruled, the cause was taken by appeal to the Superior Court of the city and county of San Francisco, the highest court to which an appeal was permissible under the constitution and laws of the State of California.

The facts were stated as follows:

"That the firm of Johnson & Higgins are average adjusters and insurance brokers, residing and having their principal place of business in the city of New York, State of New York.

"That as insurance brokers they procure for other persons, of whatever State resident, and on the request of such persons, insurance on ships and vessels, cargoes and freights, from insurance companies not incorporated under the laws of the State of California, or doing business therein as provided by the laws of said State.

"That they receive from said companies the marine policies issued by said companies so insuring said ships or vessels and deliver them to the party or parties for whom they have procured the same.

"That the said firm of Johnson & Higgins at all the times herein mentioned had a place of business in the city and county of San Francisco, State of California, and that the defendant had at all the times herein mentioned charge of said business as the employé and agent of said Johnson & Higgins, and not otherwise.

"That on the 13th day of March, 1888, C. W. Mott, a resident of the State of California, inquired of said defendant

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if he, the said defendant, as the agent of Johnson & Higgins, could procure the said Johnson & Higgins to place a certain amount of insurance on the steamer Alliance of San Francisco, at a certain named rate of premium ; to which said defendant replied he would see what could be done in respect to the same.

"That thereupon the said defendant informed Johnson & Higgins of the inquiry of said Mott and requested them to advise him, the said defendant, of what, if anything, they had done or could do in the premises; that in compliance with the said request of the said defendant, said Johnson & Higgins telegraphed to said defendant as follows:

"'Alliance, four thousand dollars, done in American form,' but did not advise said defendant of the name of the company in which said insurance had been placed.

"The contents of the telegram above named were communicated by the defendant to said Mott. In April, 1888, said firm of Johnson & Higgins forwarded to the said defendant the policy of the 'China Mutual Insurance Company,' insuring four thousand dollars on said steamer Alliance.

"Said insurance company not then and there being a company incorporated under the laws of the State of California, and not then and there having by itself or its agent filed the bond required by the laws of the said State of California relating to insurance, this policy was delivered by the defendant to said Mott, and thereupon said Mott paid to the said defendant, as agent of Johnson & Higgins, the premium for said insurance. This premium was deposited by the defendant in a bank in San Francisco to the credit of Johnson & Higgins, and Johnson & Higgins were duly advised by him that said premium had been collected and the amount deposited in the bank to their credit.

"All the said verbal acts by said Mott and also of said defendant, and all acts of defendant as agent in said procuring, were done in the city and county of San Francisco, State of California."

On the foregoing statement the judgment below was affirmed upon the ground "that the facts, as they appear

of record herein, bring the act of defendant within the true intent and meaning of section 439 of the Penal Code of the State of California," and that "on the facts in this case, said act is not repugnant to any of the provisions of the Constitution of the United States."

Mr. John E. Parsons for plaintiff in error.

Mr. A. B. Browne, (with whom were *Mr. T. C. Van Ness* and *Mr. A. T. Britton* on the brief,) for defendant in error.

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

The principle that the right of a foreign corporation to engage in business within a State other than that of its creation, depends solely upon the will of such other State, has been long settled, and many phases of its application have been illustrated by the decisions of this court. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Railroad Co.* v. *Peniston*, 18 Wall. 5; *Delaware Railroad Tax Case*, 18 Wall. 206; *State Railroad Tax Cases*, 92 U. S. 575; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *Ashley* v. *Ryan*, 153 U. S. 436, 445.

Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of its business. As, for instance, where it has derived its being from an act of Congress, and has become a lawful agency for the performance of governmental or *quasi* governmental functions, or where it is necessarily an instru-

mentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of Congress. In these cases, the exceptional business is protected against interference by state authority. The reasons upon which the exceptions to the general rule are based have been often explained. *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205, 211; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 342; *McCall* v. *California*, 136 U. S. 104, 110; *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114, 118; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Stoughtenburgh* v. *Hennick*, 129 U. S. 141; *Crutcher* v. *Kentucky*, 141 U. S. 47.

In the case last cited the precedents were fully reviewed, and the governing reasons of the law upon this subject were clearly elucidated.

The contention here is that, inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority and included among the exceptions to the general rule. This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul* v. *Virginia*, 8 Wall. 168. See also *Phila. Fire Insurance Co.* v. *New York*, 119 U. S. 110, and authorities there cited.

Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear

thereto. Thus in *Paul* v. *Virginia*, the court, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." p. 183.

This language was reiterated in the case of the *Phila. Fire Ins. Co.* v. *New York*, *supra*. In *Crutcher* v. *Kentucky*, *supra*, the court, in applying the exception to the general rule, held that the State of Kentucky was without power to prevent a corporation engaged in interstate commerce from entering that State and carrying on its business therein, and also pointed out the distinction between the making of contracts of insurance and interstate commerce, or the necessary instrumentalities thereof, as follows: "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which

would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous." p. 59.

It is evident, then, as we have said above, that the attempt to so distinguish between policies of marine insurance and policies of fire insurance, as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind, which affects the question of a State's authority to control the business of either, is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature.

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea."

The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to

enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States.

In the argument at bar it was admitted that, if the contract is to be considered as made in California, then this case is governed by the foregoing principles, unless the business of a foreign company writing marine insurance is protected by the interstate commerce clause of the Constitution, which, as we have seen, is not the case.

It is claimed, however, that, irrespective of this clause, the conviction here was illegal, first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State; and secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes "every person who in this State procures or agrees to procure for a resident of this State any insurance," etc. The words "who in this State" cannot be read out of the law in order to nullify it under the Constitution.

It is urged that the words "every person who agrees to procure for a resident of this State," are inconsistent with the preceding language, "who in this State procures," etc. The argument is this: the act punished is procuring for a resident; in order to procure for another, the procurer must be the agent of such other; hence the contract of insurance was

procured by the agent of the insured, and not by the agent of the foreign company; and inasmuch as the foreign company was not, and under the law could not be, technically, within the State for the purpose of giving its assent to the contract, the insurance must have been procured without the State. The fallacy here is ingenious, but it is easily exposed. The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. *Parsons* v. *Bedford*, 3 Pet. 433; *United States* v. *Coombs*, 12 Pet. 72; *Brewer* v. *Blougher*, 14 Pet. 178; *Grenada County* v. *Brogden*, 112 U. S. 261; *Presser* v. *Illinois*, 116 U. S. 252.

The admission that the insurance was procured for the resident from a foreign company, which had no agent in the State, does not exclude the possibility of its having been procured within the State. If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute.

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring — to bring about "the meeting of their minds," which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. *How* v. *Union Mut. Life Ins. Co.*, 80 N. Y. 32; *Monitor Mut. Ins. Co.* v. *Young*, 111 Mass. 537; *Hartford Ins. Co.* v. *Reynolds*, 36 Michigan, 502.

Domat thus defines his functions: "The engagement of a broker is like to that of a proxy, a factor, or other agent; but, with this difference, that the broker, being employed by persons who having opposite interests to manage, he is, as it were, agent both for the one and the other to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." 1 Domat, bk. 1, tit. 17, § 1, Strahan's trans.

Story says this statement of the functions of a broker is "a full and exact description according to the sense of our law." Story's Agency, 31, note 3, 9th ed.

If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable.

The facts found here enforce the correctness of these views, and illustrate the evil which the statute was doubtless intended to prevent.

Johnson & Higgins were average adjusters and brokers in New York city. Hooper, the plaintiff, as their agent, had a place of business in San Francisco. As such broker he applied for the insurance to his principals in New York city; the policy came to San Francisco for delivery, and the premium was there paid.

One more contention remains to be noticed. It is said that the right of a citizen to contract for insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he

might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction.

Judgment affirmed.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BREWER and MR. JUSTICE JACKSON, dissenting.

Hooper, the plaintiff in error, was the agent at San Francisco of the firm of Johnson & Higgins, average adjusters and insurance brokers, doing business in the city of New York. In the latter capacity that firm procured for its customers, from insurance companies wherever incorporated, insurance on ships, vessels, cargoes, and freights.

C. W. Mott, a resident of California, inquired of Hooper if he could procure a certain amount of insurance on a vessel named the Alliance at a given rate of premium — no particular company being specified by Mott. Hooper communicated with his principals, and the latter telegraphed in reply, "Alliance, four thousand dollars, done in American form," but did not name the company in which the insurance had been placed. Mott was informed of this telegram. Johnson & Higgins procured and forwarded to Hooper a policy of the China Mutual Insurance Company of Boston insuring the Alliance in the above sum. Hooper delivered it to Mott, the latter paying to the former as agent of Johnson & Higgins the amount of the premium. That amount was deposited in bank at San Francisco to the credit of Johnson & Higgins, the latter being notified of the deposit.

On account of what he did, as above stated, Hooper was prosecuted under a statute of California, which provided that "every person who in this State procures or agrees to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor." Penal Code, § 649.

The bond referred to is that prescribed by section 623 of the Political Code of California, which makes it the duty of the insurance commissioner to require every company, association, or individual, not incorporated under the laws of California "and proposing to transact insurance business by agent or agents in this State," before commencing such business to file a bond, with sureties, in the penal sum of two thousand dollars, conditioned that the person or firm, agent or officer, named therein, would pay to the treasurer of the county or city and county, in which the principal office of the agency is located, such sum per quarter, payable in advance, for a license to transact an insurance business, or such other license as may be imposed by law, so long as the agency remains in the hands of the person or firm, officer or agent, named as principal in the bond; and that such person or firm, officer or agent, would pay to the State all stamp or other duties on the gross amounts so insured, inclusive of renewals on existing policies, and conform to all the provisions of the revenue and other laws made to govern them.

It is true, as stated in the opinion just delivered, that this court has held that a State may prescribe the conditions upon which the corporations of other States, not engaged in interstate commerce, may do business within its jurisdiction; indeed, may exclude such corporations altogether from its limits. In *Paul* v. *Virginia*, 8 Wall. 178, it was adjudged that a corporation was not a citizen within the meaning of the clause of the Constitution declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, although, for purposes of suit in the courts of the United States, it must be deemed a citizen of the State under whose laws it was created. But no question like the one involved in that case is now presented for decision. There is no question here as to the rights of individual citizens of California and of New York.

Section 623 of the Political Code of California applies only to insurance companies not incorporated under the laws of that State, and "proposing to transact business" within its limits. The statement of the case on appeal shows that

defendant had charge of the business of Johnson & Higgins at San Francisco, as *their* employé and agent, and not otherwise. There is no suggestion in that statement that the China Mutual Insurance Company of Boston proposed to do business in California by agent, nor is it stated that Johnson & Higgins are or ever claimed to be agents of that company, nor that that company ever recognized them as its agents or ever issued to a resident of California any policy of insurance except the one delivered to Johnson & Higgins which that firm obtained and forwarded to Hooper, and which, by the latter was delivered to Mott. This single act of the company cannot be held to prove that it proposed to transact business in that State, or that it contemplated the issuing of any other policy to a resident of California. In *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S. 727, 734, this court, referring to a statute of Colorado forbidding foreign corporations from doing business there, except upon complying with certain regulations, said that it did not embrace a single or isolated transaction by a foreign corporation. Indeed, the prosecution in the present case manifestly had in mind the difference between a single act of insuring property and "proposing to transact insurance business by agent or agents;" for, as will be seen, the complaint under which Hooper was prosecuted does not allege, and, as I infer, purposely failed to allege, that the company which issued the policy in question proposed to transact business in California. So that we have before us a statute making it a crime to procure or agree to procure, in California, for a resident of that State, a policy of insurance from a foreign corporation which does not propose to do business there by agents, and, so far as appears, has never issued to a resident of California any policy but the one issued to Mott.

In my opinion the statute, in its application to the case now presented, is an illegal interference with the liberty both of Mott and of Hooper, as well as an abridgment of the privileges, not of a foreign corporation, but of individual citizens of other States through whom the policy in question was obtained. Johnson & Higgins are pursuing one of the ordinary callings of life in the city of New York. It is a lawful calling

as much so as that of a merchant, grocer, manufacturer, tailor, or shoemaker. It cannot properly be characterized as in itself or by the necessary results of the business hurtful to the community. They have as much right to pursue their calling in California, by agent, as they have to pursue it in New York. Of course, this calling, indeed every calling of life, is subject to the power of the State within whose limits it is pursued, to regulate it in any mode that does not violate the essential rights of liberty and property guaranteed by the Federal Constitution against hostile state action. If it were conceded that California could require every one acting within its limits as an agent for others, whether insurance brokers, merchants, grocers, manufacturers, tailors, or shoemakers, to take out a license and pay a tax as such agent — such regulations being made applicable, in similar circumstances, to all agents doing business in California — it would not follow that it could absolutely prohibit individual citizens of other States or its own people from conducting there, by agents, an ordinary calling not in itself immoral or dangerous to the public. The enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, is an essential part of liberty as guaranteed by the Fourteenth Amendment. *Powell* v. *Pennsylvania*, 127 U. S. 678, 684. Among the inalienable rights possessed by American citizens is, as Mr. Justice Field has said, "the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment." *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757, 764. And, in the same case, Mr. Justice Bradley said: "I hold that the liberty of pursuit — the right to follow any of the ordinary callings of life — is one of the privileges of a citizen of the United States." So in *Jacob's case*, 98 N. Y. 98, 106: "One may be deprived of his liberty and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense as understood in this country,

means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In many States there are individuals or firms whose business it is to negotiate loans for others. Often, if not generally, the money is in the hands of corporations for investment. These corporations may not have agents outside of the State in which they are located. What would be thought of a statute making it a crime for any one in the State which enacted it to procure for one of its residents, and through a firm of brokers in New York, a loan of money from a corporation of another State that did not propose to do business by agent, or elsewhere than at the place of its creation? The State, it may be, could forbid any foreign corporation, whose business it is to invest money for itself and others, from doing business in California, by agent, or could require as a condition of its doing business there, by agent, that the corporation or agent should give such bond with surety as may be prescribed. But it could not be made a crime for one in that State to procure a loan of money for a resident of that State, through individual citizens of another State, although the money should be obtained from a foreign investment company not proposing to transact business by agent in the State where the borrower resides and from which the application to borrow comes. And yet the principle which the court approves in its opinion would seem to justify the contrary view.

Mott, for whom Hooper acted, could not be compelled to restrict his application for insurance to foreign companies doing or proposing to do business in California, and which had filed the bond required by the statute of that State. If he preferred insurance in a company that had no agent in California, he had a right to that preference; and any interference with its free exercise would infringe his liberty. Suppose he had himself applied, by mail, directly to Johnson & Higgins for insurance on his vessel, and that firm had delivered the policy in question to an express company with directions to deliver it

to Mott. Or, suppose that Mott had made his application, by mail, directly to the company. I cannot believe that a statute making his conduct, in either of the cases supposed, a criminal offence, would be sustained as consistent with the constitutional guaranties of liberty. But, it seems from the opinion of the court, that a State is at liberty to treat one as a criminal for doing for another that which the latter might himself do of right and without becoming a criminal. In my judgment a State cannot make it a crime for one of its people to obtain, himself or through the agency of individual citizens of another State, insurance upon his property by a foreign corporation that chooses not to enter the former State by its own agents.

The chief vice in the argument of counsel in support of the California statute is found in the assumption that Hooper, as well as his principals, Johnson & Higgins, acted as agents of the insurance company. That assumption is unwarranted by the facts. Hooper was the agent of Johnson & Higgins and in that capacity alone acted for Mott. What he said and did in California was said and done for his principals. Neither Johnson & Higgins nor Hooper acted as agents for the insurance company. The transaction in legal effect is the same as it would have been if Mott had himself applied by mail to Johnson & Higgins for insurance, and had received the policy from them by mail or through some one in California to whom it was entrusted by that firm for delivery to him. If California could forbid Mott himself to obtain, by mail, a policy from a foreign corporation having no agent or representative of its own in California, and make it a crime for him to do so, then the statute in question is not repugnant to the Constitution of the United States. But in my judgment the power of excluding foreign corporations from doing business within its limits, by agents, cannot be exerted by the State so as to impair or destroy the constitutional rights of its own people or of citizens of other States. I think the judgment of the court below should be reversed.

Mr. Justice Brewer concurs in this opinion. Mr. Justice Jackson, now absent, participated in the consideration of this case. This opinion has been submitted to him and he concurs in the views here expressed.

BROWN *v.* SPILMAN.

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

No. 92. Submitted November 23, 1894. — Decided January 7, 1895.

A grant in a lease of forty acres of land, described by metes and bounds, for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all the tract excepting reserved therefrom ten acres, also described by metes and bounds, upon which no well shall be drilled without the consent of the lessor, is a grant of all the gas and oil under the entire tract, conditioned that the lessee shall not drill wells on the ten-acre plat without the consent of the lessor.

John F. Taylor, July 29, 1889, leased a tract of land containing forty acres, in Grant township, Pleasants County, West Virginia, to Joseph S. Brown for the purpose of boring and mining for oil and gas, by a deed of that date, which was, on August 3, 1889, duly recorded in the clerk's office of Pleasants County. Brown took possession under this lease and proceeded to exercise the possession therein conferred.

On the 30th day of June, 1890, John F. Taylor and his wife, by their deed of that date, sold and conveyed the same tract of land to B. D. Spilman and W. N. Chancellor, subject to the lease to Brown, which lease is described in the deed as being a lease of thirty acres of said tract of land for oil and gas purposes.

On the 9th day of July, 1890, Spilman and Chancellor filed, in the Circuit Court of the United States for the District of West Virginia, a bill of complaint against Joseph S. Brown, wherein they set up their ownership of the said tract of land, containing forty acres, conveyed to them by Taylor and wife, and complain that Brown, without right, was asserting a claim and title to the oil and gas in certain ten acres of said land, and was threatening to interfere with the right and possession of the plaintiffs in drilling oil wells and operating on said ten acres of land; and they charged that the claim of Brown

created a cloud upon their title to the ten acres, and asked for an injunction and equitable relief. As exhibits, copies of the lease to Brown and of the deed to Spilman and Chancellor were annexed to the bill.

Brown, on July 18, 1890, filed an answer to the bill, asserting his right to possession of the entire tract of forty acres for oil and gas purposes, and denying that the complainants had, under their deed from Taylor, any right to bore for oil on the said ten acres, or to exclude him therefrom. On the same day he filed a cross-bill against Spilman and Chancellor, in which, after narrating the contents of the lease and of the deed, as he claimed them to be, he asked that Spilman and Chancellor should be enjoined from boring or mining for oil and gas on the said ten acres, and from interfering with his rights in the same.

To this cross-bill Spilman and Chancellor filed a general demurrer, and on August 25, 1890, by agreement of counsel, the case was set down for hearing upon the bill and exhibits and answer and replication to said answer to the original bill and upon the cross-bill and demurrer thereto.

On February 10, 1891, the court entered a final decree and filed an opinion, reported in 45 Fed. Rep. 291, sustaining the original bill, and enjoining Brown and all persons acting under him from entering into or upon said ten acres of land, and from instituting any action or suit against the plaintiffs in respect to the said ten acres, and from interfering with or interrupting the plaintiffs in their use of the ten acres for any purpose. By the decree the demurrer to the cross-bill was sustained, and the cross-bill dismissed with costs.

From this decree an appeal was taken to this court.

Mr. Thomas I. Stealey for appellant.

Mr. John A. Hutchinson for appellees.

The opinion of the Circuit Court presents the points relied upon by appellees so clearly and refers to the authorities in support of the points decided so fully, that it is unnecessary to elaborate the questions raised.

In support of the doctrine that the exceptions are reserved to the lessor under the lease the ten acres in controversy, appellees rely upon: Shep. Touchstone, 77; Plowden, 196, 561; Dyer, 59; Perkins, § 625; 3 Wash. Real Property, 5th ed., 461; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290, 321; *Corning* v. *Troy Iron &c. Nail Factory Co.*, 40 N. Y. 191, 209; *Low* v. *Settle*, 32 W. Va. 600; *Greenleaf* v. *Birth*, 6 Pet. 302; Taylor's Landlord & Tenant, §§ 156–157; *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S. 586.

The brief of counsel for appellant admits substantially that the exception is as claimed by the appellees, but undertakes to avoid the effect of it by giving it a construction according to the opinion of the Supreme Court of Pennsylvania in the case of *Westmoreland &c. Gas Co.* v. *De Witt*, 130 Penn. St. 235. But in that case it was declared by the court to be a mere limitation on the right of the lessee to drill wells within three hundred yards of a certain building. Here was a definite and distinct grant of land excepted and reserved from a large tract by metes and bounds which the courts of West Virginia have held, as cited in *Low* v. *Settle*, 32 W. Va. 600, amounts to an exception which excluded the parcel described from the grant.

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

Whatever rights Spilman and Chancellor have in the ten acres in controversy, they hold subject to the provisions of the prior lease to Brown, of which, as a recorded instrument, they took with notice, which is referred to as an existing lease, in the deed to them from Taylor, and which they attach as an exhibit to their bill.

In order to reach an intelligible construction of the lease it will be necessary to have before us its entire language, as follows:

"This lease made this — day of July, A.D. 1889, by and between John F. Taylor, of the county of Pleasants, and State of West Virginia, of the first part, and Joseph S. Brown, of Pittsburgh, Pa., of the second part, witnesseth:

"That the said party of the first part, in consideration of fifteen dollars in hand paid, the receipt whereof is hereby acknowledged, and the stipulations, rents, and covenants hereinafter contained, on the part of said party of the second part, to be paid, kept, and performed, hath granted, demised, and let unto the said party of the second part, his heirs, executors, administrators, or assigns, for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all of that certain tract of land situate in Grant township, Pleasants County, and State of West Virginia, and bounded and described as follows, to wit: On the north by lands of Mrs. Jones and the Ohio River, south by lands of A. Smith, west by county road, east by Mrs. Jones, containing forty acres, more or less, excepting reserved therefrom ten acres, beginning at the railroad and running thence to the county road, thence south with said county road to A. Smith's line, thence with said Smith's line to a line to be drawn from the railroad to meet it, upon which no wells shall be drilled without the consent of the party of the first part. To have and to hold said premises peaceably and quietly, for the said purposes only, for, during, and until the full term of two years next ensuing the date and year above written, or so long thereafter as oil or gas shall continue to be found thereon in paying quantities. The said party of the second part hereby covenants, in consideration of the said grant and demise, to deliver unto the said party of the first part, his heirs and assigns, the full, equal one-eighth part of the petroleum or carbon oil discovered, excavated, mined, pumped, and raised on the premises herein leased, as produced in the crude state, to be delivered in pipe lines at the wells, and in case of a gas well being struck and utilized, then in lieu of a royalty, the party of the first part agrees to accept a yearly rental of two hundred dollars for each and every well drilled on above-described premises. All pipe lines shall be laid along the fences, or buried two feet under ground. The said party of the first part to fully use and enjoy the said premises for the purpose of tillage, except such parts as may be necessary for said mining purposes, and a right of

way to or from the place or places of said mining or excavating. The said party of the first part hereby grants to the party of the second part the right to remove any machinery, buildings, or fixtures, placed on said premises by the said party of the second part. The party of the second part further to have the privilege of using sufficient water from the premises herein leased for the prosecution of said business. The party of the second part agrees to, and will, within one month from this date, commence a test well for gas and oil in this vicinity, and complete the same within two months thereafter, unavoidable accidents and delays excepted. Said second party is to commence and drill a well on the within-described lands within nine months after the completion of said test well, and to prosecute said drilling with reasonable diligence, to its completion; he is also to pay to first party a monthly rental of ten dollars in advance, until said drilling one well is completed; the party of the second part is to keep up all fences, and to pay any damage done by leaving said fences down by said second party on his premises. A failure of the party of the second part to make said payments will render this lease null and void, not binding on either party. The party of the second part is only to have the right to assign this lease to the company of which he is a member and to no one else without the consent of the first party.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written."

It may be well to make some preliminary observations on the subject-matter of this contract, and thus facilitate the task of its construction.

The subject of the grant was not the land, certainly not the surface. All of that except the portions actually necessary for operating purposes and the easement of ingress and egress, was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable through the land, or rather the right to take possession of the gas and oil by mining and boring for the same.

Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other

minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. *Brown* v. *Vandergrift*, 80 Penn. St. 142, 147; *Westmoreland Nat. Gas Co.'s Appeal*, 25 Weekly Notes of Cases, (Penn.,) 103.

To operate the machinery used in boring an oil well it is necessary to erect a derrick, which is a structure of considerable height, and occupies a large space of ground. This derrick is also used, if oil be found, in connection with the pumping machinery. A very strong odor proceeds from a gas or oil well, and the noise of a well in operation can be heard for a long distance. These are some of the reasons why it is usual for farmers, when they grant the right to drill for oil and gas, to stipulate that wells shall not be drilled in close proximity to their dwelling-houses.

When oil or gas is found in paying quantities it is not usual to consume it or reduce it to use at the wells, but it is conducted in iron pipes to large tanks or reservoirs, whence it is distributed by other pipes to the places of consumption, often many miles distant.

These are matters within the common experience or knowledge of all men living in those portions of the country where oil and gas are produced, and courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. 1 Greenl. Ev. § 6.

Taking up the contract in the present case, we find that the grant is expressly "for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all of that certain tract of land situate in Grant township, Pleasants County, and State of West Virginia, and bounded and described as follows, [here follow the boundaries,] containing forty acres, more or less,

excepting reserved therefrom ten acres, beginning at the railroad, [here follow boundaries,] upon which no wells shall be drilled without consent of the party of the first part."

Do these latter words import an exception of the ten acres, taking them wholly out of the grant, or a condition affecting the mode of enjoying the grant, and, as alleged in the cross-bill, "for the personal benefit, comfort, and enjoyment of the said Taylor?"

As the grant in terms was for the purpose of boring and mining for oil and gas, and piping of oil and gas over all of the forty-acre tract, it would be strange if an exception of ten acres was to be immediately added. If thirty acres only were to be included in the lease, and to be affected by its terms, the obvious course to pursue was to grant those thirty acres only. But if we read the grant as giving all the gas and oil under the entire tract of forty acres, and the subsequent clause as a provision that in exercising the rights granted Brown should not, without the consent of Taylor, drill wells on the ten-acre plat, we shall thus give effect to all the language used.

There is given an express right to run pipes for gas and oil over the entire tract, and also a right of way to and from the place or places of mining. The so-called exception does not seek to reserve anything out of the grant to bore or mine for oil and gas, nor to restrict the rights of way to thirty acres. Its only purport is to forbid the drilling of wells upon the ten acres. Whilst the lease, in some sense, may be said to cover the entire tract for gas and oil purposes, yet the operation of drilling wells, with its accompanying discomforts to those living on the tract, is restricted to the thirty acres.

Questions such as we are now considering have been determined by the Supreme Court of Pennsylvania in several cases.

In *Appeal of the Westmoreland and Cambria Natural Gas Company*, 25 Weekly Notes of Cases, 103, was a case where an oil lease, in terms almost like the one before us, was given by the owner of a farm to a gas company, "for the sole and only purpose of drilling and operating wells, and transporting and conveying petroleum oil or gas through, over, and from all

that certain tract of land situate, be," with an excepting clause as follows: "No wells to be drilled within three hundred yards of the brick or stone building;" and the landlord, or grantor, undertook to subsequently grant to third persons the right to bore oil on the excepted territory. This the court held he could not do, saying: "We have to consider whether the well threatened to be put down was upon the land leased to the plaintiff. Of this there cannot be the slightest doubt. The lease is of 'all that certain tract of land,' etc. This means the whole tract. The grant is limited as to use, 'for the sole and only purpose of drilling and operating wells,' but is not limited as to territory. Following the description of the tract is the clause on which respondents rely: 'No wells to be drilled within three hundred yards of the brick building belonging to J. H. Brown.' The well which the respondents propose to bore is within the prohibited distance, and they claim that Brown, (the landlord,) and they, as his lessees, have the right to drill wells within that part of the territory. But the clause in question is neither a reservation nor an exception as to the land, but a limitation as to the privilege granted. It does not in any way diminish the area of the land leased — that is still the whole tract — but it restricts the operation of the lessee in putting down wells to the portions outside of the prohibited distance. For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any other part of the tract. The terms of the grant would imply the reservation of the lessor of the possession of the soil for the purposes other than those granted to the lessee, and the parties have expressed, what otherwise would have been implied, by the provision that the lessor is 'to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes.'

"From the nature of gas and gas operations, the grant of well right is necessarily exclusive. It was so held as to oil wells in *Funk* v. *Haldeman*, 53 Penn. St. 229, although in that case the plaintiff had a mere license to enter, etc., and not, as here, a lease of the land. And it is exclusive in the present case

over the whole tract. As already said, the clause relative to the three hundred yards distance was a restriction on the privilege granted, and not a reservation of any land or any boring rights to the lessor, and a well upon the prohibited portion was just as damaging to the lessees as upon any other portion of the tract. The drilling of the well threatened by respondents is therefore in violation of the lease, and should be enjoined." *Duffield* v. *Hue*, 26 Weekly Notes, 387, is to the same effect.

We observe in the cross-bill a distinct averment that Taylor, before he sold and conveyed to Spilman and Chancellor, had given his consent to Brown to drill wells on the ten-acre tract. If this were so, it would follow that Spilman and Chancellor must be regarded as having purchased subject to an exclusive right in Brown to bore for oil and gas over the entire forty-acre tract.

As, however, this averment does not seem to have received the attention of the court below, where the case went off wholly on the construction put upon the lease, we prefer to leave that feature of the case to be further dealt with in the court below, should the defendants desire to withdraw their demurrer and traverse the allegation of a license.

The decree of the court below sustaining the original bill is reversed, and the decree sustaining the demurrer and dismissing the cross-bill is also reversed, and the cause remanded for further proceedings in accordance with this opinion.

SHERMAN v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 664. Submitted December 13, 1894. — Decided January 14, 1895.

A chief supervisor of elections, appointed under the provision of Rev. Stat. § 2025, is not required by law to make copies of the lists of registered voters returned to him, nor to arrange them in alphabetical order after filing them, and is not authorized to charge the United States for such services voluntarily performed.

Statement of the Case.

THIS was a petition of the chief supervisor of elections for the Northern District of Illinois, for "services rendered as such chief supervisor, in entering and indexing the records of his office, to wit: The records of the names of persons who registered and voted at the election held in the city of Chicago, city of Lake View, town of Lake, and village of Hyde Park, in November, 1888, at which election Representatives to Congress were voted for, 61,482 folios, at 15 cents per folio, amounting to $9222.30," and for disbursements made in connection therewith amounting to $210.35.

The Court of Claims, upon the evidence, found the facts to be as follows:

1. Claimant, Elijah B. Sherman, has been a commissioner of the United States and chief supervisor of elections for the Northern District of Illinois since the year 1884, duly qualified, and is still acting as such.

2. In connection with the Congressional election of 1888 he performed the duties of chief supervisor of elections under the provisions of title 26 of the Revised Statutes of the United States, known as "the elective franchise," in addition to the duties of Circuit Court commissioner.

3. On or about the 25th day of July, 1892, the claimant made and duly verified an account for certain services and disbursements as chief supervisor of elections in connection with the Congressional election of 1888, to wit, for entering and indexing the records of persons registered and of voters, being the records of the chief supervisor's offices 61,482 folio, at 15 cents per folio, $9222.30, and for disbursements amounting to $210.35.

4. Said account was duly presented in open court in the Circuit Court of the United States for said district in the presence of the District Attorney of the United States for said district; said court entered an order finding that said account was correct as to the number of folios embraced therein, and that the item for stationery and supplies necessarily used in making said record was correct, but declining to approve said account or certify the correctness thereof for the reason that said Circuit Judge thought the statute did not authorize the work charged for by the chief supervisor.

5. No part of the work done, disbursements made, or services referred to and charged for in the aforesaid account has been included in, covered by, or embraced in any account made or presented to the accounting officers of the Treasury or any other department or office of the United States other than the account sued upon herein, and no payment has been made for any item charged therein, and all of said service was performed within six years before the commencement of this suit.

6. Said account was presented to the accounting officers of the United States Treasury Department for payment and payment thereof was refused; thereupon the First Auditor of the Treasury, on the ground that said claim involved a controverted question of law, certified said claim to the honorable Secretary of the Treasury and transmitted the same to him, together with all the vouchers, papers, documents, and proofs pertaining thereto, that the same might be transmitted to the Court of Claims, as provided in section 1063, Revised Statutes; and thereupon the honorable acting Secretary of the Treasury transmitted to this court the claim of petitioner, with all vouchers, papers, proofs, and documents pertaining thereto, to be proceeded with in this court according to law.

7. The claimant, as chief supervisor of elections, required of supervisors of elections lists of the persons who registered and voted in their respective election districts or voting precincts at said election held in November, 1888; such lists when made were returned to and filed by him and became a part of the records of his office; said lists were necessary for properly guarding and scrutinizing said election and the registration prior thereto.

8. The nature of the services described in the account in suit was the entering and indexing of the records of persons who registered for the purpose of voting at the election for Representatives in Congress held in November, 1888, in the city of Chicago, city of Lake View, village of Hyde Park, and town of Lake, in said Northern District of Illinois, and said index record contained the particulars relative to each voter then required by the laws of the State of Illinois, and

as shown in Exhibit "A." The matter contained in said index record was contained in the registers or lists made by supervisors of election, and returned to claimant as chief supervisor of elections, and which became part of the records of his office.

9. The disbursements charged for are for large index volumes for entering and indexing the records of the claimant's office and for stationery and supplies necessarily used in and about the entering and indexing of said records, amounting to $210.35.

10. Before the services now sued for were performed the claimant made out and presented his account as chief supervisor of elections for services rendered at the Congressional election of 1888, in which account, and while it was in the possession of the First Comptroller, and before it was approved by him, the claimant endorsed the following words:

"The foregoing account and claim against the government is presented without prejudice to my right to present hereafter a further account and claim for the services in entering and indexing the records of my said office touching the said election of 1888 and the registration prior thereto and for any other services rendered by me in connection with said election which is not included in the foregoing account and without prejudice to the right to sue therefor."

The index so prepared of the election of 1888 was not in fact made until after the Congressional election of 1890. It was used by the claimant in the election of 1892, but to what extent does not appear. The similar index of the election returns of the election of 1890 was made out before the election of 1892, and was used in that election, and has been paid for.

On the foregoing findings of fact the court decided as a conclusion of law:

"The services which form the cause of action in this suit not having been rendered at the proper time, to wit, before the Congressional election of 1890, and the defendants having, therefore, derived no benefit from them in that election, they must be deemed voluntary, and for them the claimant should not recover. Petition dismissed."

Argument for Appellant.

Petitioner thereupon appealed to this court.

Mr. Charles H. Aldrich and *Mr. Charles W. Needham* for appellant.

The legislation in Title 26 of the Revised Statutes was enacted to secure a fair election, at which all legal voters should be permitted to express their choice, illegal voting be prevented, and, as expressed in section 2018, "to the end that each candidate for the office of representative or delegate in Congress may obtain the benefit of every vote for him cast." To secure these objects supervisors of election were appointed, authorized and required to attend "at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress," and when required by the chief supervisor, to make lists of such voters giving their residence and qualifications. These lists, made by the supervisors at the polling places, and places of registration, were returned to the chief supervisor to be preserved for future reference and use and became a part of the records of his office. The value of these records consisted largely in the fact that they could be used in subsequent elections in detecting illegal voters, in establishing, in a degree, the right of legal voters to cast their ballots for representatives in Congress, and also as evidence in prosecutions for illegal voting under the statute.

In *Dennison* v. *United States*, 25 C. Cl. 304, the principal item of the claim was for "entering and indexing the records of names of persons who were registered and who voted for Representatives in Congress in the several cities," etc. In the decision of that case the court allowed that item as a legal and proper charge for official service.

In *Allen* v. *United States*, 26 C. Cl. 445, the whole subject of the allowance for services of this kind by the chief supervisor was carefully discussed and allowed. The case of *Dennison* v. *United States*, in so far as it allowed the item referred to, was approved, and upon the subject of these records and charges, the court, in the *Allen case*, say: "When the books

or lists of the subordinate supervisors were returned to the chief supervisor they became the basis of a record in his office, and with them he had a right to deal, under said sections. . . . It may be," the court say, "that some of the information as to the voter might have been omitted consistent with the object and purpose of the statute; but there is no suspicion arising from the evidence in this case that the record was made unnecessarily prolix for the purpose of accumulating fees. It is difficult to understand how a record can be entered and indexed without spreading it at large upon some book of the office, and the fact that the services are to be paid for by the folio is an indication of substantial clerical work. . . . The officers entrusted with the execution of the law must be given some discretion in what they will embody in the lists, and so with the chief supervisor, when the papers reach his office he must be permitted to exercise his best judgment as to how they shall be entered and indexed, and if by the entry of the entire list the public convenience is subserved and the purpose of the statute accomplished, the law allows the compensation prescribed for the service."

In passing upon a similar account of this claimant for "entering and indexing" the records of the election of 1892, Judge William A. Woods, Circuit Judge of the Northern District of Illinois, said: "Item thirteen is for work done in 'entering and indexing' records in the manner described in the affidavit accompanying the account. Similar charges were presented for the years 1888 and 1890 and reference made to the ruling of the court thereon, that of 1888 having been disapproved by Judge Gresham, and that of 1890 having been approved (by myself) upon the authority of the Court of Claims in *Allen* v. *United States*, 26 C. Cl. 445. Reference is also made to the action of the United States Circuit Court for Indiana upon a like charge in the account for 1890 of Mr. Van Buren, the chief supervisor for that State. But, as is shown by the decisions of this court in *United States* v. *Jones*, 134 U. S. 483, and *United States* v. *Poinier*, 140 U. S. 160, the rulings and opinions of the Circuit or District Courts in passing upon accounts presented as this is, are not judicial or conclu-

sive, but constitute only *prima facie* evidence of the correctness of the accounts, and are subject to be reviewed and disregarded by the officers of the department in aid of which the courts are required to act. On the other hand, the decisions of the Court of Claims are made in formal cases or suits invoking judicial action, and consequently, unless appealed from, are conclusive and authoritative. By the decision in the cases mentioned, the charge in this account for entering and indexing is justified. It is, therefore, ordered that that item of the account be approved upon the authority of that decision."

The only reported opinion adverse to those above referred to is that of Judge Gresham rendered in passing upon the account in controversy.

We submit that there can be no question as to what constitutes the records of the office of the chief supervisor under this statute. His office is made the repository of these registers and lists returned by the supervisors of election. These are to be preserved, but they are temporary memoranda made by the supervisors at the polls and registering places. Considering the objects in view and the express statements in the statute, it is evident that the law contemplated that these records should be put in some permanent and convenient form for use in prosecutions for violation of the Elective Franchise Act, and in determining at subsequent elections who were, and who were not qualified voters. In this way legal voters have some official record of their having voted, and consequently of their right to vote at subsequent elections; illegal voters could be easily detected, and the candidate for Congressional representatives could "obtain the benefit of every vote for him cast."

This court in *United States* v. *Barber*, 140 U. S. 177, 178, said, in relation to the amount of charges made for drawing complaints: "It is evident that no iron rule can be laid down upon the subject, that something must be left to the discretion of the District Attorney and commissioner, and that if the complaints are not unnecessarily prolix their action should be sustained. This is a question of fact in all cases, and as the court

below has found not only in its formal approval of this account but in its opinion upon the demurrer that no unnecessary verbiage was employed and no surplusage to increase fees, we think the item should be allowed."

Applying this rule to the case at bar, it will clearly appear that the record kept by the claimant as chief supervisor was in every way justified.

Mr. Assistant Attorney General Dodge and *Mr. Samuel A. Putnam* for appellees.

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

The charge in question is claimed to be justified by Revised Statutes, §§ 2026 and 2031, the material parts of which read as follows:

"Sec. 2026. The chief supervisor shall prepare and furnish all necessary books, forms, blanks, and instructions for the use and direction of the supervisors of election in the several cities and towns in their respective districts. . . . He shall require of the supervisors of election, when necessary, lists of the persons who may register and vote, or either, in their respective election districts or voting precincts, and cause the names of those upon any such lists whose right to register or vote is honestly doubted to be verified by proper inquiry and examination at the respective places by them assigned as their residences; and he shall receive, preserve, and file . . . all certificates, returns, reports, and records of every kind and nature contemplated or made requisite by the provisions hereof, save where otherwise herein specially directed."

"Sec. 2031. There shall be allowed and paid to the chief supervisor, for his services as such officer, the following compensation, apart from and in excess of all fees allowed by law for the performance of any duty as Circuit Court commissioner: for filing and caring for every return, report, record, document, or other paper required to be filed by him under

any of the preceding provisions, ten cents; for affixing a seal to any paper, record, report, or instrument, twenty cents; for entering and indexing the records of his office, fifteen cents per folio. . . . And the fees of the chief supervisors shall be paid at the Treasury of the United States, such accounts to be made out, verified, examined, and certified as in the case of accounts of commissioners, save that the examination or certificate required may be made by either the Circuit or District Judge."

Under the first section, it is a matter for the chief supervisor to determine whether it be "necessary" to require of the supervisors of election lists of the persons who may register and vote, etc., and his discretion in this particular is not subject to review. When these lists are returned to him, he is required to "receive, preserve, and file" them as "certificates, returns, reports, or records," and by section 2031, "for filing and caring for" such "return, report, record, document, or other paper" he is entitled to ten cents. Is he, however, under the name of "entering and indexing the records of his office," entitled to fifteen cents per folio for making a complete copy of such returns, and arranging them in alphabetical order after they have been properly filed as records of his office?

The object of the statutes concerning the elective franchise, now embodied in Title XXVI of the Revised Statutes, was as declared in the title to the act of May 31, 1870, c. 114, 16 Stat. 140: "To enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," —among which was undoubtedly the preservation of the purity of elections, and the obtaining of an honest expression of opinion from each individual voter. For this purpose the judge of the Circuit Court was required, upon the petition of a certain number of citizens of any city or town having upwards of 20,000 inhabitants or of any county or parish in any Congressional district, making known their desire to have the registration or election guarded and scrutinized, to open the Circuit Court at the most convenient point in the circuit (§ 2011); to appoint and commission, from day to day, two citizens from each voting precinct, to be known and designated as supervis-

ors of elections, (§ 2012,) who were required to attend at the registration of the voters, to challenge voters and supervise the registry, to make lists of the voters when required, (§ 2016,) to attend at the election, to supervise the manner in which the voting was done, (§ 2017,) to canvass each ballot, and generally to see that the election and canvass were fairly conducted, and to make return of their doings to the chief supervisor (§ 2018). By § 2021, the marshal for the district was required, upon the application in writing of a certain number of citizens, to appoint a certain number of deputy marshals to aid and assist the supervisors in the verification of any lists of voters, and to attend the registration and election.

By § 2025, the Circuit Court was required to appoint, from among the Circuit Court commissioners, a chief supervisor, who should serve so long as he faithfully and capably discharged the duties imposed upon him.

From this brief recapitulation of the prominent provisions of the title, it is evident that no permanent system for the carrying on of Congressional elections was intended to be established. The act was to be operative only in particular cases, when upon petition filed by the required number of citizens the Circuit Court was authorized to appoint supervisors, who attended that election, at the conclusion of which they became *functi officio*. No system for the permanent registration of voters was contemplated, simply because the exigencies which dictated the appointment of supervisors for a particular election might not exist at the next or any subsequent election. No permanent official is provided for, except a chief supervisor in each judicial district, who served without regular salary and acted only when the electoral machinery was put in motion, prior to any election, by the petition of the requisite number of voters. No permanent records were contemplated, and without a system of registration like that obtaining in many of the States, none would be of any value, since persons who are disqualified at one election by reason of minority, alienage, non-residence, or other cause, might, when the next election took place, become legal and competent voters. So, those who are this year qualified may possibly,

either by removal from their present residence, by insanity, conviction of crime, or other cause, become disqualified the next year. The laws of the several States usually recognize the fact that a person, whose name appears upon the registry of a certain precinct, is presumed to be qualified at the next election in that precinct. But even if a complete registration of voters were made by the chief supervisor, no such presumption would follow, since it is the State and not the general government which prescribes the qualification of voters. It was never the design of the act that Congress should determine who should vote at any election, or interfere with laws of the State in that regard, but only to protect those who were entitled to vote by the laws of the State in the exercise of the elective franchise. It would, therefore, have been entirely superfluous to provide for a permanent registry of voters to be kept by the chief supervisor. The state registration is presumed to answer all requirements in that particular.

So, too, a registry of voters, to be of any value, must be kept at the polling places in each precinct, in order that, as each voter presents himself, reference may instantly be made to the list to ascertain his qualifications. Hence the list made by the claimant, to serve any useful purpose, would have to be either printed or copied for use in each precinct — involving of course an enormous expense. But even this would have been of little value, since each precinct is concerned only with its own voters, and a list of 61,282 folios, containing the names of probably double that number of voters, would be so long as to be practically useless for ready and immediate reference. Add to this the fact that thousands of changes are made at each election, and that the services in question were not completed until July, 1892, nearly four years after the election took place, and it will be seen that the list made by the claimant could have been of no possible value to the government — of no more value than a city directory published four years after the compilation of names is made. The index, so prepared by him after the election of 1888, was not in fact made until after the Congressional election of 1890, and was never used until the election of 1892. To what

extent it was so used does not appear. It seems, too, that a similar index of the election returns of the election of 1890 was made out before the election of 1892, was used in that election, and has been paid for.

It is claimed, however, that if the statute requires or authorizes the work to be done, the claimant ought not to be held responsible for the fact that the transcript was of no value, or to lose his compensation for that reason. Assuming that section 2026 vests him with a discretion to require of the supervisors lists of the voters when in his opinion it is necessary, and that section 2031 authorizes and perhaps requires him to file and care for such lists, there is certainly no requirement that he make a copy of such lists. The entering and indexing the records of his office, for which he is entitled to recover 15 cents per folio, would evidently be complied with by his filing such returns, and indexing them in the name of the supervisor making the return; and even if the services performed by him in copying and rearranging the names upon these returns could be construed as "entering and indexing" them, it was a service of such manifestly disproportionate value to the cost thereby incurred, that we think it could never have been contemplated by the statute. The claimant should have recognized this fact, and before putting the government to the very large expense of this transcript, he should have been able to point to some statute requiring it to be done in language free from ambiguity.

The very magnitude of the expense incurred should have put the claimant upon inquiry as to the propriety of the service. He has no right to plunge the government into an expense of some $10,000 upon a doubtful interpretation of the law, especially when he is apprised of the fact that the service performed must have been of little or no value to the government. The index which he prepared for the election of 1890, and for which he was paid, covered every possible use for which the index he now charges for could have been made available. It is of no more value than a directory for a certain year issued after a directory for a subsequent year has been published and put upon the market.

Statement of the Case.

We do not wish to be understood as imputing any bad faith to the plaintiff in this particular, as there are undoubtedly decisions, even of the Court of Claims, which uphold charges of this description, *Dennison* v. *United States*, 25 C. Cl. 304; *Allen* v. *United States*, 26 C. Cl. 445; and the department seems to have paid many of these accounts without question since these decisions. We are, however, clear in our opinion that the service is not one within the spirit or the letter of the statute; that the Circuit Judge was right in refusing to approve the account; and that the allowance of other accounts of a similar nature works no estoppel upon the government. If there be any estoppel at all it is against the claimant, who has already been paid for a similar service performed since the transcript in question was made.

The judgment of the Court of Claims is, therefore,

Affirmed.

McKNIGHT *v.* JAMES.

ERROR TO THE CIRCUIT COURT OF THE STATE OF OHIO FOR THE SECOND JUDICIAL CIRCUIT.

No. 841. Argued and submitted December 19, 1894. — Decided January 14, 1895.

A writ of error will not go from this court to an order of a judge of a Circuit Court of a State, made at chambers, remanding a prisoner in a *habeas corpus* proceeding.

This proceeding was begun by a petition in *habeas corpus* to the circuit court of Franklin County, Ohio, setting forth that the petitioner McKnight was unlawfully deprived of his liberty in the Ohio penitentiary, under a certificate of sentence of the court of common pleas of Wood County, for the crime of forgery. Petitioner charged that there was no judgment or sentence authorizing such certificate; that the same was therefore void, and said imprisonment without legal authority, and without due process of law.

Counsel for Defendant in Error.

Under this petition a writ of *habeas corpus* was granted by the Hon. Gilbert H. Stewart, judge of the circuit court of the second circuit, and McKnight ordered to be produced before him in Columbus on August 31, 1894.

Respondent James made return to the writ, setting forth the certificate of sentence, and averring that the court of common pleas of Wood County did render the judgment and pronounce the sentence, by authority of which he held McKnight in custody; that said judgment was afterwards affirmed by the circuit court of Wood County, in a proceeding in error prosecuted by McKnight; that the case was subsequently brought before the Supreme Court of Ohio, on a motion made and filed by this petitioner, and that that court, after reviewing the entire record and proceedings in the lower courts, denied the application, thus affirming the original judgment of the court of common pleas.

Petitioner replied and averred that, after entering a plea of "not guilty," he was brought before the court without counsel, and indigent and unable to procure counsel; but the court proceeded to try him without counsel to defend him, and he was thereby deprived of his constitutional right to have the assistance of counsel in his defence; and that the certificate of sentence also was void in the fact that the requirement that he be kept at hard labor, which appears in such certificate, was not imposed by the court as a part of its sentence, and was wholly unauthorized.

The case was heard September 1, 1894, upon pleadings and testimony, by the Hon. Gilbert H. Stewart, sitting in chambers, and an order made that McKnight be remanded to the custody of the defendant James as warden of the Ohio penitentiary; whereupon the petitioner sued out this writ of error directed to the judge by name.

Mr. Hiram P. McKnight, the plaintiff in error, submitted on his brief.

Mr. J. K. Richards, Attorney General of the State of Ohio, for defendant in error.

Opinion of the Court.

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

As, under Rev. Stat. § 709, a writ of error will go from this court only to the final judgment of the highest court of the State in which a decision in the suit can be had, it is evident that our jurisdiction in this case cannot be sustained, unless an order of a judge at chambers remanding a prisoner in a *habeas corpus* proceeding, can be regarded as an order of a "court" within the meaning of this section.

We held, however, in *Carper* v. *Fitzgerald*, 121 U. S. 87, that an appeal did not lie to this court from an order of a Circuit Judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus*, for the reason that the act of March 3, 1885, c. 353, 23 Stat. 437, gave an appeal to this court in *habeas corpus* cases only from the final decision of a circuit *court;* and that Rule 34 did not make his decision as *judge* a decision of the *court*, the purpose of that rule being to regulate appeals to the Circuit Court from the final decision of any court, justice, or judge inferior to that court, as well as appeals from the final decision of such Circuit Court to the Supreme Court. As a writ of error from this court can only go to the highest *court* of a State, it follows by analogy that it will not lie to review the order of a judge at chambers.

The jurisdiction of this court was treated in the brief of plaintiff in error as if it turned upon the question whether, under the practice in Ohio, a writ of error lay from the Supreme Court of that State to an order of a circuit judge at chambers — the argument being that it did not, and hence that such judge was the highest court of the State in which a decision in the suit could be had, and a writ of error would, therefore, lie from this court. In this view, petitioner should at least have applied to that court for a writ of error, or had the order of the circuit judge at chambers made the order of the circuit court. If it be true that, under the laws of Ohio, the final order of a circuit *judge* at chambers be the judgment or decree of a circuit *court*, then it is undoubtedly reviewable by the

Syllabus.

Supreme Court of Ohio, which is the highest tribunal of Ohio, and is expressly given jurisdiction by statute to review the judgments and orders of the circuit court. But, if this order be not a judgment or decree of a court, then it is not reviewable here, because this court, under § 709, is given authority to review only the judgment and decree of the highest *court* of the State. In other words, the order cannot be the order of a *judge* to defeat the jurisdiction in error of the Supreme Court of Ohio, and at the same time an order of a *court* to confer jurisdiction upon this court to issue a writ of error. The argument in reality defeats itself. Its very strength is also its weakness. By proving that a writ of error will lie from this court, it also proves that a writ of error will lie from the Supreme Court of Ohio, and this fact of itself defeats the jurisdiction of this court. Whether the principle of this case applies to other than *habeas corpus* cases we do not undertake to determine.

The writ of error must, therefore, be

Dismissed.

POSTAL TELEGRAPH CABLE COMPANY *v.* ADAMS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 649. Submitted December 3, 1894. — Decided January 21, 1895.

While a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, by the imposition of unreasonable conditions, it may subject it to a property taxation incidentally affecting its occupation in the same way that business of individuals or other corporations is affected by common governmental burdens.

The tax imposed by the laws of Mississippi, (Code of 1880, c. 10, § 585; Sess. Laws 1888, c. 3,) when enforced against a telegraph company organized under the laws of another State, and engaged in interstate commerce in Mississippi, being graduated according to the amount and value of the company's property measured by miles, and being in lieu of taxes directly levied on the property, is a tax which it is within the power of the State to impose; and the exercise of that power, as expounded by the highest judicial tribunal of the State, does not amount to a regulation of interstate commerce, or put an unconstitutional restraint thereon.

Statement of the Case.

By the revenue laws of Mississippi certain taxes were levied as privilege taxes on various corporations, such as express companies, telegraph companies, insurance companies, sleeping-car companies, banks of deposit or discount, gas companies, and the like; and on taverns, hotels, restaurants, brokers, auctioneers, pedlers, liquor sellers, dealers in malt liquors, and so on. Code Miss. 1880, c. 10, § 585; Sess. Laws Miss. 1888, 8, act of March 8, c. 3. The tax required to be paid by telegraph companies was $3000 on each telegraph company operating within the State one thousand miles or more of wire, and on each telegraph company operating less than one thousand miles of wire a tax of one dollar per mile, and the tax thus levied was "in lieu of other state, county, and municipal taxes." During the fiscal years 1890 and 1891 the Postal Telegraph Cable Company, a corporation chartered under the laws of New York, operated within the State of Mississippi three hundred and ninety-one and twenty-eight hundredths miles of wire. The telegraph lines, equipment, and property appertaining thereto, owned and operated by the company within the limits of eighteen counties of the State, were during these years worth and valued at the sum of $41,967.54. The tax levied on the company by the law of March 8, 1888, under the name of privilege tax, amounted annually to $391.28, or an aggregate for the two years of $782.56. Under the general revenue laws of the State the *ad valorem* tax on the property of the company for the two years would have been $1188.56 for state and county purposes only, not including what might have been assessed and collected by municipalities in the way of *ad valorem* taxes for municipal purposes. For the years 1890 and 1891 the company failed to pay its taxes, and Adams, the state revenue agent of the State of Mississippi, brought suit in the Circuit Court of Hinds County, August 16, 1892, against the company therefor. The first count of the declaration was for the privilege taxes and the second count for *ad valorem* taxes in the several counties which it was alleged had been duly levied for state and county purposes. The company demurred to the second count and pleaded specially to the first count in substance,

and so far as essential here, that it was a telegraph company duly incorporated and organized under the laws of the State of New York, and was on the 1st days of January, 1890, 1891, and 1892, respectively, engaged in and still continued, to carry on the business of a telegraph company, having offices in various cities and towns in the State of Mississippi, for the purpose of receiving and sending telegraphic messages and maintaining and operating certain lines of telegraph on the various post roads, public roads, and railroads extending over, across, leading into and from the State of Mississippi to the State of Alabama, and other points in other States of the United States and the Dominion of Canada. That it was also the lessee of the Atlantic Postal Telegraph Cable Company, a corporation duly organized under the laws of the State of New York, and by its charter authorized to construct and operate lines of telegraph in and between the various States of the Union, including the State of Mississippi. That as such lessee and owner it was engaged in the general public telegraph business of transmitting messages for commercial purposes by, along, and over its lines, within, from, through, and across the State of Mississippi, and many other States and Territories of the Union, and had offices for the receiving and sending of messages by telegraph in each and every State and Territory wherein the lines leased or owned by it extended, including the State of Mississippi. That on or about the 6th day of March, 1886, the company duly filed its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of the act of Congress entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," approved July 24, 1866, now Title 65 of the United States Revised Statutes, and that in pursuance thereof it had been designated by the Postmaster-General as one of the telegraph companies that must transmit messages for the United States at a price and rate to be fixed by the said Postmaster-General. That defendant was engaged as a governmental agent of the United States, at the times mentioned, in transmitting messages for

the government of the United States between its various offices, not only from points within the State of Mississippi to points without the State of Mississippi, but also for such government officers from points wholly within the State of Mississippi to other points also wholly within the State of Mississippi; and that all of the roads upon which the lines of said company were constructed were post roads of the United States.

Plaintiff demurred to the special pleas. The case came on to be heard upon these demurrers, and the Circuit Court sustained defendant's demurrer to the second count and plaintiff's demurrer to defendant's pleas to the first count, with leave to defendant to plead over. This, defendant declined to do, and judgment was thereupon entered against the company for the amount of the so-called privilege taxes for the years 1890 and 1891, with interest and costs. From this judgment an appeal was taken to the Supreme Court of Mississippi, and the judgment affirmed. The opinion of that court will be found reported in advance of the official series in 14 Southern Rep. 36. A writ of error was then allowed to this court.

Mr. T. Moultrie Mordecai and *Mr. Philip H. Gadsden* for plaintiff in error.

I. The tax sought to be collected from the Postal Telegraph Cable Company is a license tax for the privilege of exercising its franchises within the State of Mississippi.

The Supreme Court of the State, in the course of its opinion in this case, says: "It will be thus seen at once that this is a tax imposed upon a telegraph company in lieu of all others as a privilege tax."

II. Such a tax, imposed upon a foreign corporation, engaged in interstate commerce and in transmitting messages for the government of the United States, for the privilege of exercising its franchises within the State, is unconstitutional and void.

This court has decided in a large number of cases that no

State can place a restriction in any form upon interstate commerce, either upon the commerce itself, the business of doing interstate commerce, or the instruments and means employed to carry on such commerce. *Norfolk & Western Railroad* v. *Pennsylvania*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Lyng* v. *Michigan*, 135 U. S. 161; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 464; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230.

In *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, 43, this court passed upon the identical question involved in the case at bar. The legislature of the State of Tennessee passed an act which imposed a privilege tax of fifty dollars per annum on every sleeping car or coach run over a railroad in Tennessee, and the court held such act unconstitutional so far as it applied to the interstate transportation of passengers carried over the railroads in Tennessee into or out of or across that State in sleeping cars owned by a corporation of Kentucky. The opinion of the court on this point is as follows: "The point upon which the final judgment was rendered in the case was the one considered and adjudged in the decision given on the demurrer to the declaration. The tax was not a property tax, because under the constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the state authorities, that the legislature had the power under the constitution of Tennessee to enact the 6th section of the act of 1877, and that the plaintiff had done what that section declared to be a privilege. By the decisions of the Supreme Court of Tennessee cited in the opinion of the Circuit Court on the demurrer, it is held, that the legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case the payment of the tax imposed was a

condition prescribed, without complying with which, what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the thirty-six sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the Supreme Court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. . . . The tax was really one on the right of transit, though laid wholly on the owner of the car."

The decision in *Leloup* v. *Port of Mobile*, 127 U. S. 640, 644, 645, seems to be conclusive of the question under consideration. The Western Union Telegraph Company, having an office in the city of Mobile, was required to pay a license tax under a city ordinance imposing such a tax "on all telegraph companies." The court said: "In approaching the question thus presented it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required in addition to pay taxes to the State, county and port of Mobile, on its poles, wires, fixtures and other property at the same rate and to the same extent as other corporations and individuals were required to do. . . .

"The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress, passed July 24, 1866, and other acts incorporated in Title 65 of the Revised Statutes? Can a State prohibit such a company from doing a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done."

"Ordinary occupations are taxed in various ways, and in most cases legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation, and a tax on the occupation of doing business is surely a tax on the business."

This case has been often referred to with approval in subsequent opinions of the court. *Asher* v. *Texas*, 128 U. S. 129; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Lyng* v. *Michigan*, 135 U. S. 166; *McCall* v. *California*, 136 U. S. 104; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Massachusetts* v. *Western Union Tel. Co.*, 141 U. S. 40; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18. See also *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Philadelphia Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

It thus appears that the principle we contend for has been repeatedly reaffirmed by this court in every decision, and in every case in which the question was presented. Upon no principle of law have the opinions of this court been so clearly defined and so often affirmed. Any interference on the part of the State with interstate commerce is violative of the Federal Constitution.

The Supreme Court of Mississippi has endeavored at great length to show that the utterances of this court upon this question have been so divergent and so conflicting that no authoritative ruling can be deduced from them. The Mississippi court admits that if it should be governed by the principles announced in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, and the other cases cited, the settlement of the controversy would be made without great difficulty in accordance with the contention of the appellant; but it contends that the principles announced by the last cited cases are diametrically opposed to those announced in *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne* v. *Mobile*, 16 Wall.

479; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217; *Ficklen* v. *Shelby County*, 145 U. S. 1; and *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92.

If that court had made a careful analysis of the last cited cases and had followed the interpretation put upon those cases by this court in subsequent decisions, their apparent conflict would have disappeared.

III. In making no exception for business done by the Telegraph Company for the government of the United States, both interstate and intrastate, the act of the State of Mississippi is *ultra vires*, unconstitutional, and void.

This is a tax upon the entire operations of the company and necessarily includes all business done by the telegraph company, both foreign and domestic, and it is admitted in this case that a part of the business of the telegraph company consists of messages sent for the government of the United States, its agents and officers.

The proposition submitted is that as there is no exception in the act as to governmental messages, the act is in effect a tax upon business of the United States government and a restraint and regulation upon the operations of the officers of the government in discharge of their governmental duties. While it is universally recognized that the property of a governmental agent situate within the State is subject to taxation as all other property within the State, it has been repeatedly declared that no State can impose a burden upon the business or occupation of such agency; it matters not whether such business of said government agent be intrastate or interstate, or partly both.

Mr. Marcellus Green for defendant in error.

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

It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the

receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

As pointed out by Mr. Justice Field in *Horn Silver Mining Company* v. *New York*, 143 U. S. 305, the right of a State to tax the franchise or privilege of being a corporation, as personal property, has been repeatedly recognized by this court, and this whether the corporation be a domestic, or a foreign corporation doing business by its permission within the State. But a State cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government, either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the State may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens. *Ashley* v. *Ryan*, 153 U. S. 436, and cases cited.

Doubtless, no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, con-

structing, or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce; but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 439, 445.

The method of taxation by "a tax on privileges" has been determined by the Supreme Court of Mississippi to be in harmony with the constitution of that State, and that, "where the particular arrangement of taxation provided by legislative wisdom may be accounted for on the assumption of compounding or commuting for a just equivalent, according to the determination of the legislature, in the general scheme of taxation, it will not be condemned by the courts as violative of the [state] constitution." *Vicksburg Bank* v. *Worrell*, 67 Mississippi, 47, 58. In that case privilege taxes imposed on banks of deposit or discount, which varied with the amount of capital stock or assets, and were declared to be "in lieu of all other taxes, state, county or municipal, upon the shares and assets of said banks," came under review, and it was decided that the privilege tax, to be effectual as a release from liability for all other taxes, must be measured by the capital stock and entire assets or wealth of the bank, and that real estate bought with funds of the bank was exempt from the ordinary *ad valorem* taxes, but was part of the assets of the bank to be considered in fixing the basis of its privilege tax.

And in the case at bar the Supreme Court, in its examination of the liability of plaintiff in error for the taxes in question, said: "It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in

the record, as shown by the second count of the declaration and its exhibits whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax." This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power.

The act in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*. The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise. Code Mississippi, 1880, §§ 585, 587, 588, 589, 594.

We concur with the view of the act thus expressed by the Supreme Court of the State, and, accepting it as correct, it is obvious that the case does not fall within the line of decisions in which state laws have been held inoperative because in conflict with, or amounting to the exercise of, or the assertion of control over, a power vested exclusively in the United States. In those decisions the interference with the commercial power was found to be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.

They need not be reëxamined here, as the taxation in question, according to the proper interpretation of the statute, is in principle such as was sustained in *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Ratterman* v. *West. Un. Telegraph Co.*, 127 U. S. 411; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Massachusetts* v. *West. Un. Tele-*

graph Co., 141 U. S. 40; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217.

In *Massachusetts* v. *Western Union Tel. Co.*, it was held that the tax imposed by the statutes of Massachusetts requiring every telegraph company owning a line of telegraph within the State to pay to the state treasurer "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock," deducting such portion of that valuation as is proportional to the length of its lines without the State, and deducting also an amount equal to the value of its real estate and machinery, subject to local taxation within the State, was in effect a tax upon the corporation on account of property used by it within the State; and was constitutional and valid as applied to a telegraph company incorporated by another State, and which had accepted the rights conferred by Congress by section 5263 of the Revised Statutes. In arriving at this conclusion, *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, was followed, and the following propositions affirmed in that case were reiterated by Mr. Justice Gray, delivering the opinion of the court: "The franchise of the company to be a corporation, and to carry on the business of telegraphing, was derived not from the act of Congress, but from the laws of the State of New York, under which it was organized; and it never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and to erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to the support of the government of that State. 125 U. S. 547, 548. By whatever name the tax may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation; and those laws attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the

capital so employed by it therein. 125 U. S. 547. The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. Such a tax is not forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution. 125 U. S. 552. The statute of Massachusetts is intended to govern the taxation of all corporations doing business within its territory, whether organized under its own laws or under those of some other State; and the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not an unfair or unjust one; and the details of the method by which this was determined have not exceeded the fair range of legislative discretion. 125 U. S. 553."

In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the State and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon.

Judgment affirmed.

Mr. Justice Brewer, with whom concurred Mr. Justice Harlan, dissenting.

Dissenting Opinion: Brewer, Harlan, JJ.

Mr. Justice Harlan and I are unable to concur in the foregoing decision. We are of opinion that the act of the State of Mississippi, fairly construed, imposes a tax upon the plaintiff in error for the privilege of doing within the limits of the State the business of an interstate carrier of telegraphic messages, and is, therefore, a regulation of interstate commerce; and that this characteristic of the tax is not affected by the question whether the amount thereof be more or less than the sum which the company would have had to pay if its property had been subjected to the ordinary property tax levied for state, county, and municipal purposes.

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release itself of its obligation to the German-American Bank; and that the mere fact that news of the condition of the Fidelity Bank had not reached the Evansville Bank at the time it made the entry was immaterial. *Evansville Bank* v. *German-American Bank*, 556.

See CRIMINAL LAW, 10, 11.

CASES AFFIRMED OR FOLLOWED.

1. *Duncan* v. *Missouri*, 152 U. S. 377, affirmed and followed. *Bobb* v. *Jamison*, 416.
2. *Horne* v. *George H. Hammond Co.*, 155 U. S. 393, affirmed and applied. *Cooper* v. *Newell*, 532.

See CONTRACT, 2; EQUITY, 7; CRIMINAL LAW, 5, 6; HABEAS CORPUS, 2; CUSTOMS DUTIES, 9; REMOVAL OF CAUSES, 4.

CASES DISTINGUISHED.

See HABEAS CORPUS, 2.

CASES EXPLAINED.

Commercial Bank of Pennsylvania v. *Armstrong*, 148 U. S. 50, shown not to conflict with this decision. *Evansville Bank* v. *German-American Bank*, 556.

CIRCUIT COURTS OF APPEALS.

See PRACTICE, 2.

CIRCUIT COURTS OF THE UNITED STATES.

See JURISDICTION, C;
PRACTICE, 2.

CIRCUIT COURT COMMISSIONER.

1. A commissioner of a Circuit Court is an officer of the court, authorized by law, and is entitled to his fees in the following cases when certified by the court as correct: (1) For entering on warrant the judgment of final disposition of a case, when required by rule of court; (2) for making transcripts of proceedings, when required by rule of court, to be sent up to court; (3) for making and certifying copies of subpœnas for marshal to serve on witnesses, when required by rule of court; (4) for making report to clerk of court and commissioner of internal revenue of cases heard and disposed of under the internal revenue laws, when required by rule of court; (5) for making entries on the docket in various cases of the name of an affiant, his official position, if any, date of issuing warrant, name of defendant and witnesses, and final disposition of the case, when required by rule of court. *United States* v. *Allred*, 591.

COURT OF CLAIMS.

See JURISDICTION, E.

COURT OF PRIVATE LAND CLAIMS.

See JURISDICTION, A, 3, 5.

CRIMINAL LAW.

ELECTION OF REMEDY.

EQUITY.

of the existence of which the principal is ignorant, and consents to judgment and the issue of execution and the sale of the party's interest in real estate thereunder, and such sale is made, all the proceedings being regular on their face, the remedy of the injured party, when the facts come to his knowledge, is in equity. *Robb* v. *Vos*, 13.

2. A Circuit Court of the United States has jurisdiction of such a suit in equity, if the citizenship of the parties permits, although the proceedings at law under which the sale was made were had in a state court. *Ib.*

3. The general principles of equity jurisprudence, as administered in this country and in England, permit a bill to quiet title to be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it was necessary that the title of the plaintiff should have been established by at least one successful trial at law. *Wehrman* v. *Conklin*, 314.

4. The statutes of Iowa, (Code, § 3273,) having enlarged the jurisdiction of the courts of equity of that State by providing that "an action to determine and quiet title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," such enlarged jurisdiction, if sought to be enforced in a Federal court, sitting within the State, can only be exercised subject to the constitutional provision entitling parties to a trial by jury, and to the provision in Rev. Stat., § 723, prohibiting suits in equity where a plain, complete and adequate remedy may be had at law. *Ib.*

5. In December, 1859, the land, the subject of controversy in this suit, was patented to A. W. In the same month it was conveyed by A. W. and his wife to F. W. In January, 1861, G. caused it to be attached as the property of A. W. in an action founded upon a judgment obtained against him in a court in Wisconsin, which case proceeded to judgment against A. W. in September, 1861. Prior to levy of execution in that case, G., in a suit in equity against A. W. and F. W., obtained a decree declaring the deed to be void and ordering the land to be sold in satisfaction of the judgment at law. Levy was made, the land was sold, and the sheriff made a deed conveying the property to G., who entered into possession, paid taxes, and in 1881, 1882, and 1884 conveyed the lands to C., who entered into possession and made valuable improvements upon them. For thirty years the taxes have been paid by C. and his privies in estate. F. W. having set up a claim to the property by reason of alleged irregularities in the proceedings by which G. acquired title, and having commenced an action in ejectment to enforce that claim, C. filed this bill in equity setting up the foregoing facts, averring that the deed by A. W. to F. W. was a cloud upon his title, and praying for a stay of the action of ejectment, for an injunction against further proceedings at law, and for a decree that C. held

FEES.

See CIRCUIT COURT COMMISSIONER; SUPERVISORS OF ELECTIONS.

HABEAS CORPUS.

1. Whether an offence described in an indictment in a state court is an offence against the laws of that State and punishable thereunder, or whether it is made by Federal statutes an offence against the United States, exclusively cognizable by their courts, and whether the same act may be an offence against both national and state governments, punishable in the tribunals of each, without infringing upon the constitutional guaranty against being twice put in jeopardy of limb for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance; and, (its obligation to render such decision as will give full effect to the supreme law of the land, and protect any right secured by it to the accused, being the same that rests upon the courts of the United States,) the latter, if applied to for a writ of *habeas corpus* in such case, should decline to issue it unless it also appears that the case is one of urgency. *New York* v. *Eno*, 89.
2. *Ex parte Royall*, 117 U. S. 241, followed, and distinguished from *In re Loney*, 134 U. S. 372. *Ib.*
3. The proper time, in such case, to invoke the jurisdiction of this court is after the claim of the accused of immunity from prosecution in the state court has been passed upon by the highest court of the State adversely to him. *Ib.*
4. P., being adjudged guilty of contempt by a state court, and sentenced to fine and imprisonment therefor, applied to the District Court of the United States for a writ of *habeas corpus* upon the ground that the statute of the State under which the proceedings took place of which his conviction and punishment for contempt formed a part, were in contravention of the Constitutions of the United States and of the State. The District Judge discharged the writ and remanded the petition. It was conceded that the validity of the proceedings in the state court could have been tested by the Supreme Court of the State on *certiorari* or *habeas corpus*, and no reason appeared why a writ of error could not have been applied for from this court to the state court. *Held*, that, without considering the merits of the question discussed, the judgment of the court below should be affirmed. *Pepke* v. *Cronan*, 100.

See JURISDICTION, A, 17.

INDIAN.

1. The findings of the court below touching the expenditures by the United States to support and keep a blacksmith for the use of the

INSOLVENT DEBTOR.

See LOCAL LAW.

INSURANCE.

See CONSTITUTIONAL LAW, 7.

JUDGMENT.

See EQUITY, 1.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. A finding of fact by the Court of Claims, where there is nothing in the other findings or elsewhere in the record which authorizes this court to go behind that finding and conclude that there was error in respect thereof, will not be reviewed here. *Talbert* v. *United States*, 45.
2. The questions that, the title of some of the parties to the land being in dispute, such titles must be settled before partition could be made; that the interests of several of the defendants were adverse to each other; and that as some of these defendants were citizens of the same State, it would raise controversies beyond the jurisdiction of the Circuit Court to decide, not having been certified to this court, are not passed upon. *Greeley* v. *Lowe*, 58.
3. The provisions in the act of March 3, 1891, c. 539, 26 Stat. 854, "to establish a court of private land claims and to provide for the settlement of private land claims in certain States and Territories," authorizing this court to amend the proceedings of the court below, and to cause additional testimony to be taken, are not mandatory, but only empower the court to direct further proofs, and to amend the record, if in its judgment the case demands its interposition to that effect. *United States* v. *Coe*, 76.
4. The judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the Supreme Court of the United States. *Ib.*
5. An appeal lies to this court from a judgment of the Court of Private Land Claims over property in the Territories. *Ib.*
6. The rule reiterated that where a judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance or the equivalent. *Sipperley* v. *Smith*, 86.
7. Rulings not specifically excepted to below are not reviewable here. *Allis* v. *United States*, 117.
8. This court has no jurisdiction to review a judgment of the Supreme Court of the State of Washington, denying a petition for a rehearing which had been presented to the Supreme Court of the Territory of Washington touching a cause therein decided, and had been transferred to the Supreme Court of the State under the provisions of the act of February 22, 1889, c. 180, 25 Stat. 676, admitting that State to the Union. *Northern Pacific Railroad Co.* v. *Holmes*, 137.
9. This court is not called upon to consider errors assigned by an appellee

MANDAMUS.

MASTER IN CHANCERY.

See EQUITY, 13.

MUNICIPAL BONDS.

PRINCIPAL AND AGENT.

PROHIBITION, WRIT OF.

PUBLIC LAND.

as by the filing of the map of definite location of the railroad, and the certification of the lands to the State, the lands granted by the act of June 3, 1856, had become identified and separated from the public domain before the passage of the act of March 3, 1865, c. 202, 13 Stat. 519, granting lands to Michigan to aid in the construction of a ship canal, the State acquired no title to such lands through the latter act, and whether they were or were not returned to the United States was not a question of fact, but one of law, depending upon the construction to be given to the resolution of the legislature of Michigan of February 21, 1867. *Ib.*

5. At the time of the passage of the act of March 2, 1889, c. 414, 25 Stat. 1008, forfeiting to the United States the title to the lands granted to Michigan by the act of June 3, 1856, neither the plaintiff nor the defendant had any title to the tract in controversy in this action, but, like other lands within the Ontonagon grant, it belonged to the State of Michigan, subject to forfeiture by the United States; and, construing that act, it is *Held*, (1) That § 1 grants nothing to and withdraws nothing from the parties; (2) that the provision in § 2 as to the rights of the Portage Lake Canal Company and the Ontonagon and Brule River Railroad Company means simply that neither forfeiture nor confirmation nor any other provision in the act shall be construed as a final settlement of all the claims of those companies or their grantees; (3) that the provision in § 2 as to prejudicing any right of forfeiture or recovery of the United States should not be construed as denying the confirmation granted by § 3; (4) that the provision in § 2 touching the rights of persons claiming adversely to those companies or their assigns under the laws of the United States means that the confirmation to them shall not be taken as an attempt to invalidate any legal or equitable rights as against such companies; (5) that the term "public land laws" in § 3 refers to any laws of Congress, special or general, by which public land was disposed of; (6) that the phrase "where the consideration received therefor is still retained by the government" is satisfied whenever the conditions of the attempted conveyance have been fully complied with, and apply to a homestead claim as well as to a preëmption claim; (7) that the proviso as to "original cash purchasers" is not to be taken as implying that the confirmation only extends to cash purchasers, but as also making further limitations as to some of those in whose behalf the confirmation was proposed; (8) that it was the evident intent of Congress that in all cases of conflict between a selection in aid of the canal grant and the claims of a settler, the confirmation should depend upon the state of things on the 1st of May, 1888; (9) that the words "homestead claim," as used in this act, include cases in which the claimant was, on the 1st of May, 1888, in the actual occupation of the land with a view of making a homestead of it, whether he had or had not made a formal application at the local land office; (10)

RESERVATION IN A LEASE.

See LEASE.

SALE UNDER EXECUTION.

On the facts in this case detailed in the opinion it is *held*, that, by the payment into court by the purchaser at the execution sale of the amount of the principal and interest due the plaintiff in the equity suit, and the conveyance of the lands to the purchaser, the latter became vested with a fee simple to said lands. *Robb* v. *Vos*, 13.

STATUTE.

A. CONSTRUCTION OF STATUTES.

1. It is a general rule that provisions in statutes imposing taxation, though not in terms mandatory, are to be regarded as such if necessary for the substantial protection of the taxpayer. *Erhardt* v. *Schroeder*, 124.
2. The customs laws, however, give to the complaining importer an ample remedy, only putting him to the inconvenience of seeking it in a legal tribunal. *Ib.*

B. STATUTES OF THE UNITED STATES.

See ADMIRALTY, 2;
CONSTITUTIONAL LAW, 2;
CRIMINAL LAW, 10, 13, 14;
CUSTOMS DUTIES, 3, 9;
EQUITY, 4, 13;
INDIAN, 2, 8;
JURISDICTION, A, 3, 8, 15; C, 1, 3; E, 4;
MUNICIPAL BOND, 1;
PRACTICE, 2;
PUBLIC LAND, 1, 3, 4, 5;
REMOVAL OF CAUSES, 1, 3, 4;
SUPERVISORS OF ELECTIONS.

C. STATUTES OF STATES AND TERRITORIES.

Arizona. *See* MUNICIPAL BOND, 1.
Arkansas. *See* JURISDICTION, C, 6.
California. *See* CONSTITUTIONAL LAW, 7.
Indiana. *See* MUNICIPAL BOND, 3.
Iowa. *See* EQUITY, 4.
Massachusetts. *See* CONSTITUTIONAL LAW, 3.
Michigan. *See* PUBLIC LAND, 3.
Mississippi. *See* CONSTITUTIONAL LAW, 9.