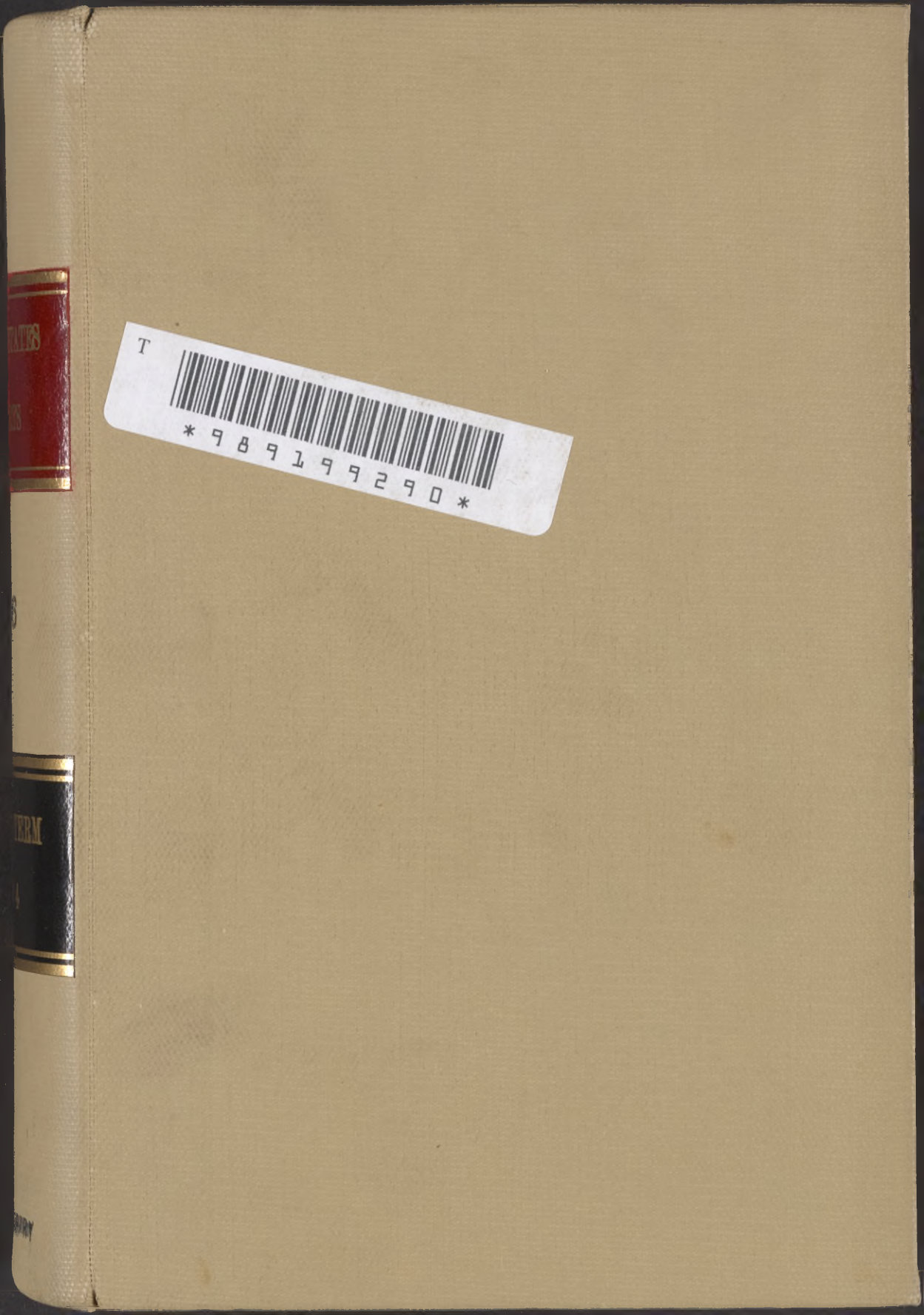

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1894

J. C. BANCROFT DAVIS

REPORTER

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1895

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.
HOLMES CONRAD, Solicitor General.[2]
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 after October 23, 1894.

[2] Mr. Maxwell resigned January 30, 1895. Mr. Conrad was commissioned February 6, 1895, and qualified February 7, 1895.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1894.

UNITED STATES *v.* E. C. KNIGHT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 675. Argued October 24, 1894. — Decided January 21, 1895.

The monopoly and restraint denounced by the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," are a monopoly in interstate and international trade or commerce, and not a monopoly in the manufacture of a necessary of life.

The American Sugar Refining Company, a corporation existing under the laws of the State of New Jersey, being in control of a large majority of the manufactories of refined sugar in the United States, acquired, through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business. *Held*, that the result of the transaction was the creation of a monopoly in the manufacture of a necessary of life, which could not be suppressed under the provisions of the act of July 2, 1890, c. 647, 26 Stat. 209, "to protect trade and commerce against unlawful restraints and monopolies," in the mode attempted in this suit; and that the acquisition of Philadelphia refineries by a New Jersey corporation, and the business of sugar refining in Pennsylvania, bear no direct relation to commerce between the States or with foreign nations.

Statement of the Case.

THIS was a bill filed by the United States against E. C. Knight Company and others, in the Circuit Court of the United States for the Eastern District of Pennsylvania, charging that the defendants had violated the provisions of an act of Congress approved July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, "providing that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several States, shall be guilty of a misdemeanor." The bill alleged that the defendant, the American Sugar Refining Company, was incorporated under and by virtue of the laws of New Jersey, whose certificate of incorporation named the places in New Jersey and New York at which its principal business was to be transacted, and several other States in which it proposed to carry on operations, and stated that the objects for which said company was formed were "the purchase, manufacture, refining, and sale of sugar, molasses, and melads, and all lawful business incidental thereto;" that the defendant, E. C. Knight Company, was incorporated under the laws of Pennsylvania "for the purpose of importing, manufacturing, refining and dealing in sugars and molasses," at the city of Philadelphia; that the defendant, the Franklin Sugar Company, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and the purchase of raw material for that purpose," at Philadelphia; that the defendant, Spreckels Sugar Refining Company, was incorporated under the laws of Pennsylvania "for the purpose of refining sugar, which will involve the buying of the raw material therefor and selling the manufactured product, and of doing whatever else shall be incidental to the said business of refining," at the city of Philadelphia; that the defendant, the Delaware Sugar House, was incorporated under the laws of Pennsylvania "for the purpose of the manufacture of sugar and syrups, and preparing the same for

market, and the transaction of such work or business as may be necessary or proper for the proper management of the business of manufacture."

It was further averred that the four defendants last named were independently engaged in the manufacture and sale of sugar until on or about March 4, 1892; that the product of their refineries amounted to thirty-three per cent of the sugar refined in the United States; that they were competitors with the American Sugar Refining Company; that the products of their several refineries were distributed among the several States of the United States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; that the American Sugar Refining Company had, on or prior to March 4, 1892, obtained the control of all the sugar refineries of the United States with the exception of the Revere of Boston, and the refineries of the four defendants above mentioned; that the Revere produced annually about two per cent of the total amount of sugar refined.

The bill then alleged that in order that the American Sugar Refining Company might obtain complete control of the price of sugar in the United States, that company, and John E. Searles, Jr., acting for it, entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four corporations defendant, by which they attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States as theretofore carried on independently by said defendants; that in pursuance of this scheme, on or about March 4, 1892, Searles entered into a contract with the defendant Knight Company and individual stockholders named, for the purchase of all the stock of that company, and subsequently delivered to the defendants therefor in exchange shares of the American Sugar Refining Company; that on or about the same date Searles entered into a similar contract with the Spreckels Company and individual stockholders, and with the Franklin Company and stockholders, and with the Delaware Sugar House and stockholders. It was further averred that the American Sugar Refining Company monopolized the manufacture and

sale of refined sugar in the United States, and controlled the price of sugar; that in making the contracts, Searles and the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several States and foreign nations, and that the said contracts were made with the intent to enable the American Sugar Refining Company to restrain the sale of refined sugar in Pennsylvania and among the several States, and to increase the regular price at which refined sugar was sold, and thereby to exact and secure large sums of money from the State of Pennsylvania, and from the other States of the United States, and from all other purchasers, and that the same was unlawful and contrary to the said act.

The bill called for answers under oath, and prayed —

"1. That all and each of the said unlawful agreements made and entered into by and between the said defendants, on or about the fourth day of March, 1892, shall be delivered up, cancelled, and declared to be void; and that the said defendants, the American Sugar Refining Company and John E. Searles, Jr., be ordered to deliver to the other said defendants respectively the shares of stock received by them in performance of the said contracts; and that the other said defendants be ordered to deliver to the said defendants, the American Sugar Refining Company and John E. Searles, Jr., the shares of stock received by them respectively in performance of the said contracts.

"2. That an injunction issue preliminary until the final determination of this cause, and perpetual thereafter, preventing and restraining the said defendants from the further performance of the terms and conditions of the said unlawful agreements.

"3. That an injunction may issue preventing and restraining the said defendants from further and continued violations of the said act of Congress, approved July 2, 1890.

"4. Such other and further relief as equity and justice may require in the premises."

Answers were filed and evidence taken, which was thus

sufficiently summarized by Judge Butler in his opinion in the Circuit Court:

"The material facts proved are that the American Sugar Refining Co., one of the defendants, is incorporated under the laws of New Jersey, and has authority to purchase, refine, and sell sugar; that the Franklin Sugar Refinery, the E. C. Knight Co., the Spreckels Sugar Refinery, and the Delaware Sugar House, were incorporated under the laws of Pennsylvania, and authorized to purchase, refine, and sell sugar; that the four latter Pennsylvania companies were located in Philadelphia, and prior to March, 1892, produced about thirty-three per cent of the total amount of sugar refined in the United States, and were in active competition with the American Sugar Refining Co., and with each other, selling their product wherever demand was found for it throughout the United States; that prior to March, 1892, the American Sugar Refining Co. had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Co. in Boston, the latter producing about two per cent of the amount refined in this country; that in March, 1892, the American Sugar Refining Co. entered into contracts (on different dates) with the stockholders of each of the Philadelphia corporations named, whereby it purchased their stock, paying therefor by transfers of stock in its company; that the American Sugar Refining Co. thus obtained possession of the Philadelphia refineries and their business; that each of the purchases was made subject to the American Sugar Refining Co. obtaining authority to increase its stock $25,000,000; that this assent was subsequently obtained and the increase made; that there was no understanding or concert of action between the stockholders of the several Philadelphia companies respecting the sales, but that those of each company acted independently of those of the others, and in ignorance of what was being done by such others; that the stockholders of each company acted in concert with each other, understanding and intending that all the stock and property of the company should be sold; that the contract of sale in each instance left the sellers free to establish other refineries

and continue the business if they should see fit to do so, and contained no provision respecting trade or commerce in sugar, and that no arrangement or provision on this subject has been made since; that since the purchase the Delaware Sugar House Refinery has been operated in conjunction with the Spreckels Refinery, and the E. C. Knight Refinery in connection with the Franklin, this combination being made apparently for reasons of economy in conducting the business; that the amount of sugar refined in Philadelphia has been increased since the purchases; that the price has been slightly advanced since that event, but is still lower than it had been for some years before, and up to within a few months of the sales; that about ten per cent of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Co.; that some additional sugar is produced in Louisiana and some is brought from Europe, but the amount is not large in either instance.

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

The Circuit Court held that the facts did not show a contract, combination, or conspiracy to restrain or monopolize trade or commerce "among the several States or with foreign nations," and dismissed the bill. 60 Fed. Rep. 306. The cause was taken to the Circuit Court of Appeals for the Third Circuit, and the decree affirmed. 60 Fed. Rep. 934. This appeal was then prosecuted. The act of Congress of July 2, 1890, c. 647, is as follows:

"An act to protect trade and commerce against unlawful restraints and monopolies.

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one

year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary

restraining order or prohibition as shall be deemed just in the premises.

"SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"SEC. 8. That the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." 26 Stat. 209, c. 647.

Mr. Solicitor General and *Mr. S. F. Phillips*, (with whom was *Mr. Attorney General* on the brief,) for appellants.

Mr. John G. Johnson, (with whom was *Mr. John E. Parsons* on the brief,) for appellees.

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

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be afforded under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And as to the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested.

In commenting upon the statute, 21 Jac. 1, c. 3, at the commencement of chapter 85 of the third Institute, entitled "Against Monopolists, Propounders, and Projectors," Lord Coke, in language often quoted, said:

"It appeareth by the preamble of this act (as a judgment in Parliament) that all grants of monopolies are against the ancient and fundamentall laws of this Kingdome. And therefore it is necessary to define what a monopoly is.

"A monopoly is an institution, or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole

buying, selling, making, working, or using of anything, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome or liberty that they had before, or hindred in their lawfull trade.

"For the word monopoly, *dicitur ἀπὸ τοῦ μόνος*, (i. *solo*,) *καὶ πωλέομαι*, (i. *vendere*,) *quod est cum unus solus aliquod genus mercaturæ universum vendit, ut solus vendat, pretium ad suum libitum statuens:* hereof you may read more at large in that case. Trin. 44 Eliz. Lib. 11, f. 84, 85; *le case de monopolies.*" 3 Inst. 181.

Counsel contend that this definition, as explained by the derivation of the word, may be applied to all cases in which "one person sells alone the whole of any kind of marketable thing, so that only he can continue to sell it, fixing the price at his own pleasure," whether by virtue of legislative grant or agreement; that the monopolization referred to in the act of Congress is not confined to the common law sense of the term as implying an exclusive control, by authority, of one branch of industry without legal right of any other person to interfere therewith by competition or otherwise, but that it includes engrossing as well, and covers controlling the market by contracts securing the advantage of selling alone or exclusively all, or some considerable portion, of a particular kind of merchandise or commodity to the detriment of the public; and that such contracts amount to that restraint of trade or commerce declared to be illegal. But the monopoly and restraint denounced by the act are the monopoly and restraint of interstate and international trade or commerce, while the conclusion to be assumed on this record is that the result of the transaction complained of was the creation of a monopoly in the manufacture of a necessary of life.

In the view which we take of the case, we need not discuss whether because the tentacles which drew the outlying refineries into the dominant corporation were separately put out, therefore there was no combination to monopolize; or, because, according to political economists, aggregations of capital may reduce prices, therefore the objection to concentration of power is relieved; or, because others were theoretically left

free to go into the business of refining sugar, and the original stockholders of the Philadelphia refineries after becoming stockholders of the American Company might go into competition with themselves, or, parting with that stock, might set up again for themselves, therefore no objectionable restraint was imposed.

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," 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. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict

with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 210; *Brown* v. *Maryland*, 12 Wheat. 419, 448; *The License Cases*, 5 How. 504, 599; *Mobile* v. *Kimball*, 102 U. S. 691; *Bowman* v. *Chicago & N. W. Railway*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545, 555.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in *Coe* v. *Errol*, 116 U. S. 517, 525, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic

law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in *Kidd* v. *Pearson*, 128 U. S. 1, 20, 21, 22, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the

South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests — interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see *Veazie* v. *Moor*, 14 How. 568, 574.

In *Gibbons* v. *Ogden*, *Brown* v. *Maryland*, and other cases

often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd* v. *Pearson* the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise mu-

nicipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs,

to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree.

Decree affirmed.

MR. JUSTICE HARLAN, dissenting.

Prior to the 4th day of March, 1892, the American Sugar Refining Company, a corporation organized under a general statute of New Jersey for the purpose of buying, manufacturing, refining, and *selling sugar in different parts of the country*, had obtained the control of *all* the sugar refineries in the United States except five, of which four were owned and operated by Pennsylvania corporations — the E. C. Knight Company, the Franklin Sugar Refining Company, Spreckels' Sugar Refining Company, and the Delaware Sugar House — and the other, by the Revere Sugar Refinery of Boston. These five corporations were all in active competition with the American Sugar Refining Company and with each other. The product of the Pennsylvania companies was about thirty-three per cent, and that of the Boston company about two per cent, of the entire quantity of sugar refined in the United States.

In March, 1892, by means of contracts or arrangements with stockholders of the four Pennsylvania companies, the New Jersey corporation — using for that purpose its own stock — purchased the stock of those companies, and thus obtained absolute control of the entire business of sugar refining in the United States except that done by the Boston company, which is too small in amount to be regarded in this discussion.

"The object," the court below said, "in purchasing the Philadelphia refineries was to obtain a greater influence or *more perfect control* over *the business* of refining *and selling* sugar *in this country*." This characterization of the object for which this stupendous combination was formed is properly accepted in the opinion of the court as justified by the proof. I need not therefore analyze the evidence upon this point. In its consideration of the important constitutional question presented, this court assumes on the record before us

that the result of the transactions disclosed by the pleadings and proof was the creation of a monopoly in the manufacture of a necessary of life. If this combination, so far as its operations necessarily or directly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress, it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land.

The court holds it to be vital in our system of government to recognize and give effect to both the commercial power of the nation and the police powers of the States, to the end that the Union be strengthened and the autonomy of the States preserved. In this view I entirely concur. Undoubtedly, the preservation of the just authority of the States is an object of deep concern to every lover of his country. No greater calamity could befall our free institutions than the destruction of that authority, by whatever means such a result might be accomplished. "Without the States in union," this court has said, "there could be no such political body as the United States." *Lane County* v. *Oregon*, 7 Wall. 71, 76. But it is equally true that the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that government was ordained by the People of the United States; and the destruction of *that* authority would be fatal to the peace and well-being of the American people. The Constitution which enumerates the powers committed to the nation for objects of interest to the people of all the States should not, therefore, be subjected to an interpretation so rigid, technical, and narrow, that those objects cannot be accomplished. Learned counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 187, having suggested that the Constitution should be strictly construed, this court, speaking by Chief Justice Marshall, said that when the original States "converted their league into a

government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected." "What do gentlemen mean," the court inquired, "by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, one might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument — for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent — then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded." p. 188. On the same occasion the principle was announced that the objects for which a power was granted to Congress, especially when those objects are expressed in the Constitution itself, should have great influence in determining the extent of any given power.

Congress is invested with power to regulate commerce with foreign nations and among the several States. The power to regulate is the power to prescribe the rule by which the subject regulated is to be governed. It is one that must be exercised whenever necessary throughout the territorial limits of the several States. *Cohens* v. *Virginia*, 6 Wheat. 264, 413. The power to make these regulations "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution." It is plenary because vested in Congress "as absolutely as it

would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It may be exercised "whenever the subject exists." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, 196. In his concurring opinion in that case, Mr. Justice Johnson observed that the grant to Congress of the power to regulate commerce carried with it the whole subject, leaving nothing for the State to act upon, and that "if there was any one object riding over every other in the adoption of the Constitution, it was to keep commercial intercourse among the States free from *all* invidious and partial restraints." p. 231. "In all commercial regulations we are one and the same people." Mr. Justice Bradley, speaking for this court, said that the United States are but one country, and are and must be subject to one system of regulations in respect to interstate commerce. *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494.

What is commerce among the States? The decisions of this court fully answer the question. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It does not embrace the completely interior traffic of the respective States — that which is "carried on between man and man in a State, or between different parts of the same State and which does not extend to or affect other States" — but it does embrace "every species of commercial intercourse" between the United States and foreign nations and among the States, and, therefore, it includes such traffic or trade, buying, selling, and interchange of commodities, as directly affects or necessarily involves the interests of the People of the United States. "Commerce, as the word is used in the Constitution, is a unit," and "cannot stop at the external boundary line of each State, but may be introduced into the interior." "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, *and to those internal concerns which affect the States generally.*"

These principles were announced in *Gibbons* v. *Ogden*, and have often been approved. It is the settled doctrine of this

court that interstate commerce embraces something more than the mere physical transportation of articles of property, and the vehicles or vessels by which such transportation is effected. In *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, it was said that "commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including, in these terms, navigation and the transportation and transit of persons and property, *as well as* the purchase, sale, and exchange of commodities." In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, the language of the court was: "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, *as well as* the purchase, sale, and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free, and when subject to duties or other exactions." In *Kidd* v. *Pearson*, 128 U. S. 1, 20, it was said that "the buying and selling, and the transportation *incidental thereto* constitute commerce." Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another — every species of commercial intercourse among the States and with foreign nations.

In the light of these principles, determining as well the scope of the power to regulate commerce among the States as the nature of such commerce, we are to inquire whether the act of Congress of July 2, 1890, c. 647, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, is repugnant to the Constitution.

By that act "every contract, combination in the form of trust *or otherwise*, or conspiracy, in restraint of trade or commerce *among the several States* or with foreign nations," is declared to be illegal, and every person making any such contract, or engaging in any such combination or conspiracy,

is to be deemed guilty of a misdemeanor, and punishable, on conviction, by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. § 1. It is also made a misdemeanor, punishable in like manner, for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce *among the several States* or with foreign nations." § 2. The act also declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories or any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and prescribes the same punishments for every person making any such contract, or engaging in any such combination or conspiracy. § 3.

The fourth section of the act is in these words: "Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

It would seem to be indisputable that no *combination* of corporations or individuals can, *of right*, impose unlawful restraints upon *interstate* trade, whether upon transportation or upon such interstate intercourse and traffic as precede trans-

portation, any more than it can, *of right*, impose unreasonable restraints upon the completely internal traffic of a State. The supposition cannot be indulged that this general proposition will be disputed. If it be true that a *combination* of corporations or individuals may, so far as the power of Congress is concerned, subject interstate trade, in any of its stages, to unlawful restraints, the conclusion is inevitable that the Constitution has failed to accomplish one primary object of the Union, which was to place commerce *among the States* under the control of the common government of all the people, and thereby relieve or protect it against burdens or restrictions imposed, by whatever authority, for the benefit of particular localities or special interests.

The fundamental inquiry in this case is, What, in a legal sense, is an unlawful restraint of trade?

Sir William Erle, formerly Chief Justice of the Common Pleas, in his essay on the Law Relating to Trade Unions, well said that "restraint of trade, according to a general principle of the common law, is unlawful;" that "at common law every person has individually, and *the public also have collectively*, a right to require that *the course of trade* should be kept free *from unreasonable obstruction;*" and that "the right to a free course for trade is of great importance to commerce and productive industry, and has been carefully maintained by those who have administered the common law." pp. 6, 7, 8.

There is a partial restraint of trade which, in certain circumstances, is tolerated by the law. The rule upon that subject is stated in *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 66, where it was said that "an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made. *Horner* v. *Graves*, 7 Bing. 735, 743. A contract, even on good consideration, not to use a trade anywhere in England is held void in that country as being too general a restraint of trade."

But a general restraint of trade has often resulted from *combinations* formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition. Combinations of this character have frequently been the subject of judicial scrutiny, and have always been condemned as illegal because of their necessary tendency to restrain trade. Such combinations are against common right and are crimes against the public. To some of the cases of that character it will be well to refer.

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173, 184, 186, 187, the principal question was as to the validity of a contract made between five coal corporations of Pennsylvania, by which they divided between themselves two coal regions of which they had the control. The referee in the case found that those companies acquired under their arrangement the power to control the entire market for bituminous coal in the northern part of the State, and their combination was, therefore, a restraint upon trade and against public policy. In response to the suggestion that the real purpose of the combination was to lessen expenses, to advance the quality of coal, and to deliver it in the markets intended to be supplied in the best order to the consumer, the Supreme Court of Pennsylvania said: "This is denied by the defendants; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal field; that it is the great source of supply of bituminous coal to the State of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel, and this is accomplished by a combination of all the companies engaged in this branch of business

in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void." Again, in the same case: "The effects produced on the public interests lead to the consideration of another feature of great weight in determining the illegality of the contract, to wit, the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence. 'I take it,' said Gibson, J., 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the

latter, whether of extortion or of mischief.' *Commonwealth* v. *Carlisle*, Brightly, (Penn.,) 40. In all such combinations where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many what severally no one could accomplish, and even what when done by one would be innocent." "There is a potency in numbers when combined, which the law cannot overlook, where injury is the consequence."

This case in the Supreme Court of Pennsylvania was cited with approval in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which involved the validity of a contract between two coal companies, the object and effect of which was to give one of them the monopoly of the trade in coal in a particular region, by which the price of that commodity could be artifically enhanced. The Court of Appeals of New York held that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal. . . . If they should be sustained, the prices of articles of pure necessity, such as coal, flour and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand. No illustration of the mischief of such contracts is perhaps more apt than a monopoly of anthracite coal, the region of the production of which is known to be limited." See also *Hooker* v. *Vandewater*, 4 Denio, 351, 352; *Stanton* v. *Allen*, 5 Denio, 434; *Saratoga Bank* v. *King*, 44 N. Y. 87.

In *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, the principal question was as to the legality of an association of substantially all the manufacturers of salt in a large salt producing territory. After adverting to the rule that contracts in general restraint of trade are against public policy, and to the agreement there in question, it was said: "Public policy, unquestionably, favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public.

. . . The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, the courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."

In *Craft* v. *McConoughy*, 79 Illinois, 346, 349, 350, which related to a combination between all the grain dealers of a particular town to stifle competition, and to obtain control of the price of grain, the Supreme Court of Illinois said: "While the argument, upon its face, would seem to indicate that the parties had formed a copartnership for the purpose of trading in grain, yet, from the terms of the contract, and the other proof in the record, it is apparent that the true object was, to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, cost of storage, and expense of shipment. In other words, the four firms, by a shrewd, deep-laid, secret combination, attempted to control and monopolize the entire grain trade of the town and surrounding country. That the effect of this contract was to restrain the trade and commerce of the country, is a proposition that cannot be successfully denied. We understand it to be a well-settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal and void, but an agreement in partial or particular restraint upon trade has been held good, where the restraint was only partial, consideration adequate, and the restriction reasonable." "While these parties were in business, in competition with each other, they had the undoubted right to establish their own rates for grain stored and commissions for shipment and sale. They could pay as high or low a price for grain as they saw proper, and as they could make contracts with the producer. So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the right of competition, were all the

guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly against which the public interest had no protection."

These principles were applied in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 269, 292, 297, which involved the validity of a corporation formed for the purpose of operating gas works, and of manufacturing and selling gas, and which, for the purpose of destroying competition, acquired the stock of four other gas companies, and thereby obtained a monopoly in the business of furnishing illuminating gas to the city of Chicago and its inhabitants. The court, in declaring the organization of the company to be illegal, said: "The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies, shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and by crushing out competition to monopolize the gas business in Chicago." "Of what avail," said the court, "is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?"

So, in *India Bagging Association* v. *Kock*, 14 La. Ann. 168, where the court passed upon the legality of an association of various commercial firms in New Orleans that were engaged in the sale of India bagging, it was said: "The agreement between the parties was palpably and unequivocably a combination in restraint of trade, and to enhance the price in the market of an article of primary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

In *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which related to a combination, the result of certain contracts among certain manufacturers, the court found that the object, purpose, and consideration of those contracts was to form a combination among all the manufacturers of lumber

at or near a particular place, for the sole purpose of increasing the price of that article, limiting the amount to be manufactured, and giving certain parties the control of all lumber manufactured near that place for the year 1881, and of the supply for that year in specified counties. It held the combination to be illegal, observing that "among the contracts illegal under the common law, because opposed to public policy, were contracts in general restraint of trade; contracts between individuals to prevent competition and keep up the price of articles of utility." It further said that while the courts had nothing to do with the results naturally flowing from the laws of demand and supply, they would not respect agreements made for the purpose of "taking trade out of the realm of competition, and thereby enhancing or depressing prices of commodities."

A leading case on the question as to what combinations are illegal as being in general restraint of trade, is *Richardson* v. *Buhl*, 77 Michigan, 632, 635, 657, 660, which related to certain agreements connected with the business and operations of the Diamond Match Company. From the report of the case it appears that that company was organized, under the laws of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States, and to monopolize and control the business of making all the friction matches in the country, and establish the price thereof. To that end it became necessary, among other things, to buy many plants that had become established or were about to be established, as well as the property used in connection therewith. Chief Justice Sherwood of the Supreme Court of Michigan said: "The sole object of the corporation is to make money by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure. Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation — an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or neces-

sities of over 60,000,000 people. The article thus completely under their control, for the last fifty years, has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes and in carrying out its object that the contract in this case was made between those parties, which we are now asked to aid in enforcing. Monopoly in trade, or in any kind of business in this country, is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise or public work under governmental control in the interest of the public. Its tendency is, however, destructive of free institutions and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provisions in several of our state constitutions. . . . All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies and intolerable; and ought to receive the condemnation of all courts."

In the same case, Mr. Justice Champlin, with whom Mr. Justice Campbell concurred, said: "There is no doubt that all the parties to this suit were active participants in perfecting the combination called 'The Diamond Match Company,' and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company. Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition.

The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such combinations have frequently been condemned by courts as unlawful and against public policy." See also *Raymond* v. *Leavitt*, 46 Michigan, 447, and *Texas Standard Oil Co.* v. *Adoue*, 83 Texas, 650.

This extended reference to adjudged cases relating to unlawful restraints upon the interior traffic of a State has been made for the purpose of showing that a combination such as that organized under the name of the American Sugar Refining Company has been uniformly held by the courts of the States to be against public policy and illegal because of its necessary tendency to impose improper restraints upon trade. And such, I take it, would be the judgment of any Circuit Court of the United States in a case between parties in which it became necessary to determine the question. The judgments of the state courts rest upon general principles of law, and not necessarily upon statutory provisions expressly condemning restraints of trade imposed by or resulting from combinations. Of course, in view of the authorities, it will not be doubted that it would be competent for a State, under the power to regulate its domestic commerce and for the purpose of protecting its people against fraud and injustice, to make it a public offence punishable by fine and imprisonment, for individuals or corporations to make contracts, form combinations, or engage in conspiracies, which unduly restrain trade or commerce carried on within its limits, and also to authorize the institution of proceedings for the purpose of annulling contracts of that character, as well as of preventing or restraining such combinations and conspiracies.

But there is a trade among the several States which is distinct from that carried on within the territorial limits of a State. The regulation and control of the former is committed by the national Constitution to Congress. Commerce among the States, as this court has declared, is a unit, and in respect of *that* commerce this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot

interfere with the enforcement of such rules. The jurisdiction of the general government extends over every foot of territory within the United States. Under the power with which it is invested, Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the States. In so doing it would not interfere with the "autonomy of the States," because the power thus to protect interstate commerce is expressly given by the people of all the States. Interstate intercourse, trade, and traffic is absolutely free, except as such intercourse, trade, or traffic may be incidentally or indirectly affected by the exercise by the States of their reserved police powers. *Sherlock* v. *Alling*, 93 U. S. 99, 103. It is the Constitution, the supreme law of the land, which invests Congress with power to protect commerce among the States against burdens and exactions arising from unlawful restraints by whatever authority imposed. Surely a right secured or granted by that instrument is under the protection of the government which that instrument creates. Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States — a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition — affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405.

It has been argued that a combination between corporations of different States, or between the stockholders of such corporations, with the object and effect of controlling not simply the manufacture but the price of refined sugar throughout the whole of the United States — which is the case now before us — cannot be held to be in restraint of "commerce among the States" and amenable to national authority, without conceding that the general government has authority to say what shall and what shall not be *manufactured* in the several States.

Kidd v. *Pearson*, 128 U. S. 1, was cited in argument as supporting that view. In that case the sole question was, whether the State of Iowa could forbid the *manufacture* within its limits of ardent spirits intended for sale ultimately in other States. This court held that the manufacture of intoxicating liquors in a State is none the less a business within the State subject to state control because the manufacturer may intend, at his convenience, to export such liquors to foreign countries or to other States. The authority of the States over the manufacture of strong drinks within their respective jurisdictions was referred to their plenary power, never surrendered to the national government, of providing for the health, morals, and safety of their people.

That case presented no question as to a *combination* to monopolize the sale of ardent spirits manufactured in Iowa to be sold in other States — no question as to combinations in restraint of trade as involved in the buying and selling of articles that are intended to go, and do go, and will always go, into commerce throughout the entire country, and are used by the people of all the States, and the making or manufacturing of which no State could forbid consistently with the liberty that every one has of pursuing, without undue restrictions, the ordinary callings of life. There is no dispute here as to the lawfulness of the business of refining sugar, *apart from the undue restraint which the promoters of such business, who have combined to control prices, seek to put upon the freedom of interstate traffic in that article.*

It may be admitted that an act which did nothing more than forbid, and which had no other object than to forbid, the *mere* refining of sugar in any State, would be in excess of any power granted to Congress. But the act of 1890 is not of that character. It does not strike at the manufacture simply of articles that are legitimate or recognized subjects of commerce, but at *combinations* that unduly restrain, because they monopolize, *the buying and selling of articles* which are to go into interstate commerce. In *State* v. *Stewart*, 59 Vermont, 273, 286, it was said that if a *combination* of persons "seek to restrain trade, or tend to the destruction of the material prop-

erty of the country, they work injury to the whole people." And in *State* v. *Glidden*, 55 Connecticut, 46, 75, the court said: "Any one man, or any one of several men acting independently, is powerless; but when several combine and direct their united energies to the accomplishment of a bad purpose, the combination is formidable. Its power for evil increases as its numbers increase. . . . The combination becomes dangerous and subversive of the rights of others, and the law wisely says it is a crime." Chief Justice Gibson well said in *Commonwealth* v. *Carlisle*, Brightly, (Penn.,) 36, 41: "There is between the different parts of the body politic a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and action, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest or that of any other individual beyond the limits of fair competition; but the increase of power by combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." These principles underlie the act of Congress, which has for its sole object the protection of such trade and commerce *as the Constitution confides to national control*, and the question is presented whether the *combination* assailed by this suit is an unlawful restraint upon interstate trade in a necessary article of food which, as every one knows, has always entered, now enters and must continue to enter, in vast quantities, into commerce among the States.

In *Kidd* v. *Pearson* we recognized, as had been done in previous cases, the distinction between the mere transportation of articles of interstate commerce and the *purchasing* and *selling* that *precede transportation*. It is said that manufacture precedes commerce and is not a part of it. But it is equally true that when manufacture ends, that which has been manu-

factured becomes a subject of commerce; that buying and selling succeed manufacture, come into existence after the process of manufacture is completed, precede transportation, and are as much commercial intercourse, where articles are bought *to be* carried from one State to another, as is the manual transportation of such articles after they have been so purchased. The distinction was recognized by this court in *Gibbons* v. *Ogden*, where the principal question was whether commerce included navigation. Both the court and counsel recognized buying and selling or barter *as included in commerce.* Chief Justice Marshall said that the mind can scarcely conceive a system for regulating commerce, which was "*confined* to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter." pp. 189, 190.

The power of Congress covers and protects the absolute freedom of such intercourse and trade among the States as may or must succeed manufacture and precede transportation from the place of purchase. This would seem to be conceded; for, the court in the present case expressly declare that "*contracts to buy*, sell, or exchange goods *to be transported among the several States*, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, *may be regulated*, but this is *because they form part of interstate trade or commerce.*" Here is a direct admission — one which the settled doctrines of this court justify — that contracts to buy and the purchasing of goods *to be transported from one State to another*, and transportation, with its instrumentalities, are all *parts* of interstate trade or commerce. Each part of such trade is then under the protection of Congress. And yet, by the opinion and judgment in this case, if I do not misapprehend them, Congress is without power to protect the commercial intercourse that such purchasing necessarily involves against the restraints and burdens arising from the existence of *combinations* that meet purchasers, from whatever State they come, with the threat — for it is nothing more nor less than a threat — that they *shall not* purchase what

they desire to purchase, *except at the prices fixed by such combinations.* A citizen of Missouri has the right to go in person, or send orders, to Pennsylvania and New Jersey for the purpose of purchasing refined sugar. But of what value is that right if he is confronted in those States by a vast *combination* which absolutely controls the price of that article by reason of its having acquired all the sugar refineries in the United States in order that they may fix prices in their own interest exclusively?

In my judgment, the citizens of the several States composing the Union are entitled, of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all recognized articles of commerce, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *State* within whose limits the business of refining sugar is exclusively carried on may not constitutionally im-

pose burdens upon purchases of sugar *to be transported to other States*, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article *to be carried from the State in which such purchases are made?* If the national power is competent to repress *State* action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may — so far as national power and interstate commerce are concerned — do, with impunity, what no State can do.

Suppose that a suit were brought in one of the courts of the United States — jurisdiction being based, it may be, alone upon the diverse citizenship of the parties — to enforce the stipulations of a written agreement, which had for its object to acquire the possession of all the sugar refineries in the United States, in order that those engaged in the combination might obtain the entire control of the business of refining and selling sugar throughout the country, and thereby to increase or diminish prices as the particular interests of the combination might require. I take it that the court, upon recognized principles of law common to the jurisprudence of this country and of Great Britain, would deny the relief asked and dismiss the suit upon the ground that the necessary tendency of such an agreement and combination was to restrain, not simply trade that was completely internal to the State in which the parties resided, but trade and commerce among all the States, and was, therefore, against public policy and illegal. If I am right in this view, it would seem to follow, necessarily, that Congress could enact a statute forbidding such combinations so far as they affected interstate commerce, and provide for their suppression as well through civil proceedings instituted for that purpose, as by penalties against those engaged in them.

In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power except those arising from the general nature of the government, or such as are embodied in the fundamental guarantees of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief Justice Marshall three-quarters of a century ago, and which has been repeatedly affirmed by this court. That rule is: "The sound construction of the Constitution must allow to the national legislature the discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. The end proposed to be accomplished by the act of 1890 is the protection of trade and commerce among the States against unlawful restraints. Who can say that that end is not legitimate or is not within the scope of the Constitution? The means employed are the suppression, by legal proceedings, of combinations, conspiracies, and monopolies, which by their inevitable and admitted tendency, improperly restrain trade and commerce among the States. Who can say that such means are not appropriate to attain the end of freeing commercial intercourse among the States from burdens and exactions imposed upon it by combinations which, under principles long recognized in this country as well as at the

common law, are illegal and dangerous to the public welfare? What clause of the Constitution can be referred to which prohibits the means thus prescribed in the act of Congress?

It may be that the means employed by Congress to suppress combinations that restrain interstate trade and commerce are not all or the best that could have been devised. But Congress, under the delegation of authority to enact laws necessary and proper to carry into effect a power granted, is not restricted to the employment of those means "without which the end would be entirely unattainable." "To have prescribed the means," this court has said, "by which government should, in all future time, execute its powers, would have been to change entirely the character of that instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415, 423.

By the act of 1890, Congress subjected to forfeiture "any property owned under any contract or by any combination, or pursuant to any conspiracy, (and being the subject thereof,) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country." It was not deemed wise to subject such property to forfeiture before transportation began or after it ended. If it be suggested that Congress might have prohibited the *transportation* from the State in which they are manufactured of any articles, by whomsoever at the time owned, that had been

manufactured by combinations formed to monopolize some designated part of trade or commerce among the States, my answer is that it is not within the functions of the judiciary to adjudge that Congress shall employ particular means in execution of a given power, simply because such means are, in the judgment of the courts, best conducive to the end sought to be accomplished. Congress, in the exercise of its discretion as to choice of means conducive to an end to which it was competent, determined to reach that end through civil proceedings instituted to prevent or restrain these obnoxious combinations in their attempts to burden interstate commerce by obstructions that interfere *in advance of transportation* with the free course of trade between the people of the States. In other words, Congress sought to prevent the coming into existence of combinations, the purpose or tendency of which was to impose unlawful restraints upon interstate commerce.

There is nothing in conflict with these views in *Coe* v. *Errol*, 116 U. S. 517, 529. There the question was whether certain logs cut in New Hampshire, and hauled to a river that they might be transported to another State, were liable to be *taxed* in the former State before actual transportation to the latter State began. The court held that the logs might be taxed while they remained in the State of their origin as part of the general mass of property there; that "for *this purpose*" — taxation — the property did not pass from the jurisdiction of the State in which it was until transportation began. The scope of the decision is clearly indicated by the following clause in the opinion of Mr. Justice Bradley: "How can property thus situated, to wit, deposited or stored at the place of entrepôt for future exportation, be taxed in the regular way as part of the property of the State? The answer is plain. It can be taxed as all other property is taxed, in the place where it is found, if taxed or assessed for taxation in the usual manner in which such property is taxed; and not singled out to be assessed by itself in an unusual and exceptional manner because of its situation." As we have now no question as to the *taxation* of articles manufactured by one of the combinations condemned by the act of Congress, and

as no one has suggested that the State in which they may be manufactured could not *tax* them *as property* so long as they remained within its limits, and before transportation of them to other States began, I am at a loss to understand how the case before us can be affected by a decision that personal property, while it remains in the State of its origin, although it is to be sent at a future time to another State, is within the jurisdiction of the former State for purposes of taxation.

The question here relates to restraints upon the freedom of interstate trade and commerce imposed by illegal combinations. After the fullest consideration I have been able to bestow upon this important question, I find it impossible to refuse my assent to this proposition: Whatever a State may do to protect its completely interior traffic or trade against unlawful restraints, the general government is empowered to do for the protection of the people of all the States — for this purpose one people — against unlawful restraints imposed upon interstate traffic or trade in articles that are to enter into commerce among the several States. If, as already shown, a State may prevent or suppress a *combination*, the effect of which is to subject its domestic trade to the restraints necessarily arising from their obtaining the absolute control of the sale of a particular article in general use by the community, there ought to be no hesitation in allowing to Congress the right to suppress a similar *combination* that imposes a like unlawful restraint upon interstate trade and traffic in that article. While the States retain, because they have never surrendered, full control of their completely internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of Congress. Each State can reach and suppress combinations so far as they unlawfully restrain its interior trade, while the national government may reach and suppress them so far as they unlawfully restrain trade among the States.

While the opinion of the court in this case does not declare the act of 1890 to be unconstitutional, it defeats the main object for which it was passed. For it is, in effect, held that the statute would be unconstitutional if interpreted as em-

bracing such unlawful restraints upon the purchasing of goods in one State to be carried to another State as necessarily arise from the *existence* of combinations formed for the purpose and with the effect, not only of monopolizing the ownership of all such goods in every part of the country, but of controlling the prices for them in all the States. This view of the scope of the act leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles purchased to be transported from one State to another State. I cannot assent to that view. In my judgment, the general government is not placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines, under the name of a corporation, to destroy competition, not in one State only, but throughout the entire country, in the buying and selling of articles — especially the necessaries of life — that go into commerce among the States. The doctrine of the autonomy of the States cannot properly be invoked to justify a denial of power in the national government to meet such an emergency, involving as it does that freedom of commercial intercourse among the States which the Constitution sought to attain.

It is said that there are no proofs in the record which indicate an *intention* upon the part of the American Sugar Refining Company and its associates to put a restraint upon trade or commerce. Was it necessary that formal proof be made that the persons engaged in this combination admitted, in words, that they intended to restrain trade or commerce? Did any one expect to find in the written agreements which resulted in the formation of this combination a distinct expression of a purpose to restrain interstate trade or commerce? Men who form and control these combinations are too cautious and wary to make such admissions orally or in writing. Why, it is conceded that the object of this combination was to obtain control of the business of making and selling refined sugar throughout the entire country. Those interested in its operations will be satisfied with nothing less than to have the whole population of America pay tribute to them. That object

is disclosed upon the very face of the transactions described in the bill. And it is proved — indeed, is conceded — that that object has been accomplished to the extent that the American Sugar Refining Company now controls ninety-eight per cent of all the sugar refining business in the country, and therefore controls the price of that article everywhere. Now, the *mere existence* of a combination having such an object and possessing such extraordinary power is itself, under settled principles of law — there being no adjudged case to the contrary in this country — a direct restraint of trade in the article for the control of the sales of which in this country that combination was organized. And that restraint is felt in all the States, for the reason, known to all, that the article in question goes, was intended to go, and must always go, into commerce among the several States, and into the homes of people in every condition of life.

A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations of corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness — so powerful that no single State is able to overthrow them and give the required protection to the whole country, and so all-pervading that they threaten the integrity of our institutions.

We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all

refined sugar in this country. Suppose another *combination*, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power — one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?

To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. "Powerful and ingenious minds," this court has said, "taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived." *Gibbons* v. *Ogden*, 9 Wheat. 1, 222.

While a decree annulling the contracts under which the

combination in question was formed, may not, in view of the facts disclosed, be effectual to accomplish the object of the act of 1890, I perceive no difficulty in the way of the court passing a decree declaring that that combination imposes an unlawful restraint upon trade and commerce among the States, and perpetually enjoining it from further prosecuting any business pursuant to the unlawful agreements under which it was formed or by which it was created. Such a decree would be within the scope of the bill, and is appropriate to the end which Congress intended to accomplish, namely, to protect the freedom of commercial intercourse among the States against combinations and conspiracies which impose unlawful restraints upon such intercourse.

For the reasons stated I dissent from the opinion and judgment of the court.

STUART *v.* EASTON.

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

No. 151. Argued January 15, 1895. — Decided January 21, 1895.

An averment that the plaintiff is "a citizen of London, England," is not sufficient to give the Circuit Court jurisdiction on the ground of his alienage, the defendant being a citizen; and on the question being raised in this court, the case may be remanded with leave to apply to the Circuit Court for amendment and for further proceedings.

THE case is stated in the opinion.

Mr. C. Berkeley Taylor and *Mr. A. T. Freedley*, (with whom was *Mr. W. Brooke Rawle* on the brief,) for plaintiff in error.

Mr. H. J. Steele for defendants in error.

THE CHIEF JUSTICE: Plaintiff in error is described throughout the record as "a citizen of London, England," and the defendants as "corporations of the State of Pennsylvania." As the jurisdiction of the Circuit Court confessedly depended

on the alienage of plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the Circuit Court with leave to apply for amendment and for further proceedings. *Bingham* v. *Cabot*, 3 Dall. 382; *Mossman* v. *Higginson*, 4 Dall. 12; *Capron* v. *Van Noorden*, 2 Cranch, 125; *Jackson* v. *Twentyman*, 2 Pet. 136; *Conolly* v. *Taylor*, 2 Pet. 556; *Brown* v. *Keene*, 8 Pet. 115; *Robertson* v. *Cease*, 97 U. S. 646; *Börs* v. *Preston*, 111 U. S. 252, 263; *Denny* v. *Pironi*, 141 U. S. 121; *Horne* v. *George H. Hammond Co.*, 155 U. S. 393.

Judgment reversed.

ROUSE v. LETCHER.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 582. Submitted December 17, 1894. — Decided January 21, 1895.

A judgment in a Circuit Court of Appeals upon the claim of an intervenor, set up in a Circuit Court against the receiver of a railroad appointed by that court in a suit for the foreclosure of a mortgage upon the road, is a final judgment which cannot be reviewed in this court.

Motion to dismiss. The Mercantile Trust Company, a corporation of New York, filed its bill in the Circuit Court of the United States for the District of Kansas, June 8, 1888, against the Missouri, Kansas and Texas Railway Company, a corporation of Kansas, for the foreclosure of certain mortgages and deeds of trust, and George A. Eddy and H. C. Cross were thereupon appointed receivers of the company, and took charge of its property, which consisted, among other things, of a line of railroad running from Hannibal, Missouri, to Parsons, Kansas, and to Fort Worth, Texas. Ancillary proceedings were also had in the Circuit Courts of the United States through whose jurisdiction the railway ran. On October 11, 1890, Annie Letcher filed her intervening petition in that cause in the Circuit Court of the United States for the Northern

Division of the Eastern District of Missouri, at Hannibal, claiming damages on account of the death of her husband, Harvey Letcher, occasioned, as she averred, by the negligence of the receivers, their agents, servants and employés. The receivers having filed their answer thereto, the matter was referred by the court to a master in chancery to report conclusions thereon. A hearing was had and a report made by the master, May 18, 1891, recommending a judgment for $5000 in favor of the intervenor. Exceptions were filed and overruled, and the Circuit Court at Hannibal, on January 5, 1892, allowed the claim of the intervenor and rendered judgment for $5000 against the receivers, and ordered it "paid unto the intervenor herein, or her solicitor of record, by George A. Eddy and Harrison C. Cross, the receivers in this cause, out of any money or funds in their hands applicable to that purpose, or that the same be paid by the persons or corporations who have succeeded to the possession of the property lately in the custody of said receivers, who by the terms of the final decree, or previous orders in this cause, are chargeable with the payment of such claims." An appeal from this decree was taken by the receivers to the Circuit Court of Appeals for the Eighth Circuit and the decree affirmed, July 10, 1893. *Eddy* v. *Letcher*, 12 U. S. App. 506; *S. C.* 57 Fed. Rep. 115. Thereupon an appeal was prayed and allowed to this court, which the intervenor moved to dismiss. The deaths of Eddy and Cross having been suggested, the appearance of Henry C. Rouse, appointed receiver in their place, was entered.

Mr. James P. Wood for the motion.

Mr. James Hagerman and *Mr. George P. B. Jackson* opposing.

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

By section six of the judiciary act of March 3, 1891, c. 517, the judgments or decrees of the Circuit Courts of Appeals are made final "in all cases in which the jurisdiction is dependent

entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." And it is also provided that "in all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars." 26 Stat. 826, 828.

If the decree of the Circuit Court of Appeals for the Eighth Circuit was final under the sixth section, then this appeal must be dismissed, and in order to maintain that the decision was not final it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States. The jurisdiction of the Circuit Court was invoked by the filing of the bill, upon which it appeared that the suit was one of which cognizance could properly be taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction was rested or could be asserted on any other ground. But it is insisted that appellee's cause of action arose long after the Circuit Court had taken jurisdiction and the receivers had been appointed, and that her suit by intervention was one arising under the Constitution and laws of the United States because the cause of action was asserted against the receivers as officers of the United States court and arose as alleged by reason of negligence on their part in the course of their receivership. It is plain, however, that the intervention was entertained as belonging to that class of proceedings recognized as allowable where property sought to be charged is *in custodia legis*, and not on any other ground. Although appellee's claim was purely a legal one, she did not bring an action at law, but was permitted to intervene by petition as in the assertion of a claim upon the property or fund being administered by the court. It is well settled that where property is in the actual possession of a court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Morgan's Co.* v. *Texas Central Railway*, 137 U. S. 171, 201; and that where assets are in the course of administration, all persons entitled

to participate may come in, under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction would be lacking if such proceedings had been originally and independently prosecuted. *Stewart* v. *Dunham*, 115 U. S. 61, 64; *Richmond* v. *Irons*, 121 U. S. 27, 52. And since where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even in cases where the Circuit Court might have had jurisdiction of an independent action. Here, as we have said, the jurisdiction of the Circuit Court was invoked in the first instance by the filing of the bill, and it was under that jurisdiction that appellee intervened in the case, and that jurisdiction depended entirely upon diverse citizenship. We think the use of the words "suit or controversy" in the sixth section does not affect the conclusion. If the word "controversy" added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and it is to that point of time that the inquiry as to jurisdiction must necessarily be referred. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138. Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed be separately reviewed but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit. We are unable to attribute to Congress the intention of allowing final orders on every incidental controversy, involving over one thousand dollars, to be brought to this court for review, while denying such review of the principal decree, although involving millions.

Tested by these principles, the decree of the Circuit Court of Appeals was final, and the motion to dismiss must be sustained.

Appeal dismissed.

Syllabus.

SPARF AND HANSEN *v.* UNITED STATES.

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

No. 613. Submitted March 5, 1894. — Decided January 21, 1895.

If one of two persons accused of having together committed the crime of murder makes a voluntary confession in the presence of the other, under such circumstances that he would naturally have contradicted it if he did not assent, the confession is admissible in evidence against both.

If two persons are indicted and tried jointly for murder, declarations of one made after the killing and in the absence of the other, tending to prove the guilt of both, are admissible in evidence against the one making the declarations, but not against the other.

An objection to the admissibility of such evidence, made at the trial in the name of both defendants, on the general ground that it was irrelevant, immaterial, and incompetent, furnishes, if the testimony be admitted, sufficient ground in case of conviction for bringing the case to this court, and warrants the reversal of the conviction of the defendant against whom it was not admissible.

Confession of a person imprisoned and in irons, under an accusation of having committed a capital offence, are admissible in evidence against him, if they appear to have been voluntary, and not obtained by putting him in fear, or by promises.

Section 1035 of the Revised Statutes does not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justifies it; but it enables the jury, in case the defendant is not shown to be guilty of the particular crime charged, to find him guilty of a lesser offence necessarily included in the one charged, or of the attempt to commit the one charged, when the evidence permits that to be done.

In the courts of the United States it is the duty of the jury, in criminal cases, to receive the law from the court, and to apply it as given by the court, subject to the condition that by a general verdict a jury of necessity determines both law and fact as compounded in the issue submitted to them in the particular case.

In criminal cases it is competent for the court to instruct the jury as to the legal presumptions arising from a given state of facts; but it may not, by a peremptory instruction, require the jury to find the accused guilty of the offence charged, nor of any offence less than that charged.

On the trial in a court of the United States of a person accused of committing the crime of murder, if there be no evidence upon which the jury can properly find the defendant guilty of an offence included in or less than the one charged, it is not error to instruct them that they cannot return a verdict of guilty of manslaughter, or of any offence less than

the one charged; and, in such case, if the defendant was not guilty of the offence charged, it is the duty of the jury to return a verdict of not guilty.

THE case is stated in the opinion.

Mr. J. F. Smith and *Mr. F. J. Kierce* for plaintiffs in error.

Mr. Assistant Attorney General Conrad for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiffs in error and Thomas St. Clair were indicted jointly for the murder of Maurice Fitzgerald upon the high seas, on board of an American vessel, the bark Hesper, as set forth in the indictment mentioned in *St. Clair* v. *United States*, 154 U. S. 134. On motion of the accused it was ordered that they be tried separately. St. Clair was tried, found guilty of murder, and sentenced to suffer the punishment of death. Subsequently the order for separate trials was set aside, and the present defendants were tried together, and both were convicted of murder. A motion for a new trial having been overruled, a like sentence was imposed upon them.

The general facts of this case do not differ from those proved in St. Clair's case, and some of the questions arising upon the present assignments of error were determined in that case. Only such questions will be here examined as were not properly presented or did not arise in the other case, and as are of sufficient importance to require notice at our hands.

In the night of January 13, 1893, Fitzgerald, the second mate of the Hesper, was found to be missing, and it was believed that he had been killed and his body thrown overboard. Suspicion being directed to St. Clair, Sparf, and Hansen, part of the crew of the Hesper, as participants in the killing, they were put in irons by order of Captain Sodergren, master of the vessel, and were so kept during the

voyage from the locality of the supposed murder to Tahiti, an island in the South Pacific belonging to the French government. They were taken ashore by the United States consul at that island, and subsequently were sent, with others, to San Francisco on the vessel Tropic Bird.

At the trial, Captain Sodergren, a witness for the government, was asked whether or not after the 13th day of January and before reaching Tahiti — which was more than one thousand miles from the locality of the alleged murder — he had any conversation with the defendant Hansen about the killing of Fitzgerald. This question having been answered by the witness in the affirmative, he was fully examined as to the circumstances under which the conversation was held. He said among other things that no one was present but Hansen and himself. Being asked to repeat the conversation referred to, the accused, by the counsel who had been appointed by the court to represent them, objected to the question as "irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary." The objection was overruled, and the defendants duly excepted. The witness then stated what Hansen had said to him. That evidence tended strongly to show that Fitzgerald was murdered pursuant to a plan formed between St. Clair, Sparf, and Hansen; that all three actively participated in the murder; and that the crime was committed under the most revolting circumstances.

Thomas Green and Edward Larsen, two of the crew of the Hesper, were also witnesses for the government. They were permitted to state what Hansen said to them during the voyage from Tahiti to San Francisco. This evidence was also objected to as irrelevant, immaterial, and incompetent, and upon the further ground that the statement the accused was represented to have made was not voluntary. But the objection was overruled and an exception taken.

Upon the conclusion of the evidence the defendants requested certain instructions which the court refused to give, and they excepted to its action in that particular, as well as to certain parts of the charge to the jury.

Opinion of the Court.

1. The declarations of Hansen, as detailed by Sodergren, Green, and Larsen, were clearly admissible in evidence against him. There was no ground on which their exclusion could have been sustained. In reference to this proof, the court charged the jury that if they believed from the evidence that Green and Larsen or either of them were accomplices in the commission of the acts charged in the indictment, they should act upon their testimony with great caution, subjecting it to a careful examination in the light of all the other evidence, and ought not to convict upon their testimony alone, unless satisfied beyond reasonable doubt of its truth; that if Larsen and Green or either of them or any other person were induced to testify by promises of immunity from punishment, or by hope held out from any one that it would go easier with them in case they disclosed their confederates, or in case they implicated some one else in the crime, this must be taken into consideration in determining the weight to be given to their testimony, and should be closely scrutinized; that the confessions of a prisoner out of court and in custody made to persons having no authority to examine him, should be acted upon and received with great care and caution; that words are often misreported through ignorance, inattention, or malice, are extremely liable to misconstruction, are rarely sufficient to warrant conviction as well on account of the great danger of mistake upon the part of the witness, as of the fact that the mind of the prisoner himself may be oppressed by his situation or influenced by motives of hope or fear to make an untrue confession; that in considering the weight to be given to the alleged confessions of the defendants, the jury were to consider their condition at the time they were made, the fact that they had been charged with crime, and were in custody; and that the jury were to determine whether those confessions were voluntary or whether any inducements were held out to them by any one. The defendants did not offer themselves as witnesses, and the court took care to say that a person charged with crime is under no obligation to testify in his own behalf, and that his neglect to testify did not create any presumption whatever against him.

So far as the record discloses, these confessions were entirely free and voluntary, uninfluenced by any hope of reward or fear of punishment. In *Hopt* v. *Utah*, 110 U. S. 574, 584, it was said: "While some of the adjudged cases indicate distrust of confessions which are not judicial, it is certain, as observed by Baron Parke, in *Regina* v. *Baldry*, 2 Dennison & Pearce Cr. Cas. 430, 445, that the rule against their admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character. Such a confession, said Eyre, C. B., *King* v. *Warickshall*, 1 Leach Cr. Law, 263, 'is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and, therefore, it is admitted as proof of the crime to which it refers.' Elementary writers of authority concur in saying that while from the nature of such evidence it must be subjected to careful scrutiny and received with great caution, a deliberate voluntary confession of guilt is among the most effectual proofs in the law and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."

Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited. The import of Sodergren's evidence was that when Hansen manifested a desire to speak to him on the subject of the killing, the latter said he did not

wish to hear it, but "to keep it until the right time came and then tell the truth." But this was not offering to the prisoner an inducement to make a confession. Littledale, J., well observed in *Rex* v. *Court*, 7 Car. & P. 486, that telling a man to be sure to tell the truth is not advising him to confess anything of which he is really not guilty. See also *Queen* v. *Reeve*, L. R. 1 C. C. 362. Nothing said to Hansen prior to the confession was at all calculated to put him in fear or to excite any hope of his escaping punishment by telling what he knew or witnessed or did in reference to the killing.

The declarations of Hansen after the killing, as detailed by Green and Larsen, were also admissible in evidence against Sparf, because they appear to have been made in his presence and under such circumstances as would warrant the inference that he would naturally have contradicted them if he did not assent to their truth.

But the confession and declarations of Hansen to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Clair, Hansen, and Sparf were charged jointly with the murder of Fitzgerald. What Hansen said after the deed had been fully consummated, and not on the occasion of the killing and in the presence only of the witness, was clearly incompetent against his codefendant, Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder, the rule is settled that "after the conspiracy has come to an end, and whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others." *Logan* v. *United States*, 144 U. S. 263, 309; *Brown* v. *United States*, 150 U. S. 93, 98; Wright's Criminal Conspiracies, Carson's ed. 212, 213, 217; 1 Greenleaf, § 233. The same rule is applicable where the evidence does not show that the killing was pursuant to a conspiracy, but yet was by the joint act of the defendants.

The objection to the question, in answer to which the declarations of Hansen to Sodergren were given, was sufficiently specific. The general rule undoubtedly is that an objection

should be so framed as to indicate the precise point upon which the court is asked to rule. It has, therefore, been often held that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if in any possible circumstances it could be deemed or could be made relevant, material, or competent. But this principle will not sustain the ruling by which the declarations of Hansen, made long after the commission of the alleged murder, and not in the presence of Sparf, were admitted as evidence against the latter. In no state of case were those declarations competent against Sparf. Its inadmissibility as to *him* was apparent. It appeared upon the very face of the question itself.

In *People* v. *Beach*, 87 N. Y. 508, 513, which was an indictment for petit larceny, the prosecution offered in evidence the statements of a third party, not in the presence of the accused, which related to the vital point upon which the conviction turned. There was a general objection to the evidence. The court said: "We think, however, the general objection made in this case was sufficient. It appeared, when the objection was made, that the conversation proposed to be shown was between the prosecutor and Hardacre, when the defendant was not present. There was no possible view of the case, as it then or afterward stood, in which such a conversation was admissible. When the witness was asked to state the conversation, and counsel objected, both the court and the prosecuting officer must have understood that it was an objection to the competency of the proposed evidence. If the objection had been made in terms, on the ground that the evidence was incompetent, the sufficiency of the objection could not have been questioned, and the objection, as made, necessarily implied this. Neither the court nor prosecuting attorney could have been misled as to the point of the objection. It was patent on considering the objection in connection with the proof offered. If any doubt could be entertained as to the technical sufficiency of the objection, we should be disinclined in a criminal case, to deprive a defendant of the benefit of an exception by the strict application of a rule more especially

applicable to civil cases, when we can see that its application would produce injustice." And in *Turner* v. *City of Newburgh*, 109 N. Y. 301, 308, it was said: "This court has held that when the objection to evidence is general and it is overruled and the evidence is received, the ruling will not be held erroneous unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent." *Tozer* v. *N. Y. Central & Hudson River Railroad*, 105 N. Y. 659; *Alcorn* v. *Chicago & Alton Railway*, 108 Missouri, 81; *Curr* v. *Hundley*, (Colorado) 31 Pac. Rep. 939, 940; *McCaden* v. *Lowenstein*, 92 Tennessee, 614; *Ward* v. *Wilms*, 16 Colorado, 86.

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, and admitted them against Hansen. The fact that the objection was made in the name of both defendants did not justify the court in overruling it as to both, when the evidence was obviously incompetent and could not have been made competent against Sparf, and was obviously competent against Hansen. It was not necessary that counsel should have made the objection on behalf of one defendant and then formally repeated it, in the same words, for the other defendant. If Sparf had been tried alone, a general objection in his behalf on the ground of incompetency would have been sufficiently definite. Surely, such an objection coming from Sparf when tried with another ought not to be deemed ineffectual because of the circumstance that his counsel, who by order of the court represented also his codefendant, incautiously spoke in the name of both defendants. Each was entitled to make his own defence, and the jury could have found one of them guilty and acquitted the other. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 293. See also *Commonwealth* v. *Robinson*, 1 Gray, 555, 560.

For the error of the court in not sustaining the objection referred to, so far as it related to Sparf, the judgment must be reversed as to him. If he were the only defendant, we might

withhold any expression of opinion upon other questions raised by the assignments of error. But as some of those questions are important and may arise upon another trial of Sparf, and especially as they must be now determined with reference to Hansen, we proceed to their examination.

2. One of the specifications of error relates to the refusal of the court to give certain instructions asked by the defendants, and to parts of the charge to the jury.

The defendants asked the court to instruct the jury as follows:

"In all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or the defendant may be found guilty of an attempt to commit the offence so charged, provided that such attempt be itself a separate offence." "Under an indictment charging murder, the defendant may be convicted of murder, of manslaughter, or an attempt to commit either murder or manslaughter." "Under the indictment in this case, the defendants may be convicted of murder, or manslaughter, or of an attempt to commit murder or manslaughter, and if after a full and careful consideration of all the evidence before you you believe beyond a reasonable doubt that the defendants are guilty, either of manslaughter or of an assault with intent to commit murder or manslaughter, you should so find your verdict." These instructions were refused and the defendants excepted.

In its charge to the jury the court, among other things, said: "What, then, is murder? There are only two kinds of felonious homicide known to the laws of the United States. One is murder and the other is manslaughter. There are no degrees of murder." "There is no definition of murder by any United States statute. We resort to the common law for that. By the common law, murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. Malice, then, is an element in the offence and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter; that is, malice express or implied, discriminates

murder from the offence of manslaughter." "Express malice exists when one, by deliberate premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim. Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind, established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation, or when the provocation is not great. Manslaughter is the unlawful killing of a human being without malice either expressed or implied. I do not consider it necessary, gentlemen, to explain it further, *for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.* In other words, it may be in the *power* of the jury under the indictment by which these defendants are accused and tried of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; *yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder.*"

The court further said to the jury:

"You are the exclusive judges of the credibility of the witnesses, and in judging of their credibility you have a right to take into consideration their prejudices, motives, or feelings of revenge, if any such have been proven or shown by the evidence in the case; if you believe from the evidence that any witness or witnesses have knowingly and wilfully testified falsely as to any material fact or point, you are at liberty to disregard entirely the testimony of such witness or witnesses." "Gentlemen, I have given you these instructions as carefully as I could, avoiding all references to the testimony, but I do not wish to be misunderstood, and out of abundant

caution I say further to you, in giving you these instructions, I may by accident have assumed facts to be proven; if so you must disregard the assumption. It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. *You are the exclusive judges of the fact. No matter what assumption may appear during the course of the trial in any ruling of mine, or what may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case and whose judgment the law wants on the case.*"

After the jury had been in consultation for a time, they returned into court for further instructions. The colloquy between the court and the jurors is set forth at large in the margin.[1]

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[1] "FOREMAN. There is one of us who wishes to be instructed by your honor as to certain points upon the question of United States marine laws in regard to murder on the high seas.

"COURT. The instruction which I gave you, gentlemen, in regard to the law upon which the indictment was based was section 5339 of the Revised Statutes, which I will read to you again. JUROR. Your honor, I would like to know in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty.

"COURT. I will read the section to you and see if that touches the proposition. The indictment is based upon section 5339, which provides, among other things, 'that every' person who commits murder upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, 'or shoots any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies on land or at sea, within or without the United States, shall suffer death.' Hence, that is the penalty for the offence described in the indictment. I have given you the definition of murder. If you remember it, you will connect it with these words: 'Every person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven, etc. JUROR. Are the two words 'aiding' or 'abetting' defined? COURT. The words 'aiding' or 'abetting' are not defined, but I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error there is a higher tribunal to correct it.

"JUROR. I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining the matter. The question arising amongst us is as to aiding and abetting.

The requests for instruction made by the defendants were based upon section 1035 of the Revised Statutes of the United

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Furthermore, as I understand, it must be one thing or the other. It must be guilty or not guilty. COURT. Yes; under the instructions I have given you. I will read them to you again, so as to be careful and that you may understand. Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. I defined to you what malice was, and I assume you can recall my definition to your minds. Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.

"JUROR. Then, as I understand your honor clearly, there is nothing about manslaughter in this court? COURT. No; I do not wish to be so understood. A verdict must be based on evidence, and in a proper case a verdict for manslaughter may be rendered.

"JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter? COURT. *In a proper case, it may be murder or it may be manslaughter, but in this case it cannot be properly manslaughter. As I have said, if a felonious homicide has been committed, the facts of the case do not reduce it below murder.* Do not understand me to say that manslaughter or murder *has been committed.* That is for you gentlemen to determine *from the testimony and the instructions* I have given you. . . . MR. SMITH. We take an exception. JUROR. We have got to bring a verdict for either manslaughter or murder? COURT. Do not misunderstand me. I have not said so. JUROR. I know you have not. COURT. *I cannot direct you what conclusion to come to from the facts. I direct you only as to the law. A judgment on the facts is your province.*

"MR. GARTER. May I ask the court to instruct this jury that in cases where persons are being tried upon a charge of murder, and the facts proven at their trial show that the defendants are guilty of manslaughter, under an indictment, they may find him guilty of manslaughter, as a general rule; but, however, if the facts show that the defendants have been guilty of murder, and that, in this case, there is no evidence tending to establish the crime or offence of manslaughter——

"MR. SMITH. It is the province of the jury. COURT. I have already so instructed the jury. I have endeavored to make myself understood. JUROR. If we bring in a verdict of guilty, that is capital punishment? COURT. Yes. JUROR. Then there is no other verdict we can bring in except guilty or not guilty? COURT. In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so; *but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.* JUROR. There has been a misunderstanding amongst us. Now it is clearly interpreted to us, and no doubt we can now agree on certain facts."

States, providing that "in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: *Provided*, That such attempt be itself a separate offence."

The refusal to grant the defendants' requests for instructions, taken in connection with so much of the charge as referred to the crime of manslaughter, and the observations of the court when the jury through their foreman applied for further instructions, present the question whether the court transcended its authority when saying, as in effect it did, that in view of the evidence the only verdict the jury could under the law properly render would be either one of guilty of the offence charged or one of not guilty of the offence charged; that if a felonious homicide had been committed by either of the defendants, *of which the jury were the judges from the proof*, there was nothing in this case to reduce it below the grade of murder; and that, "as one of the tribunals of the country, a jury is expected to be governed by law, *and the law it should receive from the court.*"

The court below assumed, and correctly, that section 1035 of the Revised Statutes did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing. Congress did not intend to invest juries in criminal cases with power arbitrarily to disregard the evidence and the principles of law applicable to the case on trial. The only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offence necessarily included in the one charged, or of the offence of attempting to commit the one charged. Upon a careful scrutiny of the evidence, we cannot find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offence included in the one charged, or of a mere attempt to commit the offence charged. A verdict of guilty of an

offence less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offence actually committed, and thus impose a punishment different from that prescribed by law.

The general question as to the duty of the jury to receive the *law* from the court, is not concluded by any direct decision of this court. But it has been often considered by other courts and by judges of high authority, and, where its determination has not been controlled by specific constitutional or statutory provisions expressly empowering the jury to determine both law and facts, the principle by which courts and juries are to be guided in the exercise of their respective functions has become firmly established. If this be true, this court should not announce a different rule, unless impelled to do so by reasons so cogent and controlling that they cannot properly be overlooked or disregarded. Some of the members of this court, after much consideration and upon an extended review of the authorities, are of opinion that the conclusion reached by this court is erroneous both upon principle and authority. For this reason, and because the question is of great importance in the administration of justice, and also involves human life, we deem it appropriate to state with more fulness than under other circumstances would be necessary the grounds upon which our judgment will rest — looking first to cases determined in the courts of the United States.

In *Georgia* v. *Brailsford*, 3 Dall. 1, 4, a case in this court tried by a special jury upon an amicable issue, Chief Justice Jay is reported to have said: "It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take

upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for as, on the one hand, it is presumed that juries are best judges of facts, it is, on the other hand, presumable that the courts are the best judges of law. But still both objects are lawfully within your power of decision." Of the correctness of this report, Mr. Justice Curtis in *United States* v. *Morris*, 1 Curtis, 23, 58, expressed much doubt, for the reason that the Chief Justice is reported as saying that, in *civil* cases, and that was a civil case, the jury had the right to decide the law, and because, also, the different parts of the charge conflict with each other; the Chief Justice, according to the report, saying at the outset that it is the province of the jury to decide questions of fact and of the court to decide questions of law, and in the succeeding sentence informing the jury that they had the *right* to take upon themselves the determination of *both* law and fact. If the Chief Justice said that it was the *province* of the court to *decide* questions of law, and the *province* of the jury to *decide* questions of fact, he could not have said that the jury had the *right*, in a civil case, to *judge of* and *determine* both law and fact. "The whole case," Mr. Justice Curtis said, "is an anomaly. It purports to be a trial by jury in the Supreme Court of the United States of certain issues out of chancery. And the Chief Justice begins by telling the jury that the facts are all agreed, and the only question is a matter of law, and upon that the whole court were agreed. If it be correctly reported, I can only say it is not in accordance with the views of any other court, so far as I know, in this country or in England, and is certainly not in accordance with the course of the Supreme Court for many years."

Certain observations of Chief Justice Marshall in the course of the trial of Burr have sometimes been referred to in support of the contention that the jury in a criminal case are under no legal obligation to accept the law as laid down by the court. But nothing said by him at that trial was inconsistent with the views expressed by eminent jurists in cases

to be presently cited. In the course of an opinion relating merely to the order of evidence, the Chief Justice said: "Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it *as compounded of fact and law.*" 1 *Burr's Trial*, 470. This language is supposed to justify the contention that the jury in a criminal case are entitled, of right, to determine questions of pure law adversely to the direction of the court. But that no such thought was in the mind of the Chief Justice is manifest from his written charge to the jury at a subsequent stage of the trial — the accuracy of the report of which has never been disputed — in which he discussed, in the light of the authorities, the question as to what constituted treason.

In the course of that charge he indicated quite distinctly his view of the respective functions of court and jury. "It has been thought proper," he said, "to discuss this question at large and to review the opinion of the Supreme Court, [*Ex parte Bollman and Swartwout*, 4 Cranch, 75,] although this court would be more disposed to leave the question of *fact* whether an overt act of levying war were committed on Blannerhassett's Island to the jury *under this explanation of the law*, and *to instruct* them that unless the assemblage on Blannerhassett's Island was an assemblage in force, was a military assemblage in a condition to make war, it was not levying war, and that *they could not construe it* into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case." 2 *Burr's Trial*, 422. This language is wholly inconsistent with the theory that the Chief Justice recognized the right of the jury to disregard the court's view of the law upon any question arising in the case before them. It was consistent only with the theory that the court could speak authoritatively as to the law, while the function of the jury

was to respond as to the facts. Again: "It is further the opinion of the court *that there is no testimony whatever* which tends to prove that the accused was actually or constructively present when that assemblage did take place; indeed, the contrary is most apparent." Ib. 439. "The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion. If a contradiction between the two opinions exist, the court cannot perceive it. It was said that levying war is an act *compounded of law and fact;* of which the jury, aided by the court, must judge. To that declaration the court still adheres." Ib. 444. He concluded his memorable charge in these words: "The jury have now heard the opinion of the court on the *law* of the case. They *will apply that law to the facts*, and will find a verdict of guilty or not guilty as their own consciences may direct." Ib. 445. Again, according to the only recognized report of that trial ever published, the Chief Justice, in response to certain inquiries of counsel made after the jury returned their verdict, said: "Without doubt the court intended to deliver merely a legal opinion as to what acts amounted in law to an overt act of levying war; and not whether such an overt act has or has not been proved. It merely stated the law, *to which the jury would apply the facts proved.* It is their province to say whether *according to this statement and the evidence* an overt act has been proved or not." Ib. 448. The language of the Chief Justice plainly imports that while the jury must of necessity often pass upon a question, "compounded of fact and law," their duty, when considering the evidence, was to apply the law, as given by the court, to the facts proved; and, *thus applying the law*, return a verdict of guilty or not guilty as their consciences might direct. If he had believed that the jury were entitled, of right, whatever might be the views of the court, to determine for themselves the law of the case, it is impossible that he could have said that "they will apply that law" — the law as he declared it to be — "to the facts." On the contrary, he observed that the province of the jury was to determine whether the accused was guilty or not guilty, according to his statement of the law as applied to the evidence.

Of course, this court has no means of determining what were the views of Chief Justice Marshall, except by referring to such authorized publications as show what he said while discharging judicial functions. In none of his opinions delivered at the Circuit Court and published can there be found anything at all in conflict with his declarations at the trial of Burr. And it may be observed that the circumstances attending that trial were such as to induce him to weigh every word embodied in his elaborate written charge to the jury. That he understood the gravity of the occasion, so far as it related to the conduct of the trial, is manifest from his referring in the following language to certain considerations that had been advanced in argument: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he had no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace. That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps a frailty incident to human nature; but, if any conduct on the part of the court could warrant a sentiment that it would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret," pp. 444, 445.

In *Henfield's case*, Mr. Justice Wilson, with whom sat Mr. Justice Iredell, stated that the jury, in a general verdict, must

decide both law and fact, but that "this did not authorize them to decide it as they pleased," and that "the questions of law coming into *joint consideration* with the facts, it is the duty of the court to explain the law to the jury, and give it to them *in direction*." Wharton's State Trials, 48, 84. This statement of the principle is sometimes referred to in support of the proposition that the jury is not under a legal duty to accept the law as declared by the court in a criminal case. We think it tends to show that it is the province and duty of the jury to apply to the facts of the case the law as given to them by the court "in direction."

There is nothing in conflict with this in the lectures on law delivered by Mr. Justice Wilson. In one of those lectures, referring to the duties of jurors in criminal cases, he said: "On questions of law, his [the juror's] deficiencies will be supplied by the professional directions of the judges, whose *duty* and *whose business it is professionally* to *direct* him. For, as we have seen, verdicts, in criminal cases, generally determine the question of law as well as the question of fact. Questions of *fact* it is his exclusive province to determine. With the consideration of evidence unconnected with the question which he is to try, his attention will not be distracted; for everything of that nature, we presume, will be excluded by the court. The collected powers of his mind, therefore, will be fixed, steadily and without interruption, upon the issue which *he* is sworn to try. *This issue* is an issue *of fact*." 2 Wilson's Works, 386. Other observations found in these lectures, if considered alone, are not so explicit upon the question of the respective functions of court and jury; but taken in connection with all that he said, it is reasonably clear that when Mr. Justice Wilson spoke of the determination by a jury, in a criminal case, of both law and fact, he meant only that a general verdict of guilty or not guilty, of necessity, decided every question before them which involved a *joint consideration* of law and fact; not that the jury could ignore the directions of the court, and take the law into their own hands.

The observations of Mr. Justice Samuel Chase in the *case of John Fries*, tried for treason, in 1800, are supposed to sustain

the broad proposition that the jury may, of right, disregard the law as expounded by the court. He undoubtedly did say that while it was the duty of the court, in all criminal cases, to state the law arising on the facts, the jury were to decide "both the law and the facts, on their consideration of the whole case." Chase's Trial, App. 44. But on the trial, in the same year, in the Circuit Court of the United States for the Virginia District, of *James Thompson Callender* for seditious libel, Wharton's State Trials, 688, he was appalled at the suggestion by learned counsel that the jury were entitled, of right, to determine the constitutional validity of the act of Congress under which the accused was indicted. Mr. Wirt, counsel for the defendant, said: "Since, then, the jury have a right to consider the law, and since the Constitution is law, the conclusion is certainly syllogistic that the jury have a right to consider the Constitution." Ib. 710. But Mr. Justice Chase declined to accept this view. He said: "The statute on which the traverser is indicted enacts 'that the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, *as in other cases.*' By this provision I understand that a right is given to the jury to determine what the law is in the case before them; and not to decide whether a statute of the United States produced to them is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the Constitution of the United States. I admit that the jury are to *compare* the statute with the facts proved, and then to decide whether the acts done are prohibited by *the law;* and whether they amount to the offence described in the indictment. This power the jury necessarily possesses, in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is on the facts proved, and another and a very different thing to determine that the statute produced is no law. To decide what the law is on the facts, is an admission that the law exists. If there be no law in the case there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them." Ib. 713.

"It was never pretended," he continued, "as I ever heard, before this time, that a petit jury in England (from whence our common law is derived) or in any part of the United States, ever exercised such power. If a petit jury can rightfully exercise this power over one statute of Congress, they must have an equal right and power over any other statute, and indeed over all the statutes; for no line can be drawn, no restriction imposed on the exercise of such power; it must rest in discretion only. If this power be once admitted, petit jurors will be superior to the national legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory is equal to the authority of making them. The evident consequences of this right in juries will be, that a law of Congress will be in operation in one State and not in another. A law to impose taxes will be obeyed in one State, and not in another, unless force be employed to compel submission. The doing of certain acts will be held criminal, and punished in one State, and similar acts may be held innocent, and even approved and applauded in another. The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the Union of the United States, on which, under divine Providence, our political safety, happiness, and prosperity depend." Ib. 714. He concluded his opinion in these words: "I consider it of the greatest consequence to the administration of justice that the powers of the court and the powers of the petit jury should be kept *distinct* and *separate*. I have uniformly delivered the opinion 'that the petit jury have a right to decide the law as well as the fact in criminal cases;' but it never entered into my mind that they, therefore, had a right to determine the constitutionality of any statute of the United States." Ib. 718.

What Mr. Justice Chase said is quite sufficient to show the mischievous consequences that would flow from the doctrine that the jury may, of right, disregard the directions of the court, and determine the law for themselves. For if, as is contended, the jury in criminal cases are not bound to take the law from the court, it is impossible to deny their absolute

right in a case depending entirely upon an act of Congress, or a statute of a State, to determine, upon their own responsibility, whether that act or statute is or is not law, that is, whether it is or is not in violation of the Constitution.

Mr. Justice Thompson, who became a member of this court in 1823, concurred in the opinion delivered by Kent, J., in *People* v. *Croswell*, (1804,) 3 Johns. Cas. 337, 362, where the court was equally divided, Chief Justice Lewis and Judge Brockholst Livingston, afterwards a Justice of this court, holding that to questions of law the court, to questions of fact the jury, must respond. But in his opinion in *Pierce* v. *State*, 13 N. H. 536, 564, Chief Justice Parker, referring to Judge Kent's opinion in *People* v. *Croswell*, said: "Mr. Justice Thompson, who concurred in that opinion, must have understood that concurrence to be merely in the points necessary to the decision of that cause, or have subsequently changed his views; for I have his authority for saying that he has repeatedly ruled that the jury are not judges of the law in criminal cases." And in the dissenting opinion of Judge Bennett in *State* v. *Croteau*, 23 Vermont, 14, 63, (where it was held that the jury, in criminal cases, could rightfully decide questions of both law and fact, but which case has been overruled, 65 Vermont 1, 34,) it was said: "Judge Thompson, whose judicial learning and experience, while on the bench of the Supreme Court of New York, and on the bench of the United States, were very extensive, thus wrote to a friend some short time before his death: 'I have repeatedly ruled on the trial of criminal cases, that it was the *right* as well as the duty of the court to decide questions of law; and any other rule, it appears to me, would be at war with our whole judicial system, and introduce the utmost confusion in criminal trials. It is true, the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions.'" See also Wharton's Cr. Pl. & Pr. § 810, note 3.

The remarks of Mr. Justice Baldwin in *United States* v. *Wilson and Porter*, 1 Baldwin, 78, 100, 108, have sometimes

been referred to as in conflict with the rule that it is the duty of the jury to accept the law as expounded by the court. It is quite true that in the charge in *Wilson's case*, Mr. Justice Baldwin said that if the jury were prepared to say that the law was different from what the court had announced, they were in the exercise of their constitutional right to do so. But in his charge in *Porter's case*, he explained what was said in *Wilson's case*. After remarking, that if a jury find a prisoner guilty against the court's opinion of the law of the case, *a new trial would be granted*, as no court would pronounce a judgment on a prisoner against what it believes to be the law, he said: "This, then, you will understand to be what is meant by your *power* to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule." Subsequently in *United States* v. *Shive*, 1 Baldwin, 510, 513, which was an indictment for passing a counterfeit note of the Bank of the United States, and when the question arose as to the right of the jury to pass upon the constitutionality of the act of Congress on which the prosecution was founded, Mr. Justice Baldwin said, in his charge: "*If juries once exercise this power, we are without a Constitution or laws*, one jury has the same power as another, you cannot bind those who may take your places, what you declare constitutional to-day another jury may declare unconstitutional to-morrow."

The question before us received full consideration by Mr. Justice Story in *United States* v. *Battiste*, 2 Sumner, 240, 243, 244. That was an indictment for a capital offence, and the question was directly presented whether in criminal cases, especially in capital cases, the jury were the judges of the law as well as of the facts. He said: "My opinion is that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily

determine the law as well as the fact. In each they have the physical power to disregard the law, as laid down to them by the court. But I deny that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land, and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But believing, as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion."

In *United States* v. *Morris*, 1 Curtis, 23, 52–58, the question, in all of its aspects, was examined by Mr. Justice Curtis with his accustomed care. In that case the contention was that every jury, impanelled in a court of the United States, was the rightful judge of the existence, construction, and effect of every law that was material in a criminal case, and could, of right, and if it did its duty must, decide finally on the constitutional validity of any act of Congress which the trial brought in question. Touching the rightful powers and duties of the court and the jury under the Constitution in criminal cases,

Mr. Justice Curtis, among other things, said: "The sixth article, after declaring that the Constitution, laws, and treaties of the United States shall be the supreme law of the land, proceeds, 'and the *judges*, in every State, shall be bound thereby.' But was it not intended that the Constitution, laws, and treaties of the United States should be the supreme law in *criminal* as well as in *civil* cases? If a state law should make it penal for an officer of the United States to do what an act of Congress commands him to do, was not the latter to be supreme over the former? And if so, and in such cases, juries finally and rightfully determine the law, and the Constitution so means when it speaks of a trial by jury, why was this command laid on the judges alone, who are thus mere advisers of the jury, and may be bound to give sound advice, but have no real power in the matter? It was evidently the intention of the Constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the Constitution confides the power of expounding that instrument; and not only construing, but holding invalid any law which may come in question on a criminal trial." "In my opinion," the learned justice proceeded, "it is the duty of the court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts, as they find them, and thus, passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the differ-

ent parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it."

It was also contended that the clause in the act of Congress, known as the Sedition Law of July 14, 1798, c. 74, § 3, 1 Stat. 596, 597, declaring that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases," implied that the jury "in other cases" might decide the law contrary to the direction of the court. But in response to this view Mr. Justice Curtis said: "I draw from this the opposite inference; for where was the necessity of this provision if, by force of the Constitution, juries, as such, have both the power and the right to determine all questions in criminal cases; and why are they to be directed by the court?" See also *Montgomery* v. *State*, 11 Ohio, 427.

But Mr. Justice Curtis considered the question from another point of view, and gave reasons which appear to us entirely conclusive against the proposition that it is for the jury, in every criminal case, to say authoritatively what is the law by which they are to be governed in finding their verdict. He said: "There is, however, another act of Congress which bears directly on this question. The act of the 29th of April, 1802, in section 6, after enacting that, in case of a division of opinion between the judges of the Circuit Court on any question, such question may be certified to the Supreme Court, proceeds, 'and shall by the said court be *finally decided*. And the decision of the Supreme Court and their order in the premises shall be remitted to the Circuit Court and be there entered of record and have effect according to the nature of such judgment and order.' The residue of this section proves that criminal as well as civil cases are embraced in it, and under it many questions arising in criminal cases have been certified to and decided by the Supreme Court, and persons have been executed by reason of such decisions. Now, can it be that, after a question arising in a criminal trial has been certified to the Supreme Court, and there, in the language of this act, finally decided, and their order remitted here and en-

tered of record, that when the trial comes on the jury may rightfully revise and reverse this final decision? Suppose, in the course of this trial, the judges had divided in opinion upon the question of the constitutionality of the act of 1850, and that, after a final decision thereon by the Supreme Court and the receipt of its mandate here, the trial should come on before a jury, does the Constitution of the United States, which established that Supreme Court, intend that a jury may, as matter of right, revise and reverse that decision? And, if not, what becomes of this supposed right? Are the decisions of the Supreme Court binding on juries, and not the decisions of inferior courts? This will hardly be pretended; and if it were, how is it to be determined whether the Supreme Court has or has not, in some former case, in effect settled a particular question of law? In my judgment this act of Congress is in accordance with the Constitution, and designed to effect one of its important and even necessary objects — a uniform exposition and interpretation of the law of the United States — by providing means for a final decision of any question of law; final as respects every tribunal and every part of any tribunal in the country; and if so, it is not only wholly inconsistent with the alleged power of juries, to the extent of all questions so decided, but it tends strongly to prove that no such right as is claimed does or can exist."

Again: "Considering the intense interest excited, the talent and learning employed, and consequently the careful researches made, in England, near the close of the last century, when the law of libel was under discussion in the courts and in Parliament, it cannot be doubted that, if any decision, having the least weight, could have been produced in support of the general proposition, that juries are judges of the law in criminal cases, it would then have been brought forward. I am not aware that any such was produced. And the decision of the King's Bench in *Rex* v. *The Dean of St. Asaph*, 3 T. R. 428, and the answers of the twelve judges to the questions propounded by the House of Lords, assume as a necessary postulate, what Lord Mansfield so clearly declares in terms, that, by the law of England, juries cannot rightfully decide a ques-

tion of law. Passing over what was said by ardent partisans and eloquent counsel, it will be found that the great contest, concerning what is known as Mr. Fox's Libel Bill, was carried on upon quite a different ground by its leading friends; a ground which, while it admits that the jury are not to decide the law, denies that the libellous intent is matter of law; and asserts that it is so mixed with the fact that, under the general issue, it is for the jury to find it as a fact. 34 An. Reg. 170; 29 Parl. His. Debates in the Lords. Such I understand to be the effect of that famous declaratory law. 32 Geo. 3, c. 60. . . . I conclude, then, that when the Constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the Constitution when it adopts a trial by jury."

That eminent jurist, whose retirement from judicial station has never ceased to be a matter of deep regret to the bench and bar of this country, closed his great opinion with an expression of a firm conviction that, under the Constitution of the United States, juries in criminal cases have not the right to decide any question of law, and that, in rendering a general verdict, their duty and their oath require them to apply to the facts, as they find them, the law given to them by the court. And in so declaring he substantially repeated what Chief Justice Marshall had said in *Burr's case.*

In *United States* v. *Greathouse*, 4 Sawyer, 457, 464, which was an indictment for treason, Mr. Justice Field said: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact — that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to

pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury."

These principles were applied by Judge Shipman in *United States* v. *Riley*, 5 Blatchford, 204, and by Judge Cranch, upon an extended review of the authorities, in *Stettinius* v. *United States*, 5 Cranch C. C. 573. They were also applied by Judge Jackson, in the District of West Virginia, in *United States* v. *Keller*, 19 Fed. Rep. 633, in which case it was said that although an acquittal in a criminal case was final, even if the jury arbitrarily disregarded the instructions of the court on the law of the case, a jury, in order to discharge its whole duty, must take the law from the court and apply it to the facts of the case.

Turning now to cases in the state courts, we find that in *Commonwealth* v. *Porter*, 10 Met. (Mass.) 263, 276, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw delivering the unanimous judgment of the court composed of himself and Justices Wilde, Dewey, and Hubbard, held that it was a well-settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to consider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact. In the same case, the court, observing that the safety, efficiency, and purity of jury trial depend upon the steady maintenance and practical application of this principle, and adverting to the fact that a jury, in rendering a general verdict, must necessarily pass upon the whole issue, compounded of the law and of the fact, and thus *incidentally* pass on questions of law, said: "It is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause, and also upon all questions, pertinent to the issue, upon which either party may request the direction of the court upon matters of law. And it is the duty of the jury to receive the law from the court, and to conform their judg-

ment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law." p. 286.

Perhaps the fullest examination of the question upon principle, as well as upon authority, to be found in the decisions of any state court, was made in *Commonwealth* v. *Anthes*, 5 Gray, 185, 208, 218, where Chief Justice Shaw, speaking for a majority of the court, said that the true theory and fundamental principle of the common law, both in its civil and criminal departments, was, that the judges should adjudicate finally, upon the whole question of law, and the jury upon the whole question of fact.

Considering, in the light of the authorities, the grounds upon which a verdict of guilty or not guilty, in a criminal case, was held, at common law, to be conclusive, he observed that though the jury have the power they had not the right to decide, that is, to adjudicate on both law and evidence. He said: "The result of these several rules and principles is, that, in practice, the verdict of a jury, both upon the law and the fact, is conclusive; because, from the nature of the proceeding, there is no judicial power by which the conclusion of law thus brought upon the record by that verdict can be reversed, set aside, or inquired into. A general verdict, either of conviction or acquittal, does embody and declare the result of both the law and the fact, and there is no mode of separating them on the record so as to ascertain whether the jury passed their judgment on the law or only on the evidence. The law authorized them to adjudicate definitively on the evidence; the law presumes that they acted upon correct rules of law given them by the judge; the verdict therefore stands conclusive and unquestionable, in point both of law and fact. In a certain limited sense, therefore, it may be said that the jury have a power and a legal right to pass upon both the law and the fact. And this is sufficient to account for many and most of the *dicta* in which the proposition is stated. But it would be more accurate to state, that it is the right of the jury to return

a general verdict; this draws after it, as a necessary consequence, that they *incidentally* pass upon the law. But here again is the question, what is intended by 'passing upon the law?' I think it is by embracing it in their verdict, and thus bringing it upon the record, with their finding of the facts. But does it follow that they may rightfully and by authority of the common law, by which all are conscientiously bound to govern their conduct, proceed upon the same grounds and principles in the one case as the other? What the jury have a right to do, and what are the grounds and principles upon which they are in duty and conscience bound to act and govern themselves in the exercise of that right, are two very distinct questions. The latter is the one we have to deal with. Suppose they have a right to find a general verdict, and by that verdict to conclude the prosecutor in the matter of law, still it is an open and very different question, whether, *in making up that verdict* and thereby embracing the law, they have the same right to exercise their own reason and judgment, against the statement of the law by the judge, to adjudicate on the law, as unquestionably they have on the fact. The affirmative of this proposition is maintained by the defendant in this case, and by others in many of the cases before us. If I am right in the assumption that the judge is to adjudge the law and the jury the fact only, it furnishes the answer to this question, to what extent the jury adjudicate the law; and it is, that they receive authoritative directions from the court, and act in conformity with them, though by their verdict they thus embrace the law with the fact, which they may rightfully adjudicate."

Alluding to the history of this question in England, and particularly, as did Mr. Justice Curtis, to the controversy in *King* v. *Dean of St. Asaph*, 3 T. R. 428, and which resulted in the passage by Parliament, after the separation of this country from Great Britain, of the Libel Act, 32 G. 3, and observing that both parties to that controversy assumed the force and existence of the rule as the ancient rule of the common law, the court said: "The court and high prerogative party say, judges answer to the law and jurors to the fact; the question

of guilty or not, in the peculiar form of a criminal prosecution for libel, after the jury have found the fact of publication and truth of the innuendoes, is a question of law, and therefore must be declared exclusively by the court. The popular party, assuming the same major proposition, say, the question of guilty or not is a question of fact, and can be found only by the jury. It appears to me, therefore, as I stated on the outset, that considering the course of the controversy, the earnestness and ability with which every point was contested, and the thorough examination of the ancient authorities, this concurrence of views on the point in question affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, *ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices.*"

The *Anthes case*, it may be observed, arose under a statute enacted in 1855, after the decision in the *Porter case.* But the court held that that statute did not confer upon juries, in criminal trials, the power of determining questions of law against the instructions of the court. And the Chief Justice said — Justices Metcalf and Merrick concurring — that if the statute could be so interpreted as to prescribe that the jury, consistently with their duty, may decide the law upon their judgment contrary to the decision and instruction of the court before whom the trial was had, such enactment would be beyond the scope of legitimate legislative power, repugnant to the Constitution, and, of course, inoperative and void. See also *Commonwealth* v. *Rock*, 10 Gray, 4, where the doctrines announced in *Commonwealth* v. *Anthes* were reaffirmed, no one of the members of the court expressing a dissent.

This question was also fully considered in *Montee* v. *Commonwealth*, 3 J. J. Marsh. 132, 149, 151, in which case Chief Justice Robertson said: "The Circuit Judge would be a cypher, and a criminal trial before him a farce, if he had no right to decide all questions of law which might arise in the progress of the case. The jury are the exclusive judges of *the facts.* In this particular they cannot be controlled, and ought not to be instructed by the court. They are, also, *ex*

necessitate, the ultimate judges, in one respect, of the law; if they acquit, the judge cannot grant a new trial, how much soever they have misconceived or disregarded the law." "If the court had no right to decide on the law, error, confusion, uncertainty, and licentiousness would characterize the criminal trials; and the safety of the accused might be as much endangered as the stability of public justice would certainly be." In *Pierce* v. *State*, 13 N. H. 536, 554, it was held to be inconsistent with the spirit of the Constitution that questions of law, and still less, questions of constitutional law, should be decided by the verdict of the jury, contrary to the instructions of the court.

In *Duffy* v. *People*, 26 N. Y. 588, 592, Judge Selden, speaking for the Court of Appeals of New York, said: "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law, as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based." See also *People* v. *Finnegan*, 1 Parker's Cr. Cas. 147, 152; *Safford* v. *People*, 1 Parker's Cr. Cas. 474, 480.

So in *Hamilton* v. *People*, 29 Michigan, 173, 192, Mr. Justice Campbell, as the organ of the court, said: "We understand the uniform practice and the decided weight of opinion to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review." And in *People* v. *Anderson*, 44 California, 65, 70: "In this State it is so well settled as no longer to be open to debate, that it is the duty of a jury in a criminal case to take the law from the court."

The principle was accurately stated by Chief Justice Ames, speaking for the Supreme Court of Rhode Island, when he said: "The line between the duties of a court and jury in the trial of causes at law, both civil and criminal, is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. Whilst, on the one hand, the jury are the sole ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them solely from the publicly given instructions of the court. In this way court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes, and in this way alone can errors of fact and errors of law be traced, for the purpose of correction, to their proper sources. If the jury can receive the law of a case on trial in any other mode than from the instructions of the court given in the presence of parties and counsel, how are their errors of law, with any certainty, to be detected, and how, with any certainty, therefore, to be corrected? It is a statute right of parties here, following, too, the ancient course of the common law, to have the law given by the court, in their presence, to the jury, to guide their decision, in order that every error in matter of law may be known and corrected." *State* v. *Smith*, 6 R. I. 33, 34.

In Pennsylvania, in the case of *Commonwealth* v. *Sherry*, (reported in the Appendix to Wharton on Homicide, pp. 481, 482) Judge Rogers, a jurist of high reputation, thus charged the jury in a capital case: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. . . . For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error injurious to

the prisoner occurs, it will be rectified by the revision of the court *in banc.* But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court and the facts to the jury." About the same time Judge Sergeant charged a jury: "The point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the court. If you believe the evidence in the whole case, you must find the defendant guilty." *Commonwealth* v. *Vansickle*, Brightly, (Penn.,) 69, 73, 75. To the same effect substantially was the language of Chief Justice Gibson, who, when closing a charge in a capital case, said: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it." *Commonwealth* v. *Harman*, 4 Penn. St. 269. In a more recent case, *Kane* v. *Commonwealth*, 89 Penn. St. 522, Sharswood, C. J., said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania. But in a later case, *Nicholson* v. *Commonwealth*, 96 Penn. St. 503, 505, it was said: "The court had an undoubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they *must* find the defendant guilty, which is what is meant by a binding instruction in criminal cases." In *Commonwealth* v. *McManus*, 143 Penn. St. 64, 85, it was adjudged that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the court said as to the law. And this view the court, speaking by Chief Justice Paxson, said was in harmony with *Kane* v. *Commonwealth.*

The question has recently been examined by the Supreme Court of Vermont, and after an elaborate review of the

authorities, English and American, that court, by a unanimous judgment — overruling *State* v. *Croteau*, 23 Vermont, 14, and all the previous cases which had followed that case — said: "We are thus led to the conclusion that the doctrine that jurors are the judges of the law in criminal cases is untenable; that it is contrary to the fundamental maxims of the common law from which it is claimed to take its origin; contrary to the uniform practice and decisions of the courts of Great Britain, where our jury system had its beginning, and where it matured; contrary to the great weight of authority in this country; contrary to the spirit and meaning of the Constitution of the United States; repugnant to the constitution of this State; repugnant to our statute relative to the reservation of questions of law in criminal cases and passing the same to the Supreme Court for final decision." *State* v. *Burpee*, 65 Vermont, 1, 34.

These principles are supported by a very large number of adjudications, as will be seen by an examination of the cases cited in the margin.[1]

To the same purport are the text writers. "In theory, therefore," says Judge Cooley, "the rule of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority." Const. Lim. 323, 324. Greenleaf, in his treatise on the Law of Evidence, says: "In trials by jury, it is the province of the presiding judge to determine all ques-

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[1] *People* v. *Wright*, 93 Cal. 564; *Brown* v. *Commonwealth*, 87 Va. 215; *People* v. *Barry*, 90 Cal. 41; *People* v. *Madden*, 76 Cal. 521; *State* v. *Jeandell*, 5 Harr. (Del.) 475; *State* v. *Wright*, 53 Maine, 328; *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; *Montgomery* v. *State*, 11 Ohio, 427; *Adams* v. *State*, 29 Ohio St. 412; *Robbins* v. *State*, 8 Ohio St. 131, 167; *Williams* v. *State*, 32 Miss. 389, 396; *Pleasant* v. *State*, 13 Ark. 360, 372; *Robinson* v. *State*, 66 Geo. 517; *Brown* v. *State*, 40 Geo. 689, 695; *Hunt* v. *State*, 81 Geo. 140; *State* v. *Drawdy*, 14 Rich. (S. C.) 87; *Nels* v. *State*, 2 Tex. 280; *Myers* v. *State*, 33 Tex. 525; *State* v. *Jones*, 64 Mo. 391; *Hardy* v. *State*, 7 Mo. 607; *State* v. *Elwood*, 73 N. C. 189; *State* v. *McLain*, 104 N. C. 894; *People* v. *Neuman*, 85 Mich. 98; *State* v. *Johnson*, 30 La. Ann. 904; *State* v. *Ford*, 37 La. Ann. 443, 465; *Fisher* v. *Railway Co.*, 131 Penn. St. 292, 297; *Union Pacific Railway* v. *Hutchinson*, 40 Kansas, 51.

tions on the admissibility of evidence to the jury, as well as to instruct them in the rules of law, by which it is to be weighed. Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." "Where the question is mixed, consisting of law and fact, so intimately blended as not to be easily susceptible of separate decision, it is submitted to the jury, who are first instructed by the judge in the principles and rules of law, by which they are to be governed in finding a verdict, and these instructions they are bound to follow." Vol. 1, § 49. Starkie, in his treatise on Evidence, observes: "Where the jury find a general verdict they are bound to apply the law as delivered by the court, in criminal as well as civil cases." p. 816. So in Phillips on Evidence: "They [the jury] are not in general, either in civil or criminal cases, judges of the law. They are bound to find the law as it is propounded to them by the court. They may, indeed, find a general verdict, including both law and fact; but if, in such verdict, they find the law contrary to the instructions of the court, they thereby violate their oath." Vol. 3, Hill & Cowen's Notes, part 2, 1501. See also 1 Taylor on Ev. §§ 21 to 24; 1 Best's Ev. Morgan's ed. § 82.

In 1 Crim. Law Mag. 51 will be found a valuable note to the case of *Kane* v. *Commonwealth*, prepared by Mr. Wharton, in which the authorities are fully examined, and in which he says: "It would be absurd to say that the determination of the law belongs to the jury, not court, if the court has power to set aside that which the jury determines. We must hold, to enable us to avoid the inconsistency, that, subject to the qualification that all *acquittals* are final, the law in criminal cases is to be determined by the court. In this way we have our liberties and rights determined, not by an irresponsible, but by a responsible, tribunal; not by a tribunal ignorant of the law, but by a tribunal trained to and disciplined by the law; not by an irreversible tribunal, but by a reversible tribunal; not by a tribunal which makes its own law, but by a tribunal that obeys the law as made. In this way we maintain two fundamental maxims. The first is, that while to

facts answer juries, to the law answers the court. The second, which is still more important, is '*nullum crimen, nulla pœna, sine lege.*' Unless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment." 1 Crim. Law Mag. 56. The same author, in his treatise on Pleadings and Practice, concludes his examination of the question in these words: "The conclusion we must, therefore, accept is, that the jury are no more judges of law in criminal than in civil cases, with the qualification that owing to the peculiar doctrine of *autrefois acquit*, a criminal *acquitted* cannot be overhauled by the court. In the Federal courts such is now the established rule." §§ 809, 810.

Forsyth, in his History of Trial by Jury — a work of merit — discusses the doctrine advanced by some that the jury were entitled in all cases, where no special pleas have been put on the record, to give a general verdict according to their own views of the law, in criminal as well as in civil cases. He says: "It is impossible to uphold the doctrine. It is founded on a confusion between the ideas of *power* and *right*." "Indeed, it is difficult to understand how any one acquainted with the principles and settled practice of the English law can assert that it sanctions the doctrine which is here combated." Again: "The distinction between the province of the judge and that of the jury is, in the English law, clearly defined, and observed with jealous accuracy. The jury must in all cases determine the value and effect of evidence which is submitted to them. They must decide what degree of credit is to be given to a witness, and hold the balance between conflicting probabilities. The law throws upon them the whole responsibility of ascertaining *facts* in dispute, and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect. But, on the other hand, the judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought or ought not to be submitted to the jury, and what liabilities it imposes. When any questions of law arise, he alone determines them, and their consideration is absolutely

withdrawn from the jury, who must in such cases follow the direction of the judge; or if they perversely refuse to do so, their verdict (in civil cases) will be set aside, and a new trial granted." London ed. 1852, pp. 261, 262, 282; Morgan's ed. pp. 235, 236.

Worthington, in his Inquiry into the Power of Juries, an English work published in 1825, and often cited in the adjudged cases, says: "Were they [the jury] permitted to decide the law, the principles of justice would be subverted; the law would become as variable as the prejudices, the inclinations and the passions of men. If they could legally *decide* upon questions of law, their decision must of necessity be final and conclusive, which would involve an absurdity in all judicial proceedings, and would be contradictory to the fundamental principles of our jurisprudence." "The jury, when called upon to decide facts which are complicated with law, are therefore constitutionally, and must be, from the nature and intention of the institution, bound to seek and to obey the direction of the judge with respect to the law. It becomes their duty to apply to the law thus explained to them the facts, (which it is their exclusive province to find,) and thus they deliver a verdict compounded of law and fact; but they do not determine or decide upon the law in any case." pp. 193, 194.

Judge Thompson, in his work on Trials, §§ 1016, 1017, thus states the principles: "The judge decides questions of law; the jury questions of fact." So in Proffat on Trial by Jury, § 375: "The preponderance of judicial authority in this country is in favor of the doctrine that the jury should take the law from the court and apply it to the evidence under its direction."

The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that "in many of the States the arbitrary temper of the colonial judges, holding office directly from the Crown, had made the independence of the jury in law as well as in fact of much popular importance." Whar-

ton's Cr. Pl. & Pr. 8th ed. § 806; *Williams* v. *State*, 32 Mississippi, 389, 396.

Notwithstanding the declarations of eminent jurists and of numerous courts, as disclosed in the authorities cited, it is sometimes confidently asserted that they all erred when adjudging that the rule at common law was that the jury in criminal cases could not properly disregard the law as given by the court. We are of opinion that the law in England at the date of our separation from that country was as declared in the authorities we have cited. The contrary view rests, as we think, in large part upon expressions of certain judges and writers enforcing the principle, that when the question is *compounded of law and fact*, a general verdict, *ex necessitate*, disposes of the case in hand, both as to law and fact. That is what Lord Somers meant when he said in his essay on "The Security of Englishmen's Lives, or the Trust, Power, and Duty of the Grand Juries of England," that jurors only "are the judges from whose sentence the indicted are to expect life or death," and that "by finding guilty or not guilty, they do complicately resolve both law and fact." In the speeches of many statesmen and in the utterances of many jurists will be found the general observation that when law and fact are "blended" their combined consideration is for the jury, and a verdict of guilty or not guilty will determine both for the particular case in hand. But this falls far short of the contention that the jury, in applying the law to the facts, may rightfully refuse to act upon the principles of law announced by the court.

It is to be observed that those who have maintained the broad position that a jury may, of right, disregard the law as declared by the court, cite the judgment of Chief Justice Vaughan in *Bushell's case*, Vaughan, 135. In that case the accused were acquitted by a general verdict in opposition, *as it was charged*, to the directions of the court. And the question presented upon *habeas corpus* was, whether, for so doing, they were subject to be fined and committed to prison until the fine was paid. Upon a careful examination of the elaborate opinion in that case, it will become clear that the funda-

mental proposition decided was that, in view of the different functions of court and jury, and because a general verdict of necessity resolves "both law and fact complicately, and not the fact by itself," it could never be proved, where the case went to the jury upon both law and facts, that the jurors did not proceed upon their view *of the evidence.* Chief Justice Vaughan said that the words in the warrant, "that the jury did acquit against the direction of the court in matter of law, literally taken, and *de plano*, are insignificant and not intelligible; for no issue can be joined of matter in law, *no jury can be charged with the trial of matter in law barely, no evidence ever was or can be given to a jury of what is law or not; nor no such oath can be given to or taken by a jury, to try matter in law;* nor no attaint can lie for such a false oath." Vaughan, 143. Touching the distinction between the oath of a witness and that of a juror, he said: "A witness swears but to what . . . hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his own understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be law in the question before him." p. 142.

In referring to the opinion in *Bushell's case*, Mr. Justice Curtis well observed that it would be found that Chief Justice Vaughan "confines himself to a narrow though, for the case, a conclusive line of argument, that the general issue embracing fact as well as law, it can never be proved that the jury believed the testimony on which the fact depended, and in reference to which the direction was given, and so they cannot be shown to be guilty of any legal misdemeanor in returning a verdict, though apparently against the direction of the court in matter of law." And this is the view of the opinion in *Bushell's case* expressed by Hallam in his Constitutional History of England. c. 13.

A similar criticism was made by the Supreme Judicial Court of Massachusetts in the case of *Anthes.* Chief Justice Shaw, after stating the principles involved in *Bushell's case,*

said: "It may be remarked that from the improved views of the nature of jury trials, during the two hundred years which have elapsed since the decision of Chief Justice Vaughan, the juror is now in no more danger of punishment, for giving an erroneous judgment in matter of fact, than a judge is for giving an erroneous judgment in matter of law. But his statement clearly implies that the judge, within his appropriate sphere, is to act by the force of his reason and understanding, and, by the aid of his knowledge of the law and all appropriate means, to adjudge all questions of law, and direct the jury thereon; and in like manner the jury, by the force of their reason and understanding, acting upon all the competent evidence in the case, to reason, weigh evidence, draw inferences, and adjudge the question of fact embraced in the issue. Again: 'In these cases the jury, and not the judge, resolve and find what the fact is. Therefore, always, in discreet and lawful assistance of the jury, the judge's direction is hypothetical and upon supposition, and not positive upon coercion, namely: If you find the fact thus, (leaving it to them what to find,) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.' Vaughan, 144." "It is strange," Chief Justice Shaw felt constrained to say, "that the authority of Vaughan, C. J., in this case should be cited, as it has been, to prove that a juror in finding a general verdict, embracing law and fact, being sworn to try the issue, must find his verdict upon his own conviction and conscience, relying, in support of the proposition, upon the following words of Vaughan, C. J.: 'A man cannot see by another's eye, nor hear by another's ear; no more can a man decide and infer the thing to be resolved by another's understanding or reasoning.' Vaughan, 148." Had these words been applied to *the whole issue* embraced in a general verdict, as would be implied from the manner of referring to them, they would have countenanced the proposition; but they are used expressly to illustrate the position, that the jury cannot be required *implicitly* to give a verdict by *the dictates and authority* of the judge. "I refer," Chief Justice Shaw continued, "only to one other passage,

which serves as a key to the whole judgment. He says: 'That *decantatum* in our books, *ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*, literally taken, is true, for if it be demanded, What is the fact? the judge cannot answer; if it be asked, *What is the law in the case? the jury cannot answer it.*' Vaughan, 149." All this tends to show that the leading thought in the opinion of Chief Justice Vaughan was that while the jury cannot answer as to the law, nor the court as to the fact, a general verdict, compounded of law and fact, of necessity determines both as to the case on trial.

In *Townsend's case*, an office taken by virtue of a writ of mandamus, and decided in the sixteenth century, the court said: "For the office of twelve men is no other than to inquire of matters of fact, and not to adjudge what the law is, for that is the office of the court, and not of the jury, and if they find the matter of fact at large, and further say that thereupon the law is so, where in truth the law is not so, the judges shall adjudge according to the matter of fact, and not according to the conclusion of the jury." 1 Plowd. 111, 114. In *Willion* v. *Berkley*, 1 Plowd. 223, 231, also a civil case: "Matters of fact being traversed, shall be tried by twelve men, and if the plaintiff should take a traverse here, it would be to make twelve illiterate men try a matter of law whereof they have no knowledge. It is not their office to try matters of law, but only to try matters of fact; for at the beginning of our law it was ordained that matters of fact should be tried by twelve men of the country where the matter arises, and matters of law by twelve judges of the law, for which purpose there were six judges here, and six in the King's Bench, who, upon matters of law, used to assemble together in a certain place, in order to discuss what the law was therein. So that if a traverse should be here taken, it would be to make twelve ignorant men of the country try that whereof they are not judges, and which does not belong to them to try." See also *Grendon* v. *Bishop of London*, 2 Plowd. 493, 496.

As early as 1727, Raymond, C. J., delivering the unanimous opinion of the twelve judges of the King's Bench in a

case of murder, said that the jury are judges only of the fact, and the court of the law. *Rex* v. *Oneby*, 2 Str. 766, 773. The force of this language as to the functions of judge and jury is not materially weakened by the fact that the case was before the judges upon a special verdict, for it was expressly declared that jurors were judges only of the fact.

Within a few years after *Oneby's case* was determined, in 1734, the case of *King* v. *Poole*, which was a criminal information in the nature of a *quo warranto*, came before Lord Hardwicke. In passing upon a motion for a new trial that famous judge, than whom there could be no higher authority as to what was the settled law of England, said: "The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only: and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." Cas. Temp. Hardwicke, 23, 27, 28.

Upon the question here under examination Mr. Foster, to whose work Chief Justice Marshall frequently refers in his opinion or charge delivered in *Burr's case*, says, in the first edition of his work, which appeared in 1762, and again in the third edition, which appeared in 1792: "In every case where the point turneth upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating the matter of fact, viz., *whether the facts alleged by way of justification, excuse, or alleviation are true*, is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the court; for the construction the law putteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circum-

stances in a special verdict. But where the law is clear, the jury, under the direction of the court *in point of law*, matters of fact being still left to their determination, may, and, if they are well advised, always will find a general verdict, conformably to such direction." Foster's Crown Law, 255, 256, 3d ed. See also *The King* v. *Withers*, (Lord Kenyon,) 3 T. R. 428; Bacon's Abridg. Title Juries, M. 2; 2 Hawkins' P. C. c. 22, § 21; 1 Duncomb, Trials per Pais, (Dublin, 1793,) pp. 229, 231.

In Wynne's Eunomus, or Dialogues Concerning the Law and Constitution of England, a work of considerable reputation, the first edition having been published about the time of the adoption of our Constitution, the principle is thus stated: "All that I have said or have to say upon the subject of juries is agreeable to this established maxim, that 'juries must answer to questions of fact and judges to questions of law.' This is the fundamental maxim acknowledged by the Constitution." "It is undoubtedly true that the *jury* are judges, the only judges of the *fact;* is it not equally within the spirit of the maxim that *judges only* have the competent cognizance of the *law?* Can it be contended that the jury have, in reality, an adequate knowledge of law? Or, that the Constitution ever designed they should?" "Well — 'but the law and the fact are often complicated' — then it is the province of the judge to distinguish them; to tell the jury, that supposing such and such facts were done, what the law is in such circumstances. This is an unbiassed direction; this keeps the province of judge and jury distinct; the facts are left altogether to the jury, and the law does not control the fact, but arises from it." "Every verdict is compounded of law and fact, but the law and fact are always distinct in their nature." Wynne's Eunomus, Dialogue III, § 53, 5th ed. 1822, pp. 523, 527, 528; 3d ed. 1809, Vol. 2, pp. 142, 144.

Mr. Stephens, in his great work on the History of the Criminal Law of England, in discussing the powers of juries in France, says: "The right of the counsel for the defence to address the jury on questions of law, as, for instance, whether killing in a duel is *meurtre*, is one of the features in which the

administration of justice in France differs essentially from the administration of justice in England. In England the judge's duty is to direct the jury in all matters of law, and any arguments of counsel upon the subject must be addressed to him and not to the jury. This is not only perfectly well established as matter of law, but it is as a fact acquiesced in by all whom it concerns." Vol. 1, p. 551.

To the same effect is *Levi* v. *Milne*, 4 Bing. 195, reported as *Levy* v. *Milne*, 12 J. B. Moore, 418, and decided in 1827. That was an action of libel. Mr. Sergeant Wilde, a counsel in the case, contended that in cases of libel the jury are judges of the law as well as of the fact. But Lord Chief Justice Best said: "If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from an arbitrary decision. In the present case, the jury have made themselves judges of the law, and have found against it." "My brother Wilde has stated that in cases of libel the jury are judges of the law as well as of fact; but I beg to deny that. Juries are not judges of the law, or at any rate not in civil actions. The authority on which the learned Sergeant has probably grounded his supposition is the 32d G. 3, c. 60, which was the famous bill brought in by Mr. Fox, or, more properly, by Lord Erskine. But whoever reads that act will see that it does not apply to civil actions — it applies only to criminal cases. There is nothing in it that in any way touches civil actions, and the jury, with respect to them, stand in the same situation as they ever have done. I mean, however, to protest against juries, *even in criminal cases*, becoming judges of the law: the act only says that they may find a general verdict. Has a jury then a right to act against the opinion of the judge, and to return a verdict on their own construction of the law? I am clearly of opinion that they have not." The report by Moore of this opinion is not as full as the report in Bingham, but the two reports do not differ in any material respect.

But a later decision was that by Lord Abinger, Chief Baron, in 1837, in *Regina* v. *Parish*, 8 Carr. & P. 94. That was an indictment for offering, disposing of, and putting off a forged

bill of exchange. In the course of his argument to the jury the counsel for the accused read the observations of Mr. Justice Coleridge in a certain case as sustaining his view of the law. He was interrupted by the judge, who said: "I cannot allow you to read cases to the jury. *It is the duty of the jury to take the law from the judge.* It no doubt often happens that, in an address to the jury, counsel cite cases; but then it is considered that that part of the speech of the counsel is addressed to the judge. That cannot be so here, as you very properly in the first instance referred me to the case, and you have my opinion upon it; you can therefore make no further legitimate use of the case, and the only effect of reading it would be to discuss propositions of law with the jury, *with which they have nothing to do, and which they ought to take from me.*"

The case of *Parmiter* v. *Coupland*, 6 M. & W. 104, 106, 108, which was an action for libel, is not without value as tending to show that Fox's Libel Bill, so far from changing the rule, as generally applicable in criminal cases, only required the same practice to be pursued in prosecutions for libel as in other criminal cases. In the course of the argument of counsel, Parke, B., said: "In criminal cases, the judge is to *define* the crime, and the jury are to find whether the party has committed that offence. Mr. Fox's act made it the same in cases of libel, the practice having been otherwise before." Again: "But it has been the course for a long time for a judge, in cases of libel, as in other cases of a criminal nature, first to give *a legal definition of the offence*, and then to leave it to the jury to say whether *the facts* necessary to constitute *that offence* are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution, or civil action. A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, *as a question of fact.* The judge,

as a matter of advice to them in deciding *that* question, might have given his own opinion as to the nature of the publication, but was not bound to do so as a matter of law. Mr. Fox's Libel Bill was a declaratory act, and put prosecution for libel on the same footing as other criminal cases." Alderson, B., concurring, said that the judge "ought — having defined what is a libel — to refer to the jury the consideration of the particular publication, *whether falling within that* definition or not."

It is, therefore, a mistake to suppose that the English Libel Act changed in any degree the general common law rule in criminal cases, as to the right of the court to decide the law, and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury by a general verdict of necessity determined in the particular case both law and fact as compounded in the issue submitted to them. That act provides that "the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his *opinion and directions* to the jury on the matter in issue between the King and the defendant, *in like manner as in other criminal cases.*" "This seems," Mr. Justice Curtis well said, "to carry the clearest implication that, in this and all other criminal cases, the jury may be *directed* by the judge; and that, while the object of the statute was to declare that there was *other matter of fact* besides publication and the innuendoes to *be decided by the jury*, it was not intended to interfere with the proper province of the judge to decide all matters of law." 1 Curtis, 55. And this accords with the views expressed by Lord Abinger in *Reeves* v. *Templar*, 2 Jur. 137, 138. He said: "Before that statute a practice had arisen of considering that the question, libel or no libel, was always for the court, independent of the intention and meaning of the party publishing. That statute corrected the error; and now, if the intention does not appear on the body of the libel, a variety of circumstances are to be left to the jury from which to infer it; but it was never intended to take from the court the power of deciding whether certain words are *per se* libellous or not."

Opinion of the Court.

The rule that jurors do not respond to questions of law was illustrated in *Bishop of Meath* v. *Marquis of Winchester*, 4 Cl. & Fin. 445, 557, where Lord Chief Justice Tindal, delivering the unanimous opinion of the judges, said: "With respect to the second question lastly above proposed to us, viz., whether if the fine were received in evidence it ought to be left to the jury to say whether it barred the action of *quare impedit*, we all think that the legal effect of such fine as a bar to the action of *quare impedit* is a matter of law merely, and not in any way a matter of fact; and, consequently, the judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle *ad quæstionem juris non respondent juratores*."

Briefly stated, the contention of the accused is that *although there may not have been any evidence whatever* to support a verdict of guilty of an offence less than the one charged — and such was the case here — yet, to charge the jury, as matter of law, that the evidence in the case did not authorize any verdict except one of guilty or one of not guilty of the particular offence charged, was an interference with their legitimate functions, and, therefore, with the constitutional right of the accused to be tried by a jury.

The error in the argument, on behalf of the accused, is in making the general rule as to the respective functions of court and jury, applicable equally to a case in which there is some substantial evidence to support the particular right asserted, and a case in which there is *an entire absence of evidence* to establish such right. In the former class of cases the court may not, without impairing the constitutional right of trial by jury, do what, in the latter cases, it may often do without at all entrenching upon the constitutional functions of the jury. The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of case. So, if there be some evidence bearing upon a

particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury. *Pleasants* v. *Fant*, 22 Wall. 116, 121; *Montclair* v. *Dana*, 107 U. S. 162; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Schofield* v. *Chicago & St. Paul Railway*, 114 U. S. 615, 619; *Marshall* v. *Hubbard*, 117 U. S. 415, 419; *Meehan* v. *Valentine*, 145 U. S. 611, 625.

The cases just cited were, it is true, of a civil nature; but the rules they announce are, with few exceptions, applicable to criminal causes, and indicate the true test for determining the respective functions of court and jury. Who can doubt, for instance, that the court has the right even in a capital case to instruct the jury as matter of law to return a verdict of acquittal on the evidence adduced by the prosecution. Could it be said, in view of the established principles of criminal law, that such an instruction entrenched upon the province of the jury to determine from the evidence whether the accused was guilty or not guilty of the offence charged, or of some lesser offence included in the one charged? Under a given state of facts, outlined in an instruction to the jury, certain legal presumptions may arise. May not the court tell the jury what those presumptions are, and should not the jury assume that they are told truly? If the court excludes evidence given in the hearing of the jury, and instructs them to disregard it altogether, is it not their duty to obey that instruction, whatever may be their view of the admissibility of such evidence? In *Famous Smith* v. *United States*, 151 U. S. 50, 55, which was an indictment for the murder, in the Indian Territory, of one Gentry, "a white man and not an Indian," we said: "That Gentry was a white man, and not an Indian, was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Without expressing any opinion as to the correctness of the legal propositions embodied in this charge, we think there was no testimony which authorized the court to submit to the jury the question whether Gentry was a white man and not an Indian.

The objection went to the jurisdiction of the court, and if no other reasonable inference could have been drawn from the evidence than that Gentry was an Indian, defendant was entitled, as matter of law, to an acquittal" — citing *Pleasants* v. *Fant*, 22 Wall. 116; *County Commissioners* v. *Clark*, 94 U. S. 278, and *Marshall* v. *Hubbard*, 117 U. S. 415. So, in this case, it was competent for the court to say to the jury that *on account of the absence of all evidence* tending to show that the defendants were guilty of manslaughter, they could not, consistently with law, return a verdict of guilty of *that* crime.

Any other rule than that indicated in the above observations would bring confusion and uncertainty in the administration of the criminal law. Indeed, if a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts — if the function of the court be only advisory as to the law — why should the court interfere for the protection of the accused against what it deems an error of the jury in matter of law.

Public and private safety alike would be in peril, if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as in their judgment were applicable to the particular case being tried. If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals and the protection of

citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles. And if it be true that jurors in a criminal case are under no legal obligation to take the law from the court, and may determine for themselves what the law is, it necessarily results that counsel for the accused may, of right, in the presence of both court and jury, contend that what the court declares to be the law applicable to the case in hand is not the law, and, in support of his contention, read to the jury the reports of adjudged cases and the views of elementary writers. Undoubtedly, in some jurisdictions, where juries in criminal cases have the right, in virtue of constitutional or statutory provisions, to decide both law and facts upon their own judgment as to what the law is, and as to what the facts are, it may be the privilege of counsel to read and discuss adjudged cases before the jury. And in a few jurisdictions, in which it is held that the court alone responds as to the law, that practice is allowed in deference to long usage. But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court. Under the contrary view — if it be held that the court may not authoritatively decide all questions of law arising in criminal cases — the result will be that when a new trial in a criminal case is ordered, even by this court, the jury, upon such trial, may of right return a verdict based upon the assumption that what this court has adjudged to be law is not law. We cannot give our sanction to any rule that will lead to such a result. We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumen-

talities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions.

To instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offences that might, under some circumstances, be included in the one so charged — there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offence charged — is not error; for the instructing or refusing to instruct, under the circumstances named, rests upon legal principles or presumptions which it is the province of the court to declare for the guidance of the jury. In the case supposed the court is as clearly in the exercise of its legitimate functions, as it is when ruling that particular evidence offered is not competent, or that evidence once admitted shall be stricken out and not be considered by the jury, or when it withdraws from the jury all proof of confessions by the accused upon the ground that such confessions, not having been made freely and voluntarily, are inadmissible under the law as evidence against the accused.

These views are sustained by a very great weight of authority in this country. In *People* v. *Barry*, 90 California, 41, which was a criminal prosecution for an assault with intent to commit robbery, the accused having been twice before convicted of petit larceny, it was held not to be error to refuse to instruct the jury that under the charge they might find him guilty of simple assault, because "the evidence tended to show that he was guilty of the crime charged or of no offence at all," and, therefore, "the instruction asked was not applicable to the facts of the case;" in *People* v. *McNutt*, 93 California, 658, the offence charged being an assault with a deadly weapon and with intent to commit murder, that an instruction that the jury might convict of a simple assault could have been properly refused, because "under the evidence he

was either guilty of an offence more serious than simple assault or he was not guilty;" in *Clark* v. *Commonwealth*, 123 Penn. St. 81, a case of murder, that the omission of an instruction on the law of voluntary manslaughter, and the power of the jury to find it, was not error, because the murder was deliberate murder, and "there was no evidence on which it could be reduced to a milder form of homicide;" in *State* v. *Lane*, 64 Missouri, 319, 324, which was an indictment for murder in the first degree, that "if the evidence makes out a case of murder in the first degree, and applies to that kind of killing, and no other, the court would commit no error in confining its instructions to that offence and refusing to instruct either as to murder in the second degree or manslaughter in any of its various degrees," and when an instruction "is given for any less grade of offence, and there is no evidence upon which to base it," the judgment should be reversed for error; in *McCoy* v. *State*, 27 Texas App. 415, the charge being murder of the first degree, that the refusal to charge the law of murder in the second degree was not error, for the reason that if the defendant was "criminally responsible at all for the homicide, the grade of the offence under the facts is not short of murder of the first degree;" in *State* v. *McKinney*, 111 N. C. 683, a murder case, that as there was no testimony on either side tending to show manslaughter, a charge that there was no element of manslaughter in the case, and that the defendant was guilty of murder or not guilty of anything at all, as the jury should find the facts, was strictly in accordance with the testimony and the precedents; in *State* v. *Musick*, 101 Missouri, 260, 270, where the charge was an assault with malice aforethought, punishable by confinement in the penitentiary, that an instruction looking to a conviction for a lower grade included in the offence charged, was proper where there was evidence justifying it; in *State* v. *Casford*, 76 Iowa, 330, 332, that the defendant, so charged in an indictment that he could be convicted of rape, an assault to commit rape, or an assault and battery, was not prejudiced by the omission of the court to instruct the jury that he could be convicted of a simple assault, there being no evidence to au-

thorize a verdict for the latter offence; in *Jones* v. *State*, 52 Arkansas, 345, a murder case, that it was not error to refuse to charge as to a lower grade of offence, there being "no evidence of any crime less than murder in the first degree," and the defendant being therefore guilty of "murder in the first degree, or innocent;" in *McClevnard* v. *Commonwealth*, (Kentucky,) 12 S. W. Rep. 148, and in *O'Brien* v. *Commonwealth*, 89 Kentucky, 354, murder cases, that an instruction as to manslaughter need not be given, unless there is evidence to justify it; in *State* v. *Estep*, 44 Kansas, 572, 575, a case of murder of the first degree, that there was no testimony tending to show that the defendant was guilty of manslaughter in either the first, second, or fourth degrees, instructions as to those degrees should not have been given; and in *Robinson* v. *State*, 84 Georgia, 674, a case of assault with intent to murder, that the refusal to instruct the jury that the defendant could have been found guilty of an assault, or of assault and battery, was not error, "for there was nothing in the evidence to justify the court in so instructing the jury."

We have said that, with few exceptions, the rules which obtain in civil cases in relation to the authority of the court to instruct the jury upon all matters of law arising upon the issues to be tried, are applicable in the trial of criminal cases. The most important of those exceptions is that it is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offence charged or of any criminal offence less than that charged. The grounds upon which this exception rests were well stated by Judge McCrary, Mr. Justice Miller concurring, in *United States* v. *Taylor*, 3 McCrary, 500, 505. It was there said: "In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result

is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside; and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly."

We are of opinion that the court below did not err in saying to the jury that they could not consistently with the law arising from the evidence find the defendants guilty of manslaughter or of any offence less than the one charged; that if the defendants were not guilty of the offence charged, the duty of the jury was to return a verdict of not guilty. No instruction was given that questioned the right of the jury to determine whether the witnesses were to be believed or not, nor whether the defendant was guilty or not guilty of the offence charged. On the contrary, the court was careful to say that the jury were the exclusive judges of the facts, and that they were to determine — applying to the facts the principles of law announced by the court — whether the evidence established the guilt or innocence of the defendants of the charge set out in the indictment.

The trial was thus conducted upon the theory that it was the duty of the court to expound the law and that of the jury to apply the law as thus declared to the facts as ascertained by them. In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights.

The main reason ordinarily assigned for a recognition of the right of the jury, in a criminal case, to take the law into their own hands, and to disregard the directions of the court in matters of law, is that the safety and liberty of the citizen will be thereby more certainly secured. That view was urged upon Mr. Justice Curtis. After stating that if he conceived the reason assigned to be well founded, he would pause long before denying the existence of the power claimed, he said that a good deal of reflection had convinced him that the

argument was the other way. He wisely observed, that "as long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect of persons or times or the opinions of men. To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to be enforced, there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne." *United States* v. *Morris*, 1 Curtis, 23, 62, 63.

The questions above referred to are the only ones that need be considered on this writ of error.

Mr. Justice Jackson participated in the decision of this case and concurs in the views herein expressed.

The judgment of the Circuit Court is affirmed as to Hansen, but is reversed as to Sparf, with directions for a new trial as to him.

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

I concur in the views expressed in the opinion of the court as to the separate functions of court and jury, and in the judgment of affirmance against Hansen; but I do not concur in holding that the trial court erred in admitting evidence of confessions, or in the judgment of reversal as to Sparf.

The facts briefly stated are these: There was a single indictment charging the defendants jointly with the crime of murder. There was a single case on trial, a case in which the government was the party on one side and the two defendants

the party on the other. These two defendants were represented by the same counsel. Three witnesses testified to confessions of Hansen. Counsel for defendants objected to each of these confessions. These objections were in the same form. They purported to be for the defendants jointly, and not separately for each. Two of the confessions were given in the presence of Sparf, and in admitting them it is not pretended that there was any error. One was made in the absence of Sparf, and it is held that the court erred in overruling the objection to it. The objection was that the testimony offered was "irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary." It will be noticed that this objection was both general and special; the special ground, that which would naturally arrest the attention of the court, being that the confession was not voluntary. This ground of objection it is admitted was not well taken. If there was any error it was in overruling the general objection that the testimony was irrelevant, immaterial, and incompetent. But it is conceded that this confession was material, relevant, and competent, was properly admitted in evidence on the single trial then pending, and properly heard by the jury. The real burden of complaint is that when the court admitted the testimony it ought to have instructed the jury that it was evidence only against Hansen, and not against Sparf. But in common fairness ought not the attention of the court to have been called to the difference, and a ruling had upon that difference? Cannot parties present a joint objection to testimony and rest their case upon such objection? Is it the duty of the court to consider a matter which is not called to its attention, and make a ruling which it is not asked to make? Is it not the duty of the court to be impartial between the government and the defendant, and decide simply the questions which each party presents? Is it its duty to watch over the interests of either party, and to put into the mouth of counsel an objection which he does not make? To my mind such a doctrine is both novel and dangerous. I do not question the proposition that a confession

made by one of two defendants in the absence of the other is to be considered by the jury only as against the one making it, and I admit that if a separate objection had been made by Sparf the court would have been called upon to formally sustain such objection, and instruct the jury that such testimony was to be considered by them only as against Hansen. If an instruction had been asked, as is the proper way, the attention of the court would have been directed to the matter, and an adverse ruling would have rightly presented the error which is now relied upon. But I need not refer to the oft-repeated decisions of this court that there is no error in failing to give an instruction which is not asked, unless it be one of those which a statute in terms requires the court to give, and there is no pretence of any such statute. *Lewis* v. *Lee County*, 66 Alabama, 480, 489, was decided in accordance with the views which I have expressed. The court in that case say:

"The witness Frazier's testimony, as to his conversation with the defendant Lewis, regarding the condition of his accounts as county treasurer, was properly admitted in evidence. It was certainly good as an admission against him, and could not be excluded because not admissible against the sureties, who were his codefendants in the action. The practice on this point is well settled in this State, that the only remedy of a codefendant, in such a case, is to request a charge from the court to the jury, limiting the operation of the evidence, so as to confine its influence only to the defendant against whom it is admissible."

So in *State* v. *Brite*, 73 N. C. 26, 28, a similar ruling was made, the court saying:

"The defendant's first exception is that his honor allowed Culpepper, a codefendant, to introduce witnesses to prove his (Brite's) declarations while in jail, which tended to exonerate Culpepper."

"While these declarations are not evidence, either for or against Culpepper, being, as to him, *res inter alios acta*, and made by one not under oath, and subject to cross-examination, yet they are clearly admissible against Brite, and it makes no difference whether they were called forth by the State, or by

Culpepper, without objection, or rather with the sanction of the State."

I have been able to find no case laying down a contrary doctrine. In *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, each defendant separately for itself presented the objection, and each, therefore, had the right to avail itself of the ruling made by the court. Indeed, I think this will be found to be the first case in which it has been held that, while the court properly allowed testimony to go to the jury on the trial of a case, the judgment has been reversed because it failed to call the attention of the jury to the bearing of that evidence upon the different parties when such parties never asked the court to so instruct the jury.

I am authorized to say that MR. JUSTICE BROWN concurs in these views.

MR. JUSTICE GRAY, with whom concurred MR. JUSTICE SHIRAS, dissenting.

Mr. Justice Shiras and myself concur in so much of the opinion of the majority of the court as awards a new trial to one of the defendants, by reason of the admission in evidence against him of confessions made in his absence by the other.

But from the greater part of that opinion, and from the affirmance of the conviction of the other defendant, we are compelled to dissent, because, in our judgment, the case, involving the question of life or death to the prisoners, was not submitted to the decision of the jury as required by the Constitution and laws of the United States.

The two defendants, Herman Sparf and Hans Hansen, together with Thomas St. Clair, seamen on board the brig Hesper, an American vessel, were indicted for the murder of Maurice Fitzgerald, the second mate, on the high seas, on January 13, 1893, by striking him with a weapon and by throwing him overboard and drowning him.

St. Clair was separately tried, convicted and sentenced, and his conviction was affirmed by this court at the last term. 154 U. S. 134.

Dissenting Opinion: Gray, Shiras, JJ.

At the trial of Sparf and Hansen, there was no direct testimony of any eye-witness to the killing, or to any assault or affray. There was evidence that, at ten o'clock in the evening of the day in question, the second mate was at the wheel, in charge of the starboard watch, consisting of St. Clair, Sparf, Hansen and another seaman; and that, when the watch was changed at midnight, the second mate could not be found, and there was much blood on the deck, as well as a bloody broomstick and a wooden bludgeon. The rest of the evidence consisted of testimony of other seamen to acts and statements of each defendant and of St. Clair, before and after the disappearance of the second mate, tending to prove a conspiracy to kill him; and to subsequent confessions of Hansen, tending to show that the killing was premeditated.

The judge, in his charge to the jury, gave the following instructions: "The indictment is based upon section 5339 of the Revised Statutes, which provides, among other things, that 'every person who commits murder' 'upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, or who upon any of such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.'"

"Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, express or implied." "Express malice" was defined as "deliberate premeditation and design, formed in advance to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim;" and "implied malice" as "an inference of the law from any deliberate and cruel act committed by one person against another," "that is, malice is inferred when one kills another without provocation, or when the provocation is not great." "Manslaughter is the unlawful killing of

a human being, without malice, either expressed or implied. I do not consider it necessary, gentlemen, to explain it further; for, if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder." "Every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree." "It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the facts."

The defendants requested the judge to instruct the jury that "under the indictment in this case the defendants may be convicted of murder, or manslaughter, or of an attempt to commit murder or manslaughter; and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendants are guilty either of manslaughter, or of an assault with intent to commit murder or manslaughter, you should so find your verdict." The judge refused to give this instruction, and the defendants excepted to the refusal.

The jury, after deliberating on the case for some time, returned into court, and being asked whether they had agreed upon a verdict, the foreman said that one of the jurors wished to be instructed upon certain points under the laws of the United States as to murder upon the high seas. One of the jurors then said that he "would like to know, in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty," evidently meaning "of murder," the whole offence charged in the indictment. The judge then read again section 5339 of the Revised Statutes. The juror asked: "Are the two words 'aiding' or 'abetting' defined?" The judge replied: "The words 'aiding' or 'abetting' are not defined. But I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error, there is a higher tribunal to correct it." The juror

said: "I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining the matter. The question arising amongst us is as to aiding and abetting. Furthermore, as I understand, it must be one thing or the other. It must be either guilty or not guilty." The judge replied: "Yes; under the instructions I have given you." The judge then, after repeating the general definitions, as before given, of murder and of manslaughter, said: "If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder;" and, in answer to further questions of the juror, repeated this again and again, and said: "In a proper case, it may be murder, or it may be manslaughter; but in this case it cannot properly be manslaughter." The defendants excepted to these instructions. And finally, in answer to the juror's direct question, "Then there is no other verdict we can bring in, except guilty or not guilty?" the judge said: "In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court." The juror then said: "There has been a misunderstanding amongst us. Now it is clearly interpreted to us, and no doubt we can now agree on certain facts." Thereupon a verdict of guilty of murder was returned against both defendants, and they were sentenced to death, and sued out this writ of error.

The judge, by instructing the jury that they were bound to accept the law as given to them by the court, denied their right to decide the law. And by instructing them that, if a felonious homicide by the defendants was proved, there was nothing in the case to reduce it below the grade of murder, and they could not properly find it to be manslaughter, and by declining to submit to them the question whether the defendants were guilty of manslaughter only, he denied their right to decide the fact. The colloquy between the judge and the

jurors, when they came in for further instructions, clearly shows that the jury, after deliberating upon the case, were in doubt whether the crime which the defendants had committed was murder or manslaughter; and that it was solely by reason of these instructions of the judge, that they returned a verdict of the higher crime.

It is our deep and settled conviction, confirmed by a reëxamination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue.

The question of the right of the jury to decide the law in criminal cases has been the subject of earnest and repeated controversy in England and America, and eminent jurists have differed in their conclusions upon the question. In this country, the opposing views have been fully and strongly set forth by Chancellor Kent in favor of the right of the jury, and by Chief Justice Lewis against it, in *People* v. *Croswell*, 3 Johns. Cas. 337; by Judge Hall in favor of the right, and by Judge Bennett against it, in *State* v. *Croteau*, 23 Vermont, 14; and by Chief Justice Shaw against the right, and by Mr. Justice Thomas in its favor, in *Commonwealth* v. *Anthes*, 5 Gray, 185.

The question of the right of the jury under the Constitution of the United States cannot be usefully or satisfactorily discussed without examining and stating the authorities which bear upon the scope and effect of the provisions of the Constitution regarding this subject. In pursuing this inquiry, it will be convenient to consider, first, the English authorities; secondly, the authorities in the several Colonies and States of America; and lastly, the authorities under the national government of the United States.

By Magna Charta, no person could be taken or imprisoned, or deprived of his freehold or of his liberties or free customs, unless by the lawful judgment of his peers, or the law of the

land — *nisi per legale judicium parium suorum, vel per legem terræ.* Accordingly, by the law of England, at the time of the discovery and settlement of this country by Englishmen, every subject (not a member of the House of Lords) indicted for treason, murder or other felony, had the right to plead the general issue of not guilty, and thereupon to be tried by a jury; and, if they acquitted him, the verdict of acquittal was conclusive, in his favor, of both the law and the fact involved in the issue. The jury, in any case, criminal or civil, might indeed, by finding a special verdict reciting the facts, refer a pure question of law to the court; but they were not bound and could not be compelled to do so, even in a civil action.

By the statute of Westm. 2, (13 Edw. I,) c. 30, "it is ordained, that the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do shew the truth of the fact, and require aid of the justices; but if they of their own head will say, that it is or is not disseisin, their verdict shall be admitted at their own peril." 1 Statutes of the Realm, 86. That statute, as Lord Coke tells us, was declaratory of the common law; and before its enactment some justices directed juries to return general verdicts, thus subjecting them to the peril of an attaint if they mistook the law. 2 Inst. 422, 425.

Littleton, speaking of civil actions in which the jury, upon the general issue pleaded, might return a special verdict, says that "if they will take upon them the knowledge of the law upon the matter, they may give their verdict generally, as is put in their charge." Lit. § 368. And accordingly Lord Coke says: "Although the jury, if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for if they do mistake the law, they run into the danger of an attaint; therefore to find the special verdict is the safest where the case is doubtful." Co. Lit. 227 *b*.

Lord Coke elsewhere says that "the jury ought, if they will not find the special matter, to find 'at their peril' according to law." *Rawlyns's case*, 4 Rep. 52 *a*, 53 *b*. And Lord Chief Justice Hobart says: "Legally it will be hard to quit

a jury that finds against the law, either common law or several statute law, whereof all men were to take knowledge, and whereupon verdict is to be given, whether any evidence be given to them or not," and "though no man informed them what the law was in that case." *Needler* v. *Bishop of Winchester*, Hob. 220, 227.

The peril or danger, above spoken of, into which the jury ran by taking upon themselves the knowledge of the law, and undertaking to decide by a general verdict the law involved in the issue of fact submitted to them, was the peril of an attaint, upon which their verdict might be set aside and themselves punished. Upon the attaint, however, the trial was not by the court, but by a jury of twenty-four; it was only by a verdict of the second jury, and not by judgment of the court only, that the first verdict could be set aside; and, if not so set aside, the second verdict was final and conclusive. Co. Lit. 293 *a*, 294 *b*; Vin. Ab., Attaint, A. (6); Com. Dig., Attaint, B. Moreover, no attaint lay in a criminal case. *Bushell's case*, Vaughan, 135, 146; *The King* v. *Shipley*, 4 Doug. 73, 115.

Lord Bacon, in his History of Henry VII, (originally written and published in English, and afterwards translated into Latin by himself or under his supervision,) speaking of the Parliament held in the eleventh year of his reign, says: "This Parliament also made that good law, which gave the attaint upon a false verdict between party and party, which before was a kind of evangile, irremediable — in the Latin, *judicia juratorum, quæ veredicta vocantur, quæ ante illud tempus evangelii cujusdam instar erant, atque plane irrevocabilia.* It extends not to causes capital; as well because they are for the most part at the King's suit, as because in them, if they be followed in course of indictment, there passeth a double jury, the indictors and the triers, and so not twelve men, but four and twenty. But it seemeth that was not the only reason; for this reason holdeth not in the appeal — *ubi causa capitalis a parte gravata peragitur.* [That is, the appeal of murder, brought by the heir of the deceased. See *Louisville & St. Louis Railroad* v. *Clarke*, 152 U. S. 230,

239.] But the great reason was, lest it should tend to the discouragement of jurors in cases of life and death — *ne forte juratores in causis capitalibus timidius se gererent* — if they should be subject to suit and penalty, where the favour of life maketh against them." 6 Bacon's Works, (ed. 1858,) 5, 7, 160, 161; 5 Bacon's Works, (ed. 1803,) 117; 9 Id. 483.

Lord Bacon was mistaken in assuming that the attaint was introduced by the St. of 11 Hen. VII, c. 24; for it existed at common law in writs of assize, and had been regulated and extended to other civil actions by many earlier statutes. 2 Inst. 130, 237, 427; Finch, Law, lib. 4, c. 47.

But the mistake does not diminish the force of Lord Bacon's statements that, wherever an attaint did not lie, the "judgment of the jury, commonly called verdict, was considered as a kind of gospel;" and that the reasons why an attaint did not lie in a capital case were, not only that two juries, the indictors and the triers, had passed upon the case, but chiefly that juries, in cases of life and death, should not be discouraged, or act timidly, by being subjected to suit and penalty if they decided in favor of life.

John Milton, in his Defence of the People of England, after speaking of the King's power in his courts and through his judges, adds: "Nay, all the ordinary power is rather the people's, who determine all controversies themselves by juries of twelve men. And hence it is that when a malefactor is asked at his arraignment, *How will you be tried?* he answers always according to law and custom, *By God and my country;* not by God and the King, or the King's deputy." 8 Milton's Works, (Pickering's ed.) 198, 199. The idea is as old as Bracton. Bract. 119.

In the reign of Charles II, some judges undertook to instruct juries that they must take the law from the court, and to punish them if they returned a verdict in favor of the accused against the judge's instructions. But, as often as application was made to higher judicial authority, the punishments were set aside, and the rights of juries vindicated.

In 1665, upon the trial of an indictment against three Quakers for an unlawful conventicle, Wagstaffe and other

jurors were fined by Chief Justice Kelyng for acquitting "against full evidence, and against the direction of the court in matter of law, in said court openly given and declared" — *contra plenam evidentiam, et contra directionem curiæ in materia legis, in dicta curia ibidem aperte datam et declaratam.* His reasons for this (as stated in his own manuscript note of the case, not included in the first edition of his reports, published by Lord Holt in 1708) were "that they and others may know that a wilful jury cannot make an act of Parliament or the law of England of no effect but they are accountable and punishable for it;" and "that in criminal cases the court may fine a jury who will give a verdict contrary to their evidence; and the reason (as I take it) is that otherwise a headstrong jury might overthrow all the course of justice, for no attaint lieth in criminal causes, and also one verdict is peremptory, and a new trial cannot be granted in criminal causes, and therefore the judges have always punished such wilful juries by fine and imprisonment, and binding them to their good behaviour." But at the end of his report is this memorandum: "Note, the whole case of the Quakers, as to fining jury, now not law." J. Kel. (3d ed.) 69–75. And Lord Hale, then Chief Baron, tells us that the jurors "were thereupon committed, and brought their *habeas corpus* in the Court of Common Bench, and all the judges of England were assembled to consider of the legality of this fine, and the imprisonment thereupon;" and the jurors were discharged of their imprisonment, for the following reasons:

"It was agreed by all the judges of England (one only dissenting) that this fine was not legally set upon the jury, for they are the judges of matters of fact; and although it was inserted in the fine, that it was *contra directionem curiæ in materia legis*, this mended not the matter, for it was impossible any matter of law could come in question, till the matter of fact were settled and stated and agreed by the jury, and of such matter of fact they were the only competent judges. And although the witnesses might perchance swear the fact to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the

fact; for possibly they might know somewhat of their own knowledge, that what was sworn was untrue, and possibly they might know the witnesses to be such as they could not believe, and it is the conscience of the jury that must pronounce the prisoner guilty or not guilty. And to say the truth, it were the most unhappy case that could be to the judge, if he at his peril must take upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless." 2 Hale P. C. 312, 313.

Lord Hale's apparent meaning is that, at a trial upon the plea of not guilty, the jury are the judges of the issue of fact thereby presented, and it is the conscience of the jury that must pronounce the prisoner guilty or not guilty; that, as no matter of law can come in question unless the facts are first found by the jury in a special verdict, it were idle to say that a general verdict was against the judge's direction or opinion in matter of law; and that if the judge's opinion in matter of law must rule the issue of fact submitted to the jury, the trial by jury would be useless.

The reasons are more fully brought out in *Bushell's case*, in 1670, not mentioned in the text of Lord Hale's treatise, and doubtless decided after that was written. William Penn and William Mead having been indicted and tried for a similar offence, and acquitted against the instructions of the court, Bushell and the other jurors who tried them were fined by Sir John Howell, Recorder of London, and Bushell was committed to prison, in like terms, for not paying his fine, and sued out a writ of *habeas corpus*. *Penn & Mead's case*, 6 Howell's State Trials, 951; *Bushell's case*, Vaughan, 135; *S. C.* 6 Howell's State Trials, 999; 1 Freeman, 1; T. Jones, 13.

At the hearing thereon, Scroggs, the King's serjeant, argued: "It is granted, that in matters of fact only, the jury are to be judges; but when the matter of fact is mixed with matter of law, the law is to guide the fact, and they are to be guided by the court. The jury are at no inconvenience, for if they please they may find the special matter; but if they will

take upon them to know the law, and do mistake, they are punishable." 1 Freeman, 3.

But Bushell was discharged from imprisonment, for reasons stated in the judgment delivered by Sir John Vaughan, Chief Justice of the Common Pleas, after a conference of all the judges of England, including Lord Hale, and with the concurrence of all except Chief Justice Kelyng. Vaughan, 144, 145; 1 Freeman, 5; Lord Holt, in *Groenwelt* v. *Burwell*, 1 Ld. Raym. 454, 470.

In that great judgment, as reported by himself, Chief Justice Vaughan discussed separately the two parts of the return; first, that the acquittal was "against full and manifest evidence;" and, second, that it was "against the direction of the court in matter of law."

It was in discussing the first part, that he observed "that the verdict of a jury, and evidence of a witness, are very different things, in the truth and falsehood of them. A witness swears but to what he hath heard or seen; generally or more largely, to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him." Vaughan, 142.

After disposing of that part of the return, he proceeds as follows: "We come now to the next part of the return, viz. *That the jury acquitted those indicted, against the direction of the court in matter of law, openly given and declared to them in court.*

"The words, *that the jury did acquit, against the direction of the court in matter of law*, literally taken, and *de plano*, are insignificant and not intelligible; for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was, or can be, given to a jury of what is law, or not; nor no such oath can be given to, or taken by, a jury to try matter in law; nor no attaint can lie for such a false oath.

"Therefore we must take off this vail and colour of words, which make a shew of being something, and in truth are nothing.

"If the meaning of these words, *finding against the direction of the court in matter of law*, be, that if the judge, having heard the evidence given in court (for he knows no other) shall tell the jury, upon this evidence, the law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do: Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued; which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

"For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?

"But if the jury be not obliged in all trials to follow such directions, if given, but only in some sort of trials (as, for instance, in trials for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal trials, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil trials.

"And how the jury should, in any other manner, according to the course of trials used, find against the direction of the court in matter of law, is really not conceptible." Vaughan, 143, 144.

He then observes: "This is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, How do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they find for the plaintiff, or *e contrario*, and thereupon they rectify their verdict. And in these cases, the jury, and not the

judge, resolve and find what the fact is. Therefore always, in discreet and lawful assistance of the jury, the judge's direction is hypothetical, and upon supposition, and not positive and upon coercion, viz.: If you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant." But he is careful to add that, "whatsoever they have answered the judge upon an interlocutory question or discourse, they may lawfully vary from it if they find cause, and are not thereby concluded." pp. 144, 145.

It is difficult to exhibit the strength of Chief Justice Vaughan's reasoning by detached extracts from his opinion. But a few other passages are directly in point:

"A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, being not assured it is so from their own understanding, are forsworn, at least *in foro conscientiæ*." p. 148.

"That *decantatum* in our books, *ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores*, literally taken, is true: for if it be demanded, What is the fact? the judge cannot answer it; if it be asked, What is the law in the case? the jury cannot answer it." He then explains this by showing that upon demurrers, special verdicts, or motions in arrest of judgment, "the jury inform the naked fact, and the court deliver the law." "But upon all general issues; as upon *not culpable* pleaded in trespass, *nil debet* in debt, *nul tort*, *nul disseisin* in assize, *ne disturba pas* in *quare impedit*, and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber, in the particular cases in issue, yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined and tried in the principal

case, but [*i.e.* except] where the verdict is special." pp. 149, 150.

He then observes that "to this purpose the Lord Hobart in *Needler's case against the Bishop of Winchester* is very apposite," citing the passage quoted near the beginning of this opinion; and concludes his main argument as follows:

"The legal verdict of the jury, to be recorded, is finding for the plaintiff or defendant; what they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore [therefor], as well as judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary." p. 150.

That judgment thus clearly appears to have been rested, not merely on the comparatively technical ground, that upon the general issue no matter of law could come in question until the facts have been found by the jury; nor yet upon the old theory that the jurors might have personal knowledge of some facts not appearing in evidence; but mainly on the broad reasons, that if the jury, especially in criminal trials, were obliged to follow the directions of the court in matter of law, no necessary or convenient use could be found of juries, or to continue trials by them at all; that though the verdict of the jury be right according to the law as laid down by the court, yet if they are not assured by their own understanding that it is so, they are forsworn, at least *in foro conscientiæ;* and that the *decantatum* in our books, *ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores*, means that issues of law, as upon demurrers, special verdicts, or motions in arrest of judgment, are to be decided by the court; but that upon general issues of fact, involving matter of law, the jury resolve both law and fact complicately, and so determine the law.

Notwithstanding that authoritative declaration of the right of the jury, upon the general issue, to determine the law, Chief Justice Scroggs, upon the trial of Harris for a seditious libel in 1680, (7 Howell's State Trials, 925, 930,) insisted that

the jury must take the law from the court; and Chief Justice Jeffreys, presiding at the trial of Algernon Sidney in 1683, charged the jury as follows: "It is our duty upon our oaths to declare the law to you, and you are bound to receive our declaration of law, and upon this declaration to inquire whether there be a fact, sufficiently proved, to find the prisoner guilty of the high treason of which he stands indicted." And Sidney was convicted, sentenced, and executed. 9 Howell's State Trials, 817, 889.

In the last year of the reign of James II, the *Trial of the Seven Bishops*, reported 12 Howell's State Trials, 183, took place upon an information for a seditious libel contained in their petition to the King, praying that he would be pleased not to insist on their distributing and reading in the churches his declaration dispensing with the penal statutes concerning the exercise of religion. The trial was at bar before all the Justices of the King's Bench, upon a general plea of not guilty. A principal ground of defence was, that the King had no dispensing power, and therefore the petition of the bishops to him was an innocent exercise of the right of petition, and was not a libel. In support of this defence, ancient acts of Parliament were given in evidence; and, upon the offer of one in Norman French, the Chief Justice said, "Read it in English, for the jury to understand it," and it was so read by a sworn interpreter. pp. 374, 375. And when the Attorney General argued that these matters were not pertinent to the case, the Chief Justice, interrupting him, said: "Yes, Mr. Attorney, I'll tell you what they offer, which it will lie upon you to give an answer to; they would have you show how this has disturbed the government, or diminished the King's authority." p. 399.

At the close of the arguments, each of the four judges in turn charged the jury. Lord Chief Justice Wright said: "The only question before me is, and so it is before you, gentlemen, it being a question of fact, whether here be a certain proof of a publication? And then the next question is a question of law indeed, whether if there be a publication proved, it be a libel?" "Now, gentlemen, anything that

shall disturb the government, or make mischief and a stir among the people, is certainly within the case of *Libellis Famosis;* and I must in short give you my opinion, I do take it to be a libel. Now this being a point of law, if my brothers have anything to say to it, I suppose they will deliver their opinions."

Mr. Justice Holloway said: "If you are satisfied there was an ill intention of sedition, or the like, you ought to find them guilty; but if there be nothing in the case that you find, but only that they did deliver a petition to save themselves harmless and to free themselves from blame, by showing the reason of their disobedience to the King's command, which they apprehended to be a grievance to them, and which they could not in conscience give obedience to, I cannot think it is a libel. It is left to you, gentlemen, but that is my opinion."

Mr. Justice Powell also expressed his opinion that the paper was not a libel; and said: "Now, gentlemen, the matter of it is before you; you are to consider of it, and it is worth your consideration." He then expressed his opinion that the King had no dispensing power; and concluded: "If this be once allowed of, there will need no Parliament; all the legislation will be in the King, which is a thing worth considering, and I leave the issue to God and your consciences."

Mr. Justice Allybone, after saying, "The single question that falls to my share is, to give my sense of this petition, whether it shall be in construction of law a libel in itself, or a thing of great innocence," expressed his opinion that it was a libel.

The jury on retiring, requested, and were allowed by the court, to take with them the statute book, the information, the petition of the bishops, and the declaration of the King; and they returned a verdict of not guilty, whereat there was great popular rejoicing in London and throughout England. 12 Howell's State Trials, 425–431; 1 Burnet's Own Time, 744.

It thus clearly appears that upon that trial, one of the most important in English history, deeply affecting the liberties of the people, the four judges of the King's Bench, while differing among themselves upon the question whether the petition

of the bishops was a libel, concurred in submitting that question, as a question of law, to the decision of the jury, not as umpires between those judges who thought the paper was a libel and those judges who thought it was not, but as the tribunal vested by the law of England with the power and the right of ultimately determining, as between the Crown and the accused, all matters of law, as well as of fact, involved in the general issue of guilty or not guilty.

Upon the accession of William and Mary, Parliament declared the King's power of dispensing with the laws to be unlawful; and reversed the conviction of Algernon Sidney, "for a partial and unjust construction of the statute" of treasons in the instructions by which his conviction had been procured. Stat. 1 W. & M. sess. 2, c. 2; 6 Statutes of the Realm, 143, 155; 9 Howell's State Trials, 996. And early in the new reign Holt was appointed Lord Chief Justice, and Somers, Lord Keeper.

Lord Somers, in the opening pages of his essay on The Security of Englishmen's Lives, or the Trust, Power and Duty of the Grand Juries of England, (first published in 1681, and republished in 1714, towards the end of his life, after he had been Lord Chancellor,) lays down in the clearest terms the right of the jury to decide the law, saying: "It is made a fundamental in our government, that (unless it be by Parliament) no man's life shall be touched for any crime whatsoever, save by the judgment of at least twenty-four men; that is, twelve or more, to find the bill of indictment, whether he be peer of the realm, or commoner; and twelve peers or above, if a lord, if not, twelve commoners, to give the judgment upon the general issue of not guilty joined." "The office and power of these juries is *judicial*, they only are the judges from whose sentence the indicted are to expect life or death: Upon their integrity and understanding, the lives of all that are brought into judgment do ultimately depend; from their verdict there lies no appeal; by finding guilty or not guilty, they do complicately resolve both law and fact. As it hath been the law, so it hath always been the custom and practice of these juries, upon all general issues, pleaded

in cases, civil as well as criminal, to judge both of the law and fact." "Our ancestors were careful, that all men of the like condition and quality, presumed to be sensible of each other's infirmity, should mutually be judges of each other's lives, and alternately taste of subjection and rule, every man being equally liable to be accused or indicted, and perhaps to be suddenly judged by the party, of whom he is at present judge, if he be found innocent."

Lord Chief Justice Holt declared that "in all cases and in all actions the jury may give a general or special verdict, as well in causes criminal as civil, and the court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the court, but are not bound so to do." *Anon.* (1697) 3 Salk. 373. And upon the trial of an information for a seditious libel, while he expressed his opinion that the paper was upon its face a criminal libel, he submitted the question whether it was such to the jury, saying, "Now you are to consider whether these words I have read to you do not tend to beget an ill opinion of the administration of the government." *Tutchin's case*, (1704) 14 Howell's State Trials, 1095, 1128. Although he concluded his charge with the words, "If you are satisfied that he is guilty of composing and publishing these papers at London, you are to find him guilty," yet, as Mr. Starkie well observes, "these words have immediate reference to the ground of defence upon which Mr. Tutchin's counsel meant to rely, namely, that the offence had not been proved to have been committed in London; and cannot be considered as used for the purpose of withdrawing the attention of the jury from the quality of the publication, upon which they had just before received instructions; and indeed to suppose it had so meant would prove too much, since, if so, the jury were directed not to find the truth of the innuendoes." Starkie on Slander, 56.

Some decisions, often cited as against the right of the jury by a general verdict to determine matter of law involved in the general issue of guilty or not guilty, were upon special verdicts presenting pure questions of law. Such were *Townsend's case*, (1554) 1 Plowd. 111; and *The King* v. *Oneby*,

(1726) 2 Ld. Raym. 1485; *S. C.* 2 Stra. 766; 1 Barnard. 17; 17 Howell's State Trials, 29.

After the accession of George II, Lord Chief Justice Raymond, on trials at *nisi prius* for seditious libels, (ignoring the cases of Tutchin and of The Seven Bishops,) told juries that they were bound to take the law from the court, and that the question, whether the paper which the defendant was accused of writing and publishing was a libel, was a mere question of law with which the jury had nothing to do. *Clarke's case*, (1729) 17 Howell's State Trials, 667, note; *S. C.* 1 Barnard. 304; *Francklin's case*, (1731) 17 Howell's State Trials, 625, 672.

In 1734, upon an information in the nature of a *quo warranto* against the defendant to show cause by what authority he acted as mayor of Liverpool, his motion for a new trial, because the jury had found a general verdict for the Crown against the instructions of the judge, and notwithstanding he ordered them to return a special verdict, was granted by the Court of King's Bench, Lord Chief Justice Hardwicke saying: "The general rule is, that if the judge of *nisi prius* directs the jury on the point of law, and they think fit obstinately to find a verdict contrary to his direction, that is sufficient ground for granting a new trial; and when the judge upon a doubt of law directs the jury to bring in the matter specially, and they find a general verdict, that also is a sufficient foundation for a new trial." "The thing that governs greatly in this determination is, that the point of law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and jury are kept distinct; that the judge determines the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." *The King* v. *Poole*, Cas. temp. Hardw. 23, 26, 28; *S. C.* Cunningham, 11, 14, 16.

But such an information to try title to a civil office (though it had some of the forms of a criminal prosecution) was brought for the mere purpose of trying a civil right, and was consid-

ered as in the nature of a civil proceeding. 3 Bl. Com. 263; *The King* v. *Francis*, 2 T. R. 484; *Ames* v. *Kansas*, 111 U. S. 449, 460, 461. And, as appears by the first passage above cited from Lord Hardwicke's opinion, it was evidently so treated by the court, under the practice of granting new trials on motion of either party to a civil case, which had gradually grown up within the century preceding, as a substitute for attaints. *Bell* v. *Wardell*, (1740) Willes, 204, 206; *Witham* v. *Lewis*, (1744) 1 Wilson, 48, 55; *Bright* v. *Eynon*, (1757) 1 Burrow, 390, 394. In a criminal case, certainly, the court could not compel the jury to return a special verdict. Nothing, therefore, was adjudged in *Poole's case* as to the right of the jury to decide the law in prosecutions for crime. And it is significant that, although both reports of that case were published in 1770, it was not cited by Lord Mansfield, in 1784, when collecting the authorities against the right of the jury in criminal cases. *The King* v. *Shipley*, 4 Doug. 73, 168.

Lord Hardwicke's own opinion, indeed, may be presumed to have been against the right of the jury; for when Attorney General he had so argued in *Francklin's case*, above cited, 17 Howell's State Trials, 669; and he was, as justly observed by Mr. Hallam, "a regularly bred crown lawyer, and in his whole life disposed to hold very high the authority of government." 3 Hallam's Const. Hist. (9th ed.) 287. His opinion, therefore, is of less weight upon a constitutional question affecting the liberty of the subject, than upon other questions of law or of equity.

The later history of the law of England upon the right of the jury to decide the law in criminal cases is illustrated by a long conflict between the views of Mr. Murray, afterwards Lord Mansfield, against the right, and of Mr. Pratt, afterwards Lord Camden, in its favor, which, after the public sentiment had been aroused by the great argument of Mr. Erskine in *The Dean of St. Asaph's case*, was finally settled, in accordance with Lord Camden's view, by a declaratory act of Parliament.

Upon the Trial of Owen, in 1752, for publishing a libel, Mr. Murray, as Solicitor General, argued to the jury that if

they determined the question of fact of publication, the judge determined the law. But Mr. Pratt, of counsel for the defendant, argued the whole matter to the jury; and, although the publication was fully proved, and Chief Justice Lee told the jury that, this being so, they could not avoid bringing in the defendant guilty, they returned and persisted in a general verdict of acquittal. 18 Howell's State Trials, 1203, 1223, 1227, 1228; 29 Parl. Hist. 1408.

In the like case of Nutt, in 1754, (Starkie on Slander, 615,) conducted by Mr. Murray as Attorney General, the like direction was given to the jury by Chief Justice Ryder. Lord Mansfield, in *The King* v. *Shipley*, 4 Doug. 168.

In the similar case of Shebbeare, in 1758, (Starkie on Slander, 56, 616,) Mr. Pratt, as Attorney General, when moving before Lord Mansfield for leave to file the information, said: "It is merely to put the matter in a way of trial; for I admit, and his lordship well knows, that the jury are judges of the law as well as the fact, and have an undoubted right to consider whether, upon the whole, the pamphlet in question be or be not published with a wicked, seditious intent, and be or not a false, malicious, and scandalous libel." Second Postscript to Letter to Mr. Almon on Libels, (1770) p. 7; 4 Collection of Tracts 1763–1770, p. 162. And at the trial, as he afterwards said in the House of Lords, he "went into court predetermined to insist on the jury taking the whole of the libel into consideration," and, "so little did he attend to the authority of the judges on that subject, that he turned his back on them, and directed all he had to say to the jury." 29 Parl. Hist. 1408. And see 20 Howell's State Trials, 709. But Lord Mansfield instructed the jury that the question whether the publication was a libel was to be determined by the court. 4 Doug. 169.

Lord Camden, when Chief Justice of the Common Pleas, presiding at criminal trials, instructed the jury that they were judges of the law as well as the fact. Pettingal on Juries (1769) cited in 21 Howell's State Trials, 853; 29 Parl. Hist. 1404, 1408.

In the prosecutions, in the summer of 1770, of Miller and

Woodfall for publishing the letter of Junius to the King, Lord Mansfield instructed the jury in the same way as in *Shebbeare's case.* In *Miller's case*, the jury returned a verdict of not guilty. In *Woodfall's case*, the jury returned a verdict of "guilty of printing and publishing only;" and the court therefore granted a motion for a new trial. But Lord Mansfield, on November 20, 1770, in delivering a judgment upon that motion, took occasion to say that the court was of opinion "that the direction is right and according to law." *Miller's case*, 20 Howell's State Trials, 869, 893, 895; *Woodfall's case*, Id. 895, 901–903, 918, 920; *S. C.* 5 Burrow, 2661, 2666, 2668.

On December 5, 1770, in the House of Lords, the judgment in *Woodfall's case* was attacked by Lord Chatham, and defended by Lord Mansfield, in replying to whom Lord Chatham said: "This, my lords, I never understood to be the law of England, but the contrary. I always understood that the jury were competent judges of the law as well as the fact; and, indeed, if they were not, I can see no essential benefit from their institution to the community." And Lord Camden, after observing that it would be highly necessary to have an authentic statement of the direction to the jury in that case laid before the House, said: "If we can obtain this direction, and obtain it fully stated, I shall very readily deliver my opinion upon the doctrines it inculcates, and if they appear to me contrary to the known and the established principles of the constitution, I shall not scruple to tell the author of his mistake in the open face of this assembly." 16 Parl. Hist. 1302–1307.

On the next day, a warm debate took place in the House of Commons upon a motion by Serjeant Glynn for a committee "to inquire into the administration of criminal justice, and the proceedings of the judges in Westminster Hall, particularly in cases relating to the liberty of the press and the constitutional power and duty of juries," in the course of which Mr. Dunning, then the leader of the bar, and afterwards Lord Ashburton, emphatically denied that the doctrine of Lord Raymond and Lord Mansfield was the established law of the land. 16 Parl. Hist. 1212, 1276. See also 2 Cavendish's Debates, 141, 369.

Pursuant to a wish expressed by Lord Mansfield on the day after, the House of Lords met on December 10, when he informed the House that he had left with its clerk a copy of the judgment of the court in *Woodfall's case.* Lord Camden thereupon said that he considered the paper as a challenge directed personally to him, which he accepted, and said: "In direct contradiction to him, I maintain that his doctrine is not the law of England. I am ready to enter into the debate whenever the noble lord will fix a day for it." And he proposed questions in writing to Lord Mansfield, framed with the view of ascertaining how far that judgment denied the right of the jury, by a general verdict in a criminal case, to determine the law as well as the fact. Lord Mansfield evaded answering the questions, and, while declaring himself ready to discuss them at some future day, declined to name one. And the matter dropped for the time. 16 Parl. Hist. 1312–1322.

In 1783, after the Independence of the United States had been recognized by Great Britain, came the case of *Rex* v. *Shipley*, commonly known as *The Dean of St. Asaph's case*, fully reported in 4 Doug. 73, and in 21 Howell's State Trials, 847, and briefly stated in 3 T. R. 428, note, which was a criminal prosecution for a seditious libel contained in a pamphlet written by Sir William Jones. Mr. Justice Buller, at the trial, told the jury that the only questions for them were whether the defendant published the pamphlet, and whether the innuendoes in the indictment were true; and that the question of libel or no libel was a question of law for the court, and not for the jury, upon which he declined to express any opinion, but that it would be open for the consideration of the court upon a motion in arrest of judgment. The jury returned a verdict of "guilty of publishing only," but were persuaded by the judge to put it in this form: "Guilty of publishing, but whether a libel or not the jury do not find." 4 Doug. 81, 82, 85, 86; 21 Howell's State Trials, 946, 950–955. The effect of all this was that the defendant was found guilty of publishing a paper, which neither the judge nor the jury had held to be a libel; and judgment was ultimately arrested

upon the ground that, as set out in the indictment, it was not libellous. 21 Howell's State Trials, 1044.

But, before the motion in arrest of judgment was argued, Mr. Erskine obtained a rule to show cause why a new trial should not be granted, principally upon the ground that the judge told the jury that the question whether libel or not was not for their decision; whereas the jury, upon the general issue, had not only the power, but the right, to decide the law. It was upon this rule that Mr. Erskine made his famous argument in support of the rights of juries, and that Lord Mansfield delivered the judgment, in which Mr. Justice Ashurst concurred, which has since been the principal reliance of those who deny the right of the jury to decide the law involved in the general issue in a criminal case.

It should not be overlooked, that at the hearing of this motion, Mr. Bearcroft, the leading counsel for the Crown, said he "agreed with the counsel for the defendant, that it is the right of the jury, if they please, on the plea of not guilty, to take upon themselves the decision of every question of law necessary to the acquittal of the defendant; and Lord Mansfield observing that he should call it the *power*, not the *right*, he adhered to the latter expression; and added, that he thought it an important privilege, and which, on particular occasions, as, for instance, if a proper censure of the measures of the servants of the Crown were to be construed by a judge to be libellous, it would be laudable and justifiable in them to exercise." 4 Doug. 94, note. See also p. 108.

Mr. Justice Willes, dissenting from the opinion of the court, said he was sure that these statements of Mr. Bearcroft expressed "the sentiments of the greater part of Westminster Hall;" and declared: "I conceive it to be the law of this country, that the jury, upon a plea of not guilty, or upon the general issue, upon an indictment or an information for a libel, have a constitutional right, if they think fit, to examine the innocence or criminality of the paper, notwithstanding there is sufficient proof given of the publication." "I believe no man will venture to say they have not the *power*, but I mean expressly to say they have the *right*. Where a civil power of

this sort has been exercised without control, it presumes, nay, by continual usage, it *gives* the right. It was the *right* which juries exercised in those times of violence when the Seven Bishops were tried, and which even the partial judges who then presided did not dispute, but authorized them to exercise upon the subject-matter of the libel; and the jury, by their solemn verdict upon that occasion, became one of the happy instruments, under Providence, of the salvation of this country. This privilege has been assumed by the jury in a variety of ancient and modern instances, and particularly in the case of *Rex* v. *Owen*, without any correction or even reprimand of the court. It is a right, for the most cogent reasons, lodged in the jury; as without this restraint the subject in bad times would have no security for his life, liberty, or property." And he concurred in refusing a new trial, solely because in his opinion neither the counsel for the prosecution, nor the judge presiding at the trial, had impugned these doctrines, and the verdict returned by the jury was in the nature of a special verdict, in effect submitting the law to the court. 4 Doug. 171–175.

In 1789, in *The King* v. *Withers*, 3 T. R. 428, Lord Kenyon instructed a jury in the same way that Mr. Justice Buller had done in *The Dean of St. Asaph's case.*

In 1791, the declaratory statute, entitled "An act to remove doubts respecting the functions of juries in cases of libel," and known as Fox's Libel Act, was introduced in Parliament, and was passed in 1792. Stat. 32 Geo. III, c. 60.

By that act, "the legislature," as lately observed by Lord Blackburn in the House of Lords, "adopted almost the words and quite the substance" of that passage of the opinion of Mr. Justice Willes, first quoted above. *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 741, 775.

The doubts which the act was passed to remove were, as recited at the beginning of the act, upon the question whether upon the trial of an indictment or information for libel, on the plea of not guilty, "it be competent to the jury impanelled to try the same to give their verdict upon the whole matter put in issue;" and it was "therefore declared and enacted," (not merely enacted, but declared to be the law as already

existing,) "that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

The act then provides, first, that the presiding judge may, at his discretion, give instructions to the jury; second, that the jury may, at their discretion, return a special verdict; and third, that the defendant, if found guilty, may move in arrest of judgment. The first of these provisos, and the only one requiring particular notice, is that the judge shall, at his discretion, give "his opinion and directions to the jury on the matter at issue," "in like manner as in other criminal cases." His "opinion and directions" clearly means by way of advice and instruction only, and not by way of order or command; and the explanation, "in like manner as in other criminal cases," shows that no peculiar rule was intended to be laid down in the case of libel. And that this was the understanding at the time is apparent from the debate on the proviso, which was adopted on the motion of Sir John Scott, (then Solicitor General, and afterwards Lord Eldon,) just before the bill passed the House of Commons in 1791. 29 Parl. Hist. 594–602.

The clear effect of the whole act is to declare that the jury (after receiving the instructions of the judge, if he sees fit to give any instructions) may decide, by a general verdict, "the whole matter put in issue," which necessarily includes all questions of law, as well as of fact, involved in the general issue of guilty or not guilty; and to recognize the same rule as existing in all criminal cases.

Not only is this the clear meaning of the words of the act; but that such was its intent and effect is shown by the grounds taken by its supporters and its opponents in Parliament, as well as by subsequent judicial opinions in England.

Mr. Fox, upon moving the introduction of the bill in the House of Commons in 1791, after observing that he was not ignorant that power and right were not convertible terms, said that, "if a power was vested in any person, it was surely meant to be exercised;" that "there was a power vested in the jury to judge the law and fact, as often as they were united; and if the jury were not to be understood to have a right to exercise that power, the constitution would never have entrusted them with it;" "but they knew it was the province of the jury to judge of law and fact; and this was the case not of murder only, but of felony, high treason, and of every other criminal indictment;" and that "it must be left in all cases to a jury to infer the guilt of men, and an English subject could not lose his life but by a judgment of his peers." 29 Parl. Hist. 564, 565, 597. And Mr. Pitt, in supporting the bill, declared that his own opinion was against the practice of the judges, "and that he saw no reason why, in the trial of a libel, the whole consideration of the case might not go precisely to the unfettered judgment of twelve men, sworn to give their verdict honestly and conscientiously, as it did in matters of felony and other crimes of a high nature." 29 Parl. Hist. 588.

In the debate in the House of Lords, on a motion of Lord Chancellor Thurlow to put off the reading of the bill, Lord Camden said, "He would venture to affirm, and should not be afraid of being contradicted by any professional man, that by the law of England as it now stood, the jury had a right, in deciding on a libel, to judge whether it was criminal or not; and juries not only possessed that right, but they had exercised it in various instances." He added, as "a matter which he conceived should be imprinted on every juror's mind, that if they found a verdict of the publishing, and left the criminality to the judge, they had to answer to God and their consciences for the punishment that might, by such judge, be inflicted on the defendant, whether it was fine, imprisonment, loss of ears, whipping, or any other disgrace, which was the sentence of the court." After further enforcing his opinion, he said: "I will affirm that they have that right, and that there is no

power by the law of this country to prevent them from the exercise of that right, if they think fit to maintain it; and when they are pleased to acquit any defendant, their acquittal will stand good until the law of England is changed." "My lords," said he, "give to the jury or to the judge the right of trial of the subjects of this country; you must give it to one of them, and I think you can have no difficulty which to prefer." And he concluded by saying that "he did not apprehend that the bill had a tendency to alter the law, but merely to remove doubts that ought never to have been entertained, and therefore the bill had his hearty concurrence; but, as he was assured that the proposed delay was not hostile to the principle of the bill, but only to take it into serious consideration, and to bring it again forward, he had no objection to the motion of the Lord Chancellor." 29 Parl. Hist. 729, 730, 732.

In the House of Lords in 1792, the bill having again passed the House of Commons, Lord Loughborough, for many years Chief Justice of the Common Pleas, said that he "had ever deemed it his duty, in cases of libel, to state the law as it bore on the facts, and to refer the combined consideration to the jury;" and that "their decision was final. There was no control upon them in their verdict. The evident reason and good sense of this was, that every man was held to be acquainted with the criminal law of the land. Ignorance was no plea for the commission of a crime; and no man was therefore supposed to be ignorant of judging upon the evidence adduced of the guilt or innocence of a defendant. It was the admitted maxim of law, *ad quæstionem juris respondeant judices, ad quæstionem facti juratores;* but when the law and the fact were blended, it was the undoubted right of the jury to decide. If the law was put to them fairly, there was undoubtedly not one case in a thousand on which they would not decide properly. If they were kept in the dark, they were sometimes led into wrong, through mere jealousy of their own right." 29 Parl. Hist. 1296, 1297.

Pending the debate, the House of Lords put questions to the judges, who returned an opinion, in which, after saying that "the general criminal law of England is the law of

libel," they laid down, as a fundamental proposition, applicable to treason as well as to other crimes, "that the criminality or innocence of any act done (which includes any paper written) is the result of the judgment which the law pronounces upon that act, and must therefore be in all cases, and under all circumstances, matter of law and not matter of fact." With such a basis, it is hardly to be wondered at that they "conceived the law to be that the judge is to declare to the jury what the law is," and "that it is the duty of the jury, if they will find a general verdict upon the whole matter in issue, to compound that verdict of the fact as it appears in evidence before them, and of the law as it is declared to them by the judge." The judges, however, "took this occasion to observe" that they had "offered no opinion which will have the effect of taking matter of law out of a general issue, or out of a general verdict;" and "disclaimed the folly of undertaking to prove that a jury, who can find a general verdict, cannot take upon themselves to deal with matter of law arising in a general issue, and to hazard a verdict made up of the fact, and of the matter of law, according to their conception of that law, against all direction by the judge." 29 Parl. Hist. 1361–1369.

On Lord Camden's motion, the bill was postponed, in order to enable the House to consider the opinion of the judges; and was then proceeded with, when Lord Camden "exposed the fallacy of the pretended distinction between law and fact, in the question of guilty or not guilty of printing and publishing a libel; they were united as much as intent and action in the consideration of all other criminal proceedings. Without an implied malice a man could not be found guilty, even of murder. The simple killing a man was nothing, until it was proved that the act arose from malice. A man might kill another in his own defence, or under various circumstances which rendered the killing no murder. How were these things to be explained? by the circumstances of the case. What was the ruling principle? the intention of the party. Who were the judges of the intention of the party; the judge? No; the jury. So that the jury were allowed to judge of the

intention upon an indictment for murder, and not to judge of the intention of the party upon libel." And Lord Loughborough, as well as Lord Camden, distinctly affirmed, and Lord Thurlow as distinctly denied, that upon the general issue in criminal cases, after the judge had stated the law to the jury, the jury were to decide both the question of law and the question of fact. 29 Parl. Hist. 1370, 1405, 1406, 1426, 1429.

Towards the close of the debate, Lord Thurlow moved to amend the bill by inserting the words "that the judge state to the jury the legal effect of the record." Lord Camden successfully opposed the amendment, "as an attempt indirectly to convert the bill into the very opposite of what it was intended to be, and to give the judges a power ten times greater than they had ever yet exercised;" and said, "He must contend, that the jury had an undoubted right to form their verdict themselves according to their consciences, applying the law to the fact; if it were otherwise, the first principle of the law of England would be defeated and overthrown. If the twelve judges were to assert the contrary again and again, he would deny it utterly, because every Englishman was to be tried by his country; and who was his country but his twelve peers, sworn to condemn or acquit according to their consciences? If the opposite doctrine were to obtain, trial by jury would be a nominal trial, a mere form; for, in fact, the judge, and not the jury, would try the man. He would contend for the truth of this argument to the latest hour of his life, *manibus pedibusque.* With regard to the judge stating to the jury what the law was upon each particular case, it was his undoubted duty so to do; but having done so, the jury were to take both law and fact into their consideration, and to exercise their discretion and discharge their consciences." 29 Parl. Hist. 1535, 1536.

The first ground of the protest of Lord Thurlow, Lord Bathurst, Lord Kenyon and three other lords against the passage of the act was "because the rule laid down by the bill, contrary to the determination of the judges and the unvaried practice of ages, subverts a fundamental and important principle of English jurisprudence, which, leaving to the jury

the trial of the fact, reserves to the court the decision of the law." 29 Parl. Hist. 1537.

Lord Brougham, in his sketch of Lord Camden, declares that "the manly firmness which he uniformly displayed in maintaining the free principles of the constitution, wholly unmixed with any leaning towards extravagant popular opinions, or any disposition to court vulgar favour, justly entitles him to the very highest place among the judges of England;" and, speaking of his conduct in carrying the libel bill through the House of Lords, says that "nothing can be more refreshing to the lovers of liberty, or more gratifying to those who venerate the judicial character, than to contemplate the glorious struggle for his long-cherished principles with which Lord Camden's illustrious life closed;" and quotes some of his statements, above cited, as passages upon which "the mind fondly and reverently dwells," "hopeful that future lawyers and future judges may emulate the glory and the virtue of this great man." 3 Brougham's Statesmen of George III, (ed. 1843,) 156, 178, 179.

In the well known case of *The King* v. *Burdett*, 3 B. & Ald. 717, and 4 B. & Ald. 95; *S. C.* 1 State Trials (N. S.) 1; for publishing a seditious libel, Mr. Justice Best (afterwards Chief Justice of the Common Pleas, and Lord Wynford) told the jury that in his opinion the publication was a libel; that they were to decide whether they would adopt his opinion; but that they were to take the law from him, unless they were satisfied that he was wrong. 4 B. & Ald. 131, 147, 183. The defendant having been convicted, the Court of King's Bench, upon a motion for a new trial, held, after advisement, that this instruction was correct.

Mr. Justice Best said: "It must not be supposed that the statute of George III made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which

it was left before that time. The jury were then only to find the fact of the publication, and the truth of the innuendoes; for the judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The legislature has said that that is not so, but that the whole case is to be left to the jury. But judges are in express terms directed to lay down the law *as in other cases.* In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And this is plain from the words of the statute." 4 B. & Ald. 131, 132.

Justices Holroyd and Bayley and Chief Justice Abbott (afterwards Lord Tenterden) expressed the same view. 4 B. & Ald. 145–147, 183, 184. Mr. Justice Bayley said: "The old rule of law is, *ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores;* and I take it to be the bounden duty of the judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment." And the Chief Justice said: "If the judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment; and that, if it be so in their opinion, the publication is an offence against the law." "The statute was not intended to confine the matter in issue exclusively to the jury without hearing the opinion of the judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the judge."

The weight of this deliberate and unanimous declaration of the rightful power of the jury to decide the law in criminal cases is not impaired by the *obiter dictum* hastily uttered and promptly recalled by Chief Justice Best in the civil case, summarily decided upon a narrower point, of *Levi* v. *Milne*, and

reported so differently in 4 Bing. 195, and in 12 J. B. Moore, 418, as to leave it doubtful what he really said. And according to later English authorities, even in civil actions, the question of libel or no libel may be submitted by the judge to the jury without expressing his own opinion upon it. *Parmiter* v. *Coupland*, 6 M. & W. 105, 108; *Baylis* v. *Lawrence*, 11 Ad. & El. 920; *S. C.* 3 Per. & Dav. 526; *Cox* v. *Lee*, L. R. 4 Ex. 284.

It is to be remembered, that by the law of England, a person convicted of treason or felony could not appeal, or move for a new trial, or file a bill of exceptions, or in any other manner obtain a judicial review of rulings or instructions not appearing upon the record, unless the judge himself saw fit to reserve the question for the opinion of all the judges. In short, as observed by Dr. Lushington in delivering judgment in the Privy Council, "The prisoner has no legal right, in the proper sense of the term, to demand a reconsideration, by a court of law, of the verdict, or of any legal objection raised at the trial." *The Queen* v. *Eduljee Byramjee*, 5 Moore P. C. 276, 287; *The Queen* v. *Bertrand*, L. R. 1 P. C. 520; 1 Chit. Crim. Law, 622, 654; 3 Russell on Crimes, (9th ed.,) 212. Consequently, a prisoner tried before an arbitrary, corrupt or ignorant judge had no protection but in the conscience and the firmness of the jury.

There is no occasion further to pursue the examination of modern English authorities, because in this country, from the time of its settlement until more than half a century after the Declaration of Independence, the law as to the rights of juries, as generally understood and put in practice, was more in accord with the views of Bacon, Hale, Vaughan, Somers, Holt and Camden, than with those of Kelyng, Scroggs, Jeffreys, Raymond, Hardwicke and Mansfield. Upon a constitutional question, affecting the liberty of the subject, there can be no doubt that the opinions of Somers and of Camden, especially, were of the very highest authority, and were so considered by the founders of the Republic.

In Massachusetts, the leading authorities upon the question, nearest the time of the Declaration of Independence and the

adoption of the Constitution of the United States, are John Adams and Theophilus Parsons, each of whom was appointed, with the general approval of the bar and the people, Chief Justice of the State; the one, appointed to that office by the revolutionary government in 1775, resigning it the next year, remaining in the Continental Congress to support the Declaration of Independence, and afterwards the first Vice-President and the second President of the United States; the other, a leading supporter of the Constitution of the United States in the convention of 1788 by which Massachusetts ratified the Constitution, appointed by President Adams in 1801 Attorney General of the United States, but declining that office, and becoming Chief Justice of Massachusetts in 1806.

John Adams, writing in 1771, said: "Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people." "The British empire has been much alarmed, of late years, with doctrines concerning juries, their powers and duties, which have been said, in printed papers and pamphlets, to have been delivered from the highest tribunals of justice. Whether these accusations are just or not, it is certain that many persons are misguided and deluded by them to such a degree, that we often hear in conversation doctrines advanced for law, which, if true, would render juries a mere ostentation and pageantry, and the court absolute judges of law and fact." "Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given *under the direction of the court* in point of law, was a legal determination of the issue. Therefore the jury have the power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment and conscience?" "The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution

are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air. Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, No. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." "The English law obliges no man to decide a cause upon oath against his own judgment." 2 John Adams's Works, 253–255.

Theophilus Parsons, in the Massachusetts convention of 1788, answering the objection that the Constitution of the United States, as submitted to the people for adoption, contained no bill of rights, said: "The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms. An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation." 2 Elliot's Debates, 94; 2 Bancroft's History of the Constitution, 267.

In 1808, Chief Justice Parsons, in delivering judgment in a civil action for slander, said: "Both parties have submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony; that they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able." And, as the reporter states, "In this opinion of the

Chief Justice, the other judges, viz. Sedgwick, Sewall, Thatcher and Parker, severally declared their full and entire concurrence." *Coffin* v. *Coffin*, 4 Mass. 1, 25, 37.

In 1816, upon the trial of an indictment for murder, the Supreme Judicial Court of Massachusetts, held by Chief Justice Parker and Justices Jackson and Putnam, instructed the jury as follows: "In all capital cases, the jury are the judges of the law and fact. The court are to direct them in matters of law, and although it is safer for them to rely on the instructions derived from that source, still, gentlemen, they are to decide for themselves." Bowen's Trial, 51.

In 1826, Mr. Justice Wilde, speaking for the whole court, assumed, as unquestionable, that "in criminal prosecutions the jury are the judges of both law and fact." *Commonwealth* v. *Worcester*, 3 Pick. 462, 475.

In 1830, in a celebrated trial for murder, before Justices Putnam, Wilde and Morton, the right and duty of the jury to decide the law as well as the fact involved in the general issue were recognized and affirmed in the charge to the jury, and were distinguished from the right of deciding questions of evidence, as follows: "As the jury have the right, and if required by the prisoner are bound, to return a general verdict of guilty or not guilty, they must necessarily, in the discharge of this duty, decide such questions of law, as well as of fact, as are involved in this general question; and there is no mode in which their opinions upon questions of law can be reviewed by this court or by any other tribunal. But this does not diminish the obligation resting upon the court to explain the law, or their responsibility for the correctness of the principles of law by them laid down. The instructions of the court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong. And when the jury undertake to decide the law (as they undoubtedly have the power to do) in opposition to the advice of the court, they assume a high responsibility, and should be very careful to see clearly that they are right. Although the jury have the power, and it is their duty, to decide all points of law which are involved in the general question of the guilt or

innocence of the prisoner, yet when questions of law arise in the arraignment of the prisoner, or in the progress of the trial, in relation to the admissibility of evidence, they must be decided by the court, and may not afterwards be reviewed by the jury." *Commonwealth* v. *Knapp*, 10 Pick. 477, 496.

Many other Massachusetts authorities, from the earliest times to the date last mentioned, tending to maintain the right of the jury to decide the law involved in the general issue, are collected in the opinion of Mr. Justice Thomas in 5 Gray, 275–280, and in a note to Quincy's Reports, 558–560, 563–567.

To that date, or later, the right of the jury in criminal cases to decide both the law and the fact, even against the directions of the court, was certainly recognized and acted on throughout New England, unless in Rhode Island. *State* v. *Snow*, (1841) 18 Maine, 346; Doe, C. J., in *State* v. *Hodge*, 50 N. H. 510, 523; *State* v. *Wilkinson*, (1829) 2 Vermont, 480, 488; *State* v. *Croteau*, (1849) 23 Vermont, 14; *Witter* v. *Brewster* (1788) Kirby, 422; *Bartholomew* v. *Clark*, (1816) 1 Connecticut, 472, 481; *State* v. *Buckley*, (1873) 40 Connecticut, 246. See Laws of 1647 in 1 Rhode Island Col. Rec. 157, 195, 203, 204.

In the Province of New York, in 1702, on the trial of Colonel Nicholas Bayard for high treason, it was argued by his counsel, and not denied by the court, that the jury, upon the general issue of not guilty, were judges as well of matter of law as of matter of fact. 14 Howell's State Trials, 471, 502, 503, 505.

In the same Province, in 1735, upon the trial of John Peter Zenger, for a seditious libel, his counsel, Andrew Hamilton, of Philadelphia, while admitting that the jury might, if they pleased, find the defendant guilty of printing and publishing, and leave it to the court to judge whether the words were libellous, said, without contradiction by the court: "But I do likewise know they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so." The court afterwards submitted to the jury, in the

words of Lord Chief Justice Holt, in *Tutchin's case*, 14 Howell's State Trials, 1128, above cited, the question whether the words set forth were libellous. And Zenger was acquitted by the jury. 17 Howell's State Trials, 675, 706, 716, 722.

Upon the trial in the Supreme Court of the State of New York, in 1803, of an indictment for a libel on the President of the United States, Chief Justice Lewis instructed the jury, among other things, that the question of libel or no libel was an inference of law from the fact, and that the law as laid down by Lord Mansfield in *The Dean of St. Asaph's case* was the law of this State. The defendant was convicted, and brought the question of the correctness of these instructions before the full court in 1804 upon a motion for a new trial. *People* v. *Croswell*, 3 Johns. Cas. 337, 341, 342.

Alexander Hamilton was of counsel for the defendant. Two reports of his argument upon that motion have come down to us, the one in 3 Johns. Cas. 352–362, the other in a contemporary pamphlet of the speeches in the case, pp. 62–78, and reprinted in 7 Hamilton's Works, (ed. 1886,) 336–373. But the most compact and trustworthy statement of his position upon the general question, unsurpassed for precision and force by anything on the subject to be found elsewhere, is in three propositions upon his brief, (7 Hamilton's Works, 335, 336,) read by him in recapitulating his argument, (3 Johns. Cas. 361, 362,) which were as follows:

"That in the general distribution of powers in our system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive. That in civil cases it is always so, and may rightfully be so exerted. That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, is entrusted with the power of deciding both law and fact.

"That this distinction results: 1, from the ancient forms of pleading in civil cases, none but special pleas being allowed in matter of law; in criminal, none but the general issue; 2, from the liability of the jury to attaint in civil cases, and the

general power of the court as its substitute in granting new trials, and from the exemption of the jury from attaint in criminal cases, and the defect of power to control their verdicts by new trials, the test of every legal power being its capacity to produce a definitive effect, liable neither to punishment nor control.

"That in criminal cases, nevertheless, the court are the constitutional advisers of the jury in matter of law; who may compromit their conscience by lightly or rashly disregarding that advice, but may still more compromit their consciences by following it, if exercising their judgments with discretion and honesty they have a clear conviction that the charge of the court is wrong."

The court was equally divided in opinion, Judge Kent (afterwards Chief Justice and Chancellor) and Judge Thompson being in favor of a new trial, and Chief Justice Lewis and Judge Livingston against it. Judge Kent drew up a careful opinion, in which he reviewed the leading English authorities, and from which the following passages are taken:

"In every criminal case, upon the plea of not guilty, the jury may, and indeed they must, unless they choose to find a special verdict, take upon themselves the decision of the law, as well as the fact, and bring in a verdict as comprehensive as the issue; because, in every such case, they are charged with the deliverance of the defendant from the crime of which he is accused." "The law and fact are so involved, that the jury are under an indispensable necessity to decide both, unless they separate them by a special verdict. This right in the jury to determine the law as well as the fact has received the sanction of some of the highest authorities in the law."

"But while the *power* of the jury is admitted, it is denied that they can *rightfully* or *lawfully* exercise it, without compromitting their consciences, and that they are bound implicitly, in all cases, to receive the law from the court. The law must, however, have intended, in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power is its capacity to produce

a definitive effect, liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect, absolutely final. The jury are not liable to punishment, nor the verdict to control. No attaint lies, nor can a new trial be awarded. The exercise of this power in the jury has been sanctioned, and upheld in constant activity, from the earliest ages." 3 Johns. Cas. 366-368.

"The result from this view is, to my mind, a firm conviction that this court is not bound by the decisions of Lord Raymond and his successors. By withdrawing from the jury the consideration of the essence of the charge, they render their function nugatory and contemptible. Those opinions are repugnant to the more ancient authorities which had given to the jury the power, and with it the right, to judge of the law and fact, when they were blended by the issue, and which rendered their decisions, in criminal cases, final and conclusive. The English bar steadily resisted those decisions, as usurpations on the rights of the jury. Some of the judges treated the doctrine as erroneous, and the Parliament, at last, declared it an innovation, by restoring the trial by jury, in cases of libel, to that ancient vigour and independence, by which it had grown so precious to the nation, as the guardian of liberty and life, against the power of the court, the vindictive persecution of the prosecutor, and the oppression of the government.

"I am aware of the objection to the fitness and competency of a jury to decide upon questions of law, and, especially, with a power to overrule the directions of the judge. In the first place, however, it is not likely often to happen, that the jury will resist the opinion of the court on the matter of law. That opinion will generally receive its due weight and effect; and in civil cases it can, and always ought to be ultimately enforced by the power of setting aside the verdict. But in human institutions, the question is not, whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject, that in criminal cases the jury should, after receiving the

advice and assistance of the judge as to the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole, whether the act done be, or be not, within the meaning of the law. This distribution of power, by which the court and jury mutually assist, and mutually check each other, seems to be the safest, and consequently the wisest arrangement, in respect to the trial of crimes. The constructions of judges, on the intention of the party, may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions does not require a master's skill in the science of the law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity." 3 Johns. Cas. 375, 376.

In April, 1805, the legislature of New York passed a statute, very like Fox's Libel Act, declaring that upon an indictment or information for libel, "the jury who shall try the same shall have a right to determine the law and the fact, under the direction of the court, in like manner as in other criminal cases." And the reporter notes that, "in consequence of this declaratory statute, the court, in August term, 1805, (no motion having been made for judgment on the verdict,) unanimously awarded a new trial in the above cause." 3 Johns. Cas. 412, 413.

In 1825, Judge Walworth (afterwards Chancellor) presiding in a court of oyer and terminer, at trials of indictments for murder, instructed the jury "that in criminal trials, they had a right to decide both as to the law and the facts of the case; that the court was bound, by the oaths of office of its judges, honestly and impartially to decide the questions of law arising in the case, and state them to the jury; but the jury had a right to disregard the decision of the court upon questions of law, especially in favor of life, if they were fully satisfied that such decision was wrong." *People* v. *Thayers*, 1 Parker's Crim. Cas. 595, 598; *People* v. *Videto*, Id. 603, 604.

In New Jersey, by Provincial laws of 1676 and 1681, it was not only enacted "that the trial of all causes, civil and criminal, shall be heard and decided by the verdict of twelve honest men of the neighbourhood;" but also "that there shall be, in every court, three justices or commissioners, who shall sit with the twelve men of the neighbourhood, with them to hear all causes, and to assist the said twelve men of the neighbourhood in case of law; and that they the said justices shall pronounce such judgment as they shall receive from, and be directed by the said twelve men, in whom only the judgment resides, and not otherwise; and, in case of their neglect and refusal, that then one of the twelve, by consent of the rest, pronounce their own judgment as the justices should have done." Leaming & Spicer's Laws, pp. 396–398, 428, 429. How far, under the present constitution and laws of the State, juries, in criminal cases, have the right to decide the law for themselves, disregarding the instructions of the judge presiding at the trial, does not appear to be settled. *State* v. *Jay*, (1871) 5 Vroom, (34 N. J. Law,) 368; *Drake* v. *State*, (1890) 24 Vroom, (53 N. J. Law,) 23.

In Pennsylvania, Chief Justice Sharswood said: "No one acquainted with the life of the founder of this Commonwealth can entertain any doubt of his opinion or that of his friends and followers" — referring to the case of Penn and Mead before the Recorder of London, and to that of Bushell upon *habeas corpus*, cited in the earlier part of this opinion, as well as to the argument of Andrew Hamilton, of Philadelphia, "certainly the foremost lawyer of the Colonies," in *Zenger's case*, above cited. And the right of the jury in criminal cases to decide both law and fact (notwithstanding opinions to the contrary, expressed near the end of the last century by a judge of a county court in charging juries and grand juries, Addison's Reports, pp. 160, 257, and Charges, pp. 57–63) was long and generally recognized in that State. *Kane* v. *Commonwealth*, 89 Penn. St. 522, 526; Testimony of William Lewis and Edward Tilghman, Chase's Trial, (Evans's ed.) 20, 21, 27.

In Maryland, the provision of the constitution of 1851, art.

10, sec. 5, repeated in the constitutions of 1864, art. 12, sec. 4, and of 1867, art. 15, sec. 5, that "in the trial of all criminal cases the jury shall be the judges of law as well as fact," has been held by the Court of Appeals to be merely declaratory of the preëxisting law, but not applicable to the question of the constitutionality of a statute. 1 Charters and Constitutions, 858, 885, 918; *Franklin* v. *State*, (1858) 12 Maryland, 236, 249. As has been said by that court, speaking by Mr. Justice Alvey, "the jury are made the *judges* of law as well as of fact, in the trial of criminal cases, under the constitution of this State; and any instruction given by the court, as to the law of the *crime*, is but advisory, and in no manner binding upon the jury, except in regard to questions as to what shall be considered as evidence." *Wheeler* v. *State*, (1875) 42 Maryland, 563, 570. See also *Broll* v. *State*, (1876) 45 Maryland, 356; *Bloomer* v. *State*, (1878) 48 Maryland, 521, 538, 539; *World* v. *State*, (1878) 50 Maryland, 49, 55.

In Virginia, the doctrine that the jury, upon the general issue in a criminal case, had the right, as well as the power, to decide both law and fact, appears to have been generally admitted and practised upon until 1829, when, to the surprise of the bar, it was treated by the Court of Appeals as doubtful. *Dance's case*, (1817) 5 Munf. 349, 363; *Baker* v. *Preston*, (1821) Gilmer, 235, 303; *Davenport* v. *Commonwealth*, (1829) 1 Leigh, 588, 596; *Commonwealth* v. *Garth*, (1831) 3 Leigh, 761, 770; 3 Rob. Va. Pract. (1839) c. 23.

In Georgia, Alabama and Louisiana, the right of the jury was formerly recognized. *McGuffie* v. *State*, (1855) 17 Georgia, 497, 513; *McDaniel* v. *State*, (1860) 30 Georgia, 853; *State* v. *Jones*, (1843) 5 Alabama, 666; *Bostwick* v. *Gasquet*, (1836) 10 Louisiana, 80; *State* v. *Scott*, (1856) 11 La. Ann. 429; *State* v. *Jurche*, (1865) 17 La. Ann. 71.

The Ordinance of the Continental Congress of 1787 for the government of the Northwest Territory provided that the inhabitants of the Territory should always be entitled to the benefit of the trial by jury, and that no man should be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and the constitutions of the

State of Indiana in 1816, and of Illinois in 1818 and 1848, contained similar provisions. 1 Charters and Constitutions, 431, 446, 447, 466, 500, 501.

In Indiana, the Supreme Court, under the constitution of 1816, having alternately denied and affirmed the right of the jury in criminal cases to decide the law, the people, by the constitution which took effect in November, 1851, declared that "in all criminal cases whatever the jury shall have the right to determine the law and the facts;" and this right has since been maintained by that court, even when the constitutionality of a statute was involved. *Townsend* v. *State*, (1828) 2 Blackford, 151; *Warren* v. *State*, (1836) 4 Blackford, 150; *Carter* v. *State*, (May, 1851) 2 Indiana, 617; 1 Charters and Constitutions, 513, 526; *Lynch* v. *State*, (1857) 9 Indiana, 541; *McCarthy* v. *State*, (1877) 56 Indiana, 203; *Hudelson* v. *State*, (1883) 94 Indiana, 426; *Blake* v. *State*, (1891) 130 Indiana, 203.

In Illinois, the criminal code having declared that "juries in all cases shall be judges of the law and the fact," the jury at a trial for murder, after being out for some time, came into court, and through their foreman suggested that a juror maintained that he was competent to judge of the correctness of the instructions of the judge as the juror's opinion of the law might dictate. The judge instructed the jury that they must take the law as laid down to them by the court, and could not determine for themselves whether the law so given to them was or was not the law. Upon exception to the instructions, the Supreme Court of Illinois, speaking by Judge Breese, granted a new trial and said: "Being judges of the law and the fact, they are not bound by the law as given to them by the court, but can assume the responsibility of deciding, each juror for himself, what the law is. If they can say, upon their oaths, that they know the law better than the court, they have the power so to do. If they are prepared to say the law is different from what it is declared to be by the court, they have a perfect legal right to say so, and find the verdict according to their own notions of the law. It is a matter between their consciences and their God, with which no power can interfere." *Fisher* v. *People*, (1860) 23 Illinois, 283, 294. See

also *Mullinix* v. *People*, (1875) 76 Illinois, 211; *Spies* v. *Illinois*, (1887) 122 Illinois, 1, 252.

In the Declaration of Rights unanimously adopted October 14, 1774, by the Continental Congress, of which John Adams, Samuel Adams, Roger Sherman, John Jay, Samuel Chase, George Washington and Patrick Henry were members, it was resolved "that the respective Colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." 1 Journals of Congress, 28.

The Constitution of the United States, as framed in 1787 and adopted in 1788, ordained, in art. 3, sect. 3, that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been committed;" and, in the Fifth, Sixth and Seventh Amendments adopted in 1791, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb," "nor be deprived of life, liberty or property, without due process of law;" "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law;" and "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Within six years after the Constitution was established, the right of the jury, upon the general issue, to determine the law as well as the fact in controversy, was unhesitatingly and unqualifiedly affirmed by this court, in the first of the very few trials by jury ever had at its bar, under the original jurisdiction conferred upon it by the Constitution.

That trial took place at February term, 1794, in *Georgia* v. *Brailsford*, 3 Dall. 1, which was an action at law by the State of Georgia against Brailsford and others, British subjects. The pleadings, as appears by the files of this court, were as

follows: The declaration was in assumpsit for money had and received; the defendants pleaded *non assumpsit*, and "put themselves upon the country;" and the replication was, "And the said State of Georgia also putteth herself upon the country." The action, as the report shows, was brought to recover moneys received by the defendants upon a bond of a citizen of Georgia to them, to which the State of Georgia claimed title under an act of confiscation passed by that State in 1782, during the Revolutionary War, under circumstances which were agreed to be as stated in the suit in equity between the same parties, reported in 2 Dall. 402, 415. After the case had been argued for four days to the court and jury, Chief Justice Jay, on February 7, 1794, as the report states, "delivered the following charge:"

"This cause has been regarded as of great importance, and doubtless it is so. It has accordingly been treated by the counsel with great learning, diligence and ability; and on your part it has been heard with particular attention. It is, therefore, unnecessary for me to follow the investigation over the extensive field into which it has been carried; you are now, if ever you can be, completely possessed of the merits of the cause.

"The facts comprehended in the case are agreed; the only point that remains is to settle what is the law of the land arising from those facts; and on that point, it is proper that the opinion of the court should be given. It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous; we entertain no diversity of sentiment; and we have experienced no difficulty in uniting in the charge which it is my province to deliver."

The Chief Justice, after stating the opinion of the court in favor of the defendants upon the questions of law, proceeded as follows: "It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon your-

selves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable that the court are the best judges of law. But still both objects are lawfully within your power of decision."

Then, after telling the jury that they should not be influenced by a consideration of the comparative situations and means of the parties, he concluded the charge thus: "Go, then, gentlemen, from the bar, without any impressions of favor or prejudice for the one party or the other; weigh well the merits of the case, and do on this, as you ought to do on every occasion, equal and impartial justice." The jury, after coming into court, and requesting and receiving further explanations of the questions of law, returned a verdict for the defendants, without going again from the bar. 3 Dall. 3–5.

The report shows that, in a case in which there was no controversy about the facts, the court, while stating to the jury its unanimous opinion upon the law of the case, and reminding them of "the good old rule, that on questions of fact it is the province of the jury, on questions of law it is the province of the court to decide," expressly informed them that "by the same law, which recognizes this reasonable distribution of jurisdiction," the jury "have nevertheless a right to take upon themselves to judge of both, and to determine the law as well as the fact in controversy."

The court at that time consisted of Chief Justice Jay, and Justices Cushing, Wilson, Blair, Iredell and Paterson, all of whom, (as appears by its records,) except Justice Iredell, were present at the trial.

The doubts which have been sometimes expressed of the accuracy of Mr. Dallas's report are unfounded, as is apparent from several considerations. He was of counsel for the plaintiff. The court was then held at Philadelphia; and there is no reason to doubt that the practice mentioned in the preface to his first volume containing reports of cases in the courts of

Pennsylvania only, by which "each case, before it was sent to the press, underwent the examination of the presiding judge of the court in which it was determined," was continued in his succeeding volumes containing "reports of cases ruled and adjudged in the several courts of the United States, and of Pennsylvania, held at the seat of the Federal Government." The charge contains internal evidence of being reported verbatim, and has quotation marks at the end, although they are omitted at the beginning. And the charge, in the same words, with the prefix that it "was delivered by Jay, Chief Justice, on the 7th of February, in the following terms," is printed in Dunlop and Claypole's American Daily Advertiser of February 17, 1794.

That was not a criminal case, nor a suit to recover a penalty; had it been, it could hardly have been brought within the original jurisdiction of this court. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 294, 295. But it was a suit by a State to assert a title acquired by an act of its legislature in the exercise of its sovereign powers in time of war against private individuals. As the charge of the court dealt only with the case before it, without any general discussion, it does not appear whether the opinion expressed as to the right of the jury to determine the law was based upon a supposed analogy between such a suit and a prosecution for crime, or upon the theory, countenanced by many American authorities of the period, that at the foundation of the Republic, as in early times in England, the right of the jury extended to all cases, civil or criminal, tried upon the general issue.

However that may have been, it cannot be doubted that this court, at that early date, was of opinion that the jury had the right to decide for themselves all matters of law involved in the general issue in criminal cases; and it is certain that in the century that has since elapsed there has been no judgment or opinion of the court, deciding or intimating, in any form, that the right does not appertain to the jury in such cases. And the opinions expressed by individual justices of the court upon the subject, near the time of the decision in *Georgia* v. *Brailsford*, or within forty years afterwards, of

which any reports are known to exist, tend, more or less directly, to affirm this right of the jury. That there is not a greater accumulation of evidence to this effect is easily accounted for when it is remembered that comparatively few reports of trials were printed, and that the right of the jury was considered to be so well settled, that it was seldom controverted in practice, or specially noticed in reporting trials.

Upon the trial of Gideon Henfield in the Circuit Court of the United States for the District of Pennsylvania in 1793, before Justices Wilson and Iredell and Judge Peters, for illegal privateering, Mr. Justice Wilson told the jury that "the questions of law coming into joint consideration with the facts, it is the duty of the court to explain the law to the jury and give it to them in direction;" and, after expressing the unanimous opinion of the court upon the questions of law involved in the case, "concluded by remarking that the jury, in a general verdict, must decide both law and fact, but that this did not authorize them to decide it as they pleased; they were as much bound to decide by law as the judges: the responsibility was equal upon both." Wharton's State Trials, 49, 84, 87, 88.

This statement that the jury, in a general verdict, must decide both law and fact, and were as much bound to decide by law as the judges, and under an equal responsibility, is quite inconsistent with the idea that the jury were bound to accept the explanation and direction of the court in matter of law as controlling their judgment. That neither Mr. Justice Wilson nor Mr. Justice Iredell entertained any such idea is conclusively disproved by authentic and definite statements of their views upon the question.

Mr. Justice Iredell, speaking for himself only, in a civil case before this court at February term, 1795, said: "It will not be sufficient, that the court might charge the jury to find for the defendant; because, though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them." *Bingham* v. *Cabot*, 3 Dall. 19, 33 [see Appendix].

Mr. Justice Wilson, in his lectures on law at the Philadel-

phia College in 1790 and 1791, discussing the maxim that the judges determine the law and the jury determine the fact, made the following observations:

"This well known division between their provinces has been long recognized and established. When the question of law and the question of fact can be decided separately, there is no doubt or difficulty in saying by whom the separate decision shall be made. If, between the parties litigant, there is no contention concerning the facts, but an issue is joined upon a question of law, as is the case in a demurrer, the determination of this question, and the trial of this issue, belongs exclusively to the judges. On the other hand, when there is no question concerning the law, and the controversy between the parties depends entirely upon a matter of fact, the determination of this matter, brought to an issue, belongs exclusively to the jury. But, in many cases, the question of law is intimately and inseparably blended with the question of fact; and when this is the case, the decision of one necessarily involves the decision of the other. When this is the case, it is incumbent on the judges to inform the jury concerning the law; and it is incumbent on the jury to pay much regard to the information, which they receive from the judges. But now the difficulty in this interesting subject begins to press upon us. Suppose that, after all the precautions taken to avoid it, a difference of sentiment takes place between the judges and the jury, with regard to a point of law; suppose the law and the fact to be so closely interwoven, that a determination of one must, at the same time, embrace the determination of the other; suppose a matter of this description to come in trial before a jury — what must the jury do? The jury must do their duty and their whole duty; they must decide the law as well as the fact. This doctrine is peculiarly applicable to criminal cases; and from them, indeed, derives its peculiar importance."

"Juries undoubtedly may make mistakes: they may commit errors: they may commit gross ones. But changed as they constantly are, their errors and mistakes can never grow into a dangerous system. The native uprightness of their sentiments will not be bent under the weight of precedent and

authority. The *esprit de corps* will not be introduced among them; nor will society experience from them those mischiefs of which the *esprit de corps*, unchecked, is sometimes productive. Besides, their mistakes and their errors, except the venial ones on the side of mercy made by traverse juries, are not without redress. The court, if dissatisfied with their verdict, have the power, and will exercise the power, of granting a new trial. This power, while it prevents or corrects the effects of their errors, preserves the jurisdiction of juries unimpaired. The cause is not evoked before a tribunal of another kind; a jury of the country — an abstract, as it has been called, of the citizens at large — summoned, selected, impanelled, and sworn as the former, must still decide."

"One thing, however, must not escape our attention. In the cases and on the principles which we have mentioned, jurors possess the power of determining legal questions. But they must determine them according to law." 2 Wilson's Works, 371–374.

In closing his discussion of the subject, and reviewing the principles before stated, he said: "With regard to the law in criminal cases, every citizen, in a government such as ours, should endeavor to acquire a reasonable knowledge of its principles and rules, for the direction of his conduct, when he is called to obey, when he is called to answer, and when he is called to judge. On questions of law, his deficiencies will be supplied by the professional directions of the judges, whose duty and whose business it is professionally to direct him. For, as we have seen, verdicts, in criminal cases, generally determine the question of law, as well as the question of fact. Questions of fact, it is his exclusive province to determine. With the consideration of evidence unconnected with the question which he is to try, his attention will not be distracted; for everything of that nature, we presume, will be excluded by the court. The collected powers of his mind, therefore, will be fixed, steadily and without interruption upon the issue which he is sworn to try. This issue is an issue of fact." 2 Wilson's Works, 386, 387.

These passages, taken together, clearly evince the view of

Mr. Justice Wilson to have been that, while an issue of law is to be tried and decided by the judge, an issue of fact, although it involve a question of law blended and interwoven with the fact, is to be tried and decided by the jury, after receiving the instructions of the court; and, if a difference of opinion arise between them and the judge upon the question of law, it is their right and their duty to decide the law as well as the fact; that a reasonable knowledge of the principles and rules of law is important to the citizen, not only "when he is called to obey" as an individual, and "when he is called to answer" as a defendant, but also "when he is called to judge" as a juror; and that the general issue which the jury in a criminal case are sworn to try, and which it is their duty to decide, even if it involve questions of law, is "an issue of fact."

The provision of section 3 of the act of Congress of July 14, 1798, c. 74, for punishing seditious libels, that "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases," (1 Stat. 597,) is a clear and express recognition of the right of the jury in all criminal cases to determine the law and the fact. The words "direction of the court," as here used, like the words "opinion and directions" in the English libel act, do not oblige the jury to adopt the opinion of the court, but are merely equivalent to instruction, guide or aid, and not to order, command or control. The provision is in affirmance of the general rule, and not by way of creating an exception; and the reason for inserting it probably was that the right of the jury had been more often denied by the English courts in prosecutions for seditious libels than in any other class of cases.

Upon the trial of John Fries for treason, in 1800, before Mr. Justice Chase and Judge Peters, in the Circuit Court of the United States for the District of Pennsylvania, the district attorney having quoted from English law books definitions of actual and constructive treason, Mr. Justice Chase said: "They may, any of them, be read to the jury, and the decisions thereupon — not as authorities whereby we are bound, but as the opinions and decisions of men of great

legal learning and ability. But, even then, the court would attend carefully to the time of the decision, and in no case must it be binding upon our juries." Trials of Fries, 180. And he afterwards instructed the jury as follows: "It is the duty of the court in this case, and in all *criminal* cases, to state to the jury their opinion of the *law* arising on the facts; but the jury are to decide, on the present and in all *criminal* cases, *both the law and the facts*, on their consideration of the *whole* case." And he concluded his charge in these words: "If, upon consideration of the whole matter, (*law* as well as *fact*,) you are *not* fully satisfied, without any doubt, that the prisoner is guilty of the treason charged in the indictment, you will find him not guilty; but if upon the consideration of the whole matter, (*law* as well as *fact*,) you are convinced that the prisoner is guilty of the treason charged in the indictment, you will find him guilty." These instructions, with words italicized as above, are in the exhibits annexed by Mr. Justice Chase to his answer upon the impeachment in 1805. Chase's Trial, (Evans's ed.,) appx. 44, 45, 48. See also Trials of Fries, 196, 199; Wharton's State Trials, 634, 636.

In 1806, at the trial of William S. Smith in the Circuit Court of the United States for the District of New York, upon an indictment for setting out a military expedition against a foreign country at peace with the United States, Judge Talmadge said to the jury: "You have heard much said upon the right of a jury to judge of the law as well as the fact." "The law is now settled that this right appertains to a jury in all criminal cases. They unquestionably may determine upon all the circumstances, if they will take the responsibility and hazard of judging incorrectly upon questions of mere law. But the jury is not therefore above the law. In exercising this right, they attach to themselves the character of judges, and as such are as much bound by the rules of legal decision as those who preside upon the bench." Trials of Smith and Ogden, 236, 237.

In prosecutions in the District Court of the United States for the District of Massachusetts, under the act of Congress of January 8, 1808, c. 8, laying an embargo, (2 Stat. 453,)

Samuel Dexter argued the unconstitutionality of the act to the jury, and they acquitted the defendant, although the evidence of the violation of the act was clear, and the court held, and instructed the jury, that the act was constitutional. 3 Bradford's Hist. Mass. 108, note; 3 Webster's Works, 329, 330; *United States* v. *The William*, 2 Hall's Law Journal, 255; Sigma's Reminiscences of Dexter, 60, 61.

In 1812, at the trial of an action in the District Court of the United States for the District of New York, upon a bond given under the Embargo Act, Judge Van Ness instructed the jury that "this was in its nature and essence, though not in its form, a penal or criminal action; and they were, therefore, entitled to judge both of the law and the fact." *United States* v. *Poillon*, 1 Carolina Law Repository, 60, 66.

In 1815, at the trial of John Hodges in the Circuit Court of the United States for the District of Maryland for treason, William Pinkney, for the defendant, argued: "The best security for the rights of individuals is to be found in the trial by jury. But the excellence of this institution consists in its exclusive power. The jury are here judges of law and fact, and are responsible only to God, to the prisoner, and to their own consciences." And Mr. Justice Duvall of this court, after expressing his opinion upon the law of the case, said, with the concurrence of Judge Houston: "The jury are not bound to conform to this opinion, because they have a right, in all criminal cases, to decide on the law and the facts." Hall's Law Tracts, III, 19, 28; *S. C.*, 2 Wheeler Crim. Cas. 477, 478, 485.

In 1830, George Wilson and James Porter were jointly indicted in the Circuit Court of the United States for the District of Pennsylvania for robbing the mail, and were tried separately. In *Wilson's case*, Mr. Justice Baldwin, Judge Hopkinson concurring, after expressing to the jury an opinion upon the law, said to them: "We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand

that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and if you should feel it your duty to differ from us, you must find your verdict accordingly. At the same time, it is our duty to say, that it is in perfect accordance with the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so: when the law is settled by a court, there is more certainty than when done by a jury, it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject — by taking the law as given by the court, you incur no moral responsibility; in making a rule of your own, there may be some danger of a mistake." Baldwin, 78, 99, 100. And in *Porter's case*, the court, after repeating and explaining these instructions, said to the jury, "In a word, gentlemen, decide on the law and the facts as best comports with your sense of duty to the public and yourselves; act on the same rule under which you would be guided as a magistrate or judge on the oath and responsibility of office. Then you will not err." Baldwin, 108, 109.

Some justices of this court, indeed, who, as already shown, admitted the general right of juries in criminal cases to decide both law and fact, denied their right to pass upon the constitutionality of a statute, apparently upon the ground that the question of the existence or the validity of a statute was for the court alone. Paterson, J., in *Lyon's case*, (1798) Wharton's State Trials, 333, 336; Chase, J., in *Callender's case*, (1800) Wharton's State Trials, 688, 710–718; Baldwin, J., in *United States* v. *Shive*, (1832) Baldwin, 510. It may well be doubted whether such a distinction can be maintained. *Commonwealth* v. *Anthes*, 5 Gray, 185, 188–192, 262; Cooley Const. Lim. (6th ed.) 567. But the point does not arise in this case.

Upon the general question of the right of the jury in criminal cases to decide the law, Chief Justice Marshall's opinion is of so great weight, that the evidence of that opinion, although perhaps not so satisfactory as might be wished, should not be disregarded.

At the trial of Aaron Burr in the Circuit Court of the United States for the District of Virginia in 1808, for treason by levying war in Blennerhassett's Island, Chief Justice Marshall, in delivering an opinion upon the order of evidence, said: "Levying of war is a fact, which must be decided by the jury. The court may give general instructions on this, as on every other question brought before them, but the jury must decide upon it as compounded of fact and law." 1 Burr's Trial, 470.

In the charge, drawn up by the Chief Justice in writing, and read by him to the jury, speaking of the question of the defendant's constructive presence, he said: "Had he not arrived in the island, but had taken a position near enough to coöperate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law." 2 Burr's Trial, 429.

The Chief Justice took occasion to demonstrate that questions of the admissibility of evidence must be decided by the court only, saying: "No person will contend that, in a civil or criminal case, either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal; for they do not agree. The jury cannot constitute it; for the question is whether they shall hear the testimony or not. Who then but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony." p. 443.

Referring to his previous opinion on the order of testimony,

he remarked: "It was said that levying war is an act compounded of law and fact; of which the jury aided by the court must judge. To that declaration the court still adheres." p. 444. And he concluded his charge thus: "The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct." p. 445.

It thus appears that Chief Justice Marshall, while affirming that a question of the admissibility of evidence must be decided by the court, because that question was whether the jury should hear the evidence or not, yet told the jury, (in many forms, but of the same meaning,) that upon a question compounded of fact and law, involved in the issue submitted to the jury, the court might give general instructions, but the jury must decide it; that such a question, compounded of law and fact, would be decided by the jury, with the aid of the court so far as respects the law; that of such a question the jury, aided by the court, must judge; and that, having "heard the opinion of the court on the law of the case, they will apply," not "that opinion," but "that law," namely, the law as to which the court had expressed its opinion, "to the facts, and will find a verdict of guilty or not guilty as their own consciences may direct." The manifest intent and effect of all this was that the jury, after receiving the aid of the instructions of the court on matter of law, must judge of and determine, as their own consciences might direct, every question compounded of law and fact, involved in the general issue of guilty or not guilty.

The meaning of the charge in this respect, as carefully prepared by the Chief Justice, is too clear to be controlled by the words attributed to him by the reporter, on page 448, in the course of a desultory conversation with counsel in regard to other defendants, after the jury had found Burr not guilty.

In 1817, before Chief Justice Marshall, in the same court, there was tried an indictment for piracy, by robbing on the high seas, under the act of Congress of April 30, 1790, c. 9,

§ 8, (1 Stat. 113; Rev. Stat. § 5372,) enacting that any person committing upon the high seas "murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death," should be deemed a pirate. Mr. Upshur, for the defendant, argued "that it was necessary that robbery should first be made punishable with death by the laws of the United States, when committed on land, before it could amount to piracy, when committed on the sea, which was not now the case; that Judge Johnson had so decided in South Carolina, although a contrary decision had been subsequently pronounced by Judge Washington; that the conflict between these two learned judges proved that the law was at least doubtful; that the jury in a capital case were judges, as well of the law as the fact, and were bound to acquit, where either was doubtful." Chief Justice Marshall, (far from denying this right of the jury,) "being appealed to for the interpretation of the law, decided that it was not necessary that robbery should be punishable by death when committed on land, in order to amount to piracy if committed on the ocean; but as two judges (for both of whom the court entertained the highest respect) had pronounced opposite decisions upon it, the court could not undertake to say that it was not at least doubtful." And the case being submitted to the jury, they returned a verdict of not guilty. *United States* v. *Hutchings*, 2 Wheeler Crim. Cas. 543, 547, 548.[1]

It may be added that Mr. Conway Robinson, well known to many members of this court and this bar as a most careful and accurate, as well as learned lawyer, informed Mr. Justice Blatchford and myself that he well remembered hearing Chief Justice Marshall, presiding at the trial of a criminal case in the Circuit Court of the United States at Richmond, after expressing, at the request of the counsel on both sides, his own

[1] The decision of Mr. Justice Johnson, there referred to, does not appear to have been reported. But the decision of Mr. Justice Washington is reported as *United States* v. *Jones*, (1813) 3 Wash. C. C. 209; and the point was decided the same way by this court, Mr. Justice Johnson dissenting, in *United States* v. *Palmer*, (1818) 3 Wheat. 610.

opinion upon the construction of the statute on which the indictment was founded, conclude his charge to the jury by telling them that, as it was a criminal case, they were not bound to accept his opinion, but had the right to decide both the law and the fact.

Until nearly forty years after the adoption of the Constitution of the United States, not a single decision of the highest court of any State, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue — except the two or three cases, above mentioned, concerning the constitutionality of a statute. And it cannot have escaped attention that many of the utterances, above quoted, maintaining the right of the jury, were by some of the most eminent and steadfast supporters of the Constitution of the United States, and of the authority of the national judiciary.

It must frankly be admitted that in more recent times, beginning with the judgment of the Court of Appeals of Kentucky in 1830 in *Montee* v. *Commonwealth*, 3 J. J. Marsh. 132, and with Mr. Justice Story's charge to a jury in 1835 in *United States* v. *Battiste*, 2 Sumner, 240, the general tendency of decision in this country (as appears by the cases cited in the opinion of the majority of the court) has been against the right of the jury, as well in the courts of the several States, including many States where the right was once established, as in the Circuit Courts of the United States. The current has been so strong, that in Massachusetts, where counsel are admitted to have the right to argue the law to the jury, it has yet been held that the jury have no right to decide it, and it has also been held, by a majority of the court, that the legislature could not constitutionally confer upon the jury the right to determine, against the instructions of the court, questions of law involved in the general issue in criminal cases; and in Georgia and in Louisiana, a general provision in the constitution of the State, declaring that "in criminal cases the jury shall be judges of the law and fact," has been held not to authorize them to decide the law against the instruc-

tions of the court. *Commonwealth* v. *Porter*, 10 Met. 263; *Commonwealth* v. *Anthes*, 5 Gray, 185; *Ridenhour* v. *State*, 75 Georgia, 382; *State* v. *Tisdale*, 41 La. Ann. 338.

But, upon the question of the true meaning and effect of the Constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the Constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage. *Stuart* v. *Laird*, 1 Cranch, 299. And, upon this constitutional question, neither decisions of state courts, nor rulings of lower courts of the United States, can relieve this court from the duty of exercising its own judgment. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 443; *Andrews* v. *Hovey*, 124 U. S. 694, 717; *The J. E. Rumbell*, 148 U. S. 1, 17.

The principal grounds which have been assigned for denying the right of a jury, upon the general issue in a criminal case, to determine the law against the instructions of the court, have been that the old maxim, *ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores*, is of universal application; that judges are more competent than juries to determine questions of law; and that decisions upon such questions in one case become precedents to guide the decision of subsequent cases.

But the question what are the rights, in this respect, of persons accused of crime, and of juries summoned and empanelled to try them, under the Constitution of the United States, is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature; but what, in the light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument.

This question, like all questions of constitutional construction, is largely a historical question; and it is for that reason, that it has seemed necessary, at the risk of tediousness, to review and to state at some length the principal authorities upon the subject in England and America. The reasons to be

derived from these authorities for maintaining the contested right of the jury in this regard may be summed up as follows:

By the Great Charter of England, and by the American constitutions, it is not by a decision of the ablest or most learned judges, that the citizen can be deprived of his life or liberty; but it is only by "the judgment of his peers," or, in the ancient phrase, "by his country," a jury taken from the body of the people.

The ancient forms, used before and since the adoption of the Constitution, and hardly altered at the present day, in which the general issue is pleaded by the accused, and submitted to the jury, are significant. When the defendant, being arraigned upon the indictment, pleads not guilty, he is asked by the clerk of the court, "How will you be tried?" and answers, "By God and my country." The oath administered to each juror as he is called and accepted is, "You shall well and truly try and true deliverance make between our sovereign lord the King" (or the State or People, or the United States, as the case may be,) "and the prisoner at the bar, whom you shall have in charge, according to your evidence. So help you God." And after the jury have been empanelled, the clerk reads the indictment to the jury, and then says to them: "To this indictment the prisoner at the bar has pleaded not guilty, and for trial has put himself upon the country, which country you are. You are now sworn to try the issue. If he is guilty, you will say so; if not guilty, you will say so; and no more."

In the maxim, *ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores*, the word *quæstio* denotes an issue joined by the pleadings of the parties, or otherwise stated on the record, for decision by the appropriate tribunal. Issues of law, so joined or stated, are to be decided by the judge; issues of fact, by the jury. If the accused demurs to the indictment, an issue of law only is presented, which must be decided and judgment rendered thereon by the court, and by the court alone. But if the accused pleads generally not guilty, the only issue joined is an issue of fact, to be decided by the jury, and by the jury only — unless the jury

choose to return a special verdict, so that the record may present an issue of mere law, to be decided by the court. After a verdict of guilty, again, any defence in matter of law, apparent on the record, is to be considered and decided by the court on motion in arrest of judgment.

The maxim has no application to rulings, in the course of the trial, upon the admission of evidence. The object of rules as to the competency of evidence is to prevent trials from being unduly prolonged, and the consideration and decision of the merits of the real issue on trial obscured, embarrassed or prejudiced by the introduction of irrelevant matter. The question whether particular evidence shall be admitted or not is one to be decided before the evidence can be submitted to the jury at all, and must be, as it always is, decided by the court; and this is so, whether the admissibility of the evidence depends, as it usually does, upon a question of law only; or depends largely or wholly upon a question of fact, as whether dying declarations were made under immediate apprehension of death, or whether a confession of the defendant was voluntary, or whether sufficient foundation has been laid for the introduction of secondary evidence, or for permitting a witness to testify as an expert. To infer, because the court must decide questions of law upon which the admissibility of evidence depends, that the jury have no right to determine the matter of law involved in the general issue, would be as unwarrantable as to infer, because the court must decide questions of fact upon which the admissibility of evidence depends, that the jury have no right to decide the matter of fact involved in that issue.

The jury to whom the case is submitted, upon the general issue of guilty or not guilty, are entrusted with the decision of both the law and the facts involved in that issue. To assist them in the decision of the facts, they hear the testimony of witnesses; but they are not bound to believe the testimony. To assist them in the decision of the law, they receive the instructions of the judge; but they are not obliged to follow his instructions.

Upon the facts, although the judge may state his view of

them, the duty of decision remains with the jury, and cannot be thrown by them upon the judge. Upon the law involved in the issue of fact, the jury, if they are satisfied to do so, may let it be decided by the judge, either by returning a general verdict in accordance with his opinion as expressed to them, or by returning a special verdict reciting the facts as found by them, and, by thus separating the law from the facts, put the question of law in a shape to be decided by the court in a more formal manner. But the whole issue, complicated of law and fact, being submitted to their determination, the law does not require them to separate the law from the fact, but authorizes them to decide both at once by a general verdict.

The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by wilfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.

In the forcible words of Chief Justice Vaughan, in *Bushell's case*, Vaughan, 135, 148, already quoted: "A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they, being not assured it is so from their own understanding, are forsworn, at least *in foro conscientiæ;*" or, as more briefly stated in another report of the same case, "The jury are perjured if the verdict be against their own judgment, although by directions of the court, for their oath binds them to their own judgment." T. Jones, 13, 17.

It is universally conceded that a verdict of acquittal, although rendered against the instructions of the judge, is final, and cannot be set aside; and consequently that the jury have the legal power to decide for themselves the law involved in the general issue of guilty or not guilty.

It has sometimes, however, been asserted that, although they have the power, they have no right to do this, and that it is their legal, or at least their moral duty, in every criminal case, to obey and follow the judge's instructions in matter of law. The suggestion is not that the jury ought not to exercise the power wrongfully, but that they ought not to exercise it at all; that, whether the instructions of the court be right or wrong, just or arbitrary, according to the law as known of all men, or directly contrary to it, the jury must be controlled by and follow them.

But a legal duty which cannot in any way, directly or indirectly, be enforced, and a legal power, of which there can never, under any circumstances, be a rightful and lawful exercise, are anomalies — "the test of every legal power" (as said by Alexander Hamilton, and affirmed by Chancellor Kent, in *People* v. *Croswell*, 3 Johns. Cas. 362, 368, above cited) "being its capacity to produce a definite effect, liable neither to punishment nor control"—"to censure nor review."

It has been said that, if not their legal duty, it is their moral duty, to follow the instructions of the court in matter of law. But moral duties, as distinguished from legal duties, are governed not by human, but by divine laws; and the oath which the jurors in a capital case severally take to the Almighty Judge is to well and truly try and true deliverance make between the government and the prisoner at the bar, according to their evidence — not according to the instructions of the court — and to decide whether, in their own judgment and conscience, the accused is guilty or not guilty.

The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. As every citizen or subject is conclusively presumed to know the law, and cannot set up his ignorance of it to excuse him from criminal responsibility for offending against it, a jury of his peers must be presumed to have equal knowledge, and, especially after being aided by the explanation and exposition of the law by counsel and court, to be capable of applying it to the facts as proved by the evidence before them.

On the other hand, it is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

The jury having the undoubted and uncontrollable power to determine for themselves the law as well as the fact by a general verdict of acquittal, a denial by the court of their right to exercise this power will be apt to excite in them a spirit of jealousy and contradiction, and to prevent them from giving due consideration and weight to the instructions of the court in matter of law.

In civil cases, doubtless, since the power to grant new trials has become established, the court, being authorized to grant one to either party as often as the verdict appears to be contrary to the law, or to the evidence, may, in order to avoid unnecessary delay, whenever in its opinion the evidence will warrant a verdict for one party only, order a verdict accordingly. *Pleasants* v. *Fant*, 22 Wall. 116; *Hendrick* v. *Lindsay*, 93 U. S. 143; *Schofield* v. *Chicago &c. Railway*, 114 U. S. 615.

But a person accused of crime has a twofold protection, in the court and the jury, against being unlawfully convicted. If the evidence appears to the court to be insufficient in law to warrant a conviction, the court may direct an acquittal. *Smith* v. *United States*, 151 U. S. 50. But the court can never order the jury to convict; for no one can be found guilty, but by the judgment of his peers.

Decisions of courts, and especially of courts of last resort, upon issues of law, such as are presented by a demurrer or by a special verdict, become precedents to govern judicial decisions in like cases in the future. But the verdict of a jury, upon the general issue of guilty or not guilty, settles nothing but the guilt or innocence of the accused in the particular case; and the issue decided is so complicated of law and fact, blended together, that no distinct decision of any question of law is recorded or made. The purpose of establishing trial by jury was not to

obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose.

As said by Alexander Hamilton in *Croswell's case*, above cited, the power of deciding both law and fact upon the general issue in a criminal case is entrusted to the jury, "for reasons of a political and peculiar nature, for the security of life and liberty." 7 Hamilton's Works, 335; 3 Johns. Cas. 362. The people, by a jury drawn from among themselves, take part in every conviction of a person accused of crime by the government; and the general knowledge that no man can be otherwise convicted increases the public confidence in the justice of convictions, and is a strong bulwark of the administration of the criminal law.

By the law of England, as has been seen, a person accused of murder or other felony, and convicted before a single judge, could not move for a new trial, and had no means of reviewing his instructions to the jury upon any question of law, unless the judge himself saw fit to reserve the question for decision by higher judicial authority.

Although Mr. Justice Story, in *United States* v. *Gibert*, (1834) 2 Sumner, 19, thought that a new trial could not be granted to a man convicted of murder by a jury, because to do so would be to put him twice in jeopardy of his life, yet the Circuit Courts of the United States may doubtless grant new trials after conviction, though not after acquittal, in criminal cases tried before them. *United States* v. *Fries*, (1799) 3 Dall. 515; *United States* v. *Porter*, (1830) Baldwin, 78, 108; *United States* v. *Harding*, (1846) 1 Wall. Jr. 127; *United States* v. *Keen*, (1839) 1 McLean, 429; *United States* v. *Macomb*, (1851) 5 McLean, 286; *United States* v. *Smith*, (1855) 3 Blatchford, 255; *United States* v. *Williams*, (1858) 1 Clifford, 5. But the granting or refusal of a new trial rests wholly in the discretion of the court in which the trial was had, and cannot be reviewed on error. *Blitz* v. *United States*, 153 U. S. 308.

By the Constitution of the United States, this court has appellate jurisdiction in such cases, and under such regulations

only, as Congress may prescribe; and under the legislation of Congress before 1889, no rulings or instructions of a Circuit Court of the United States in a criminal case could be brought to this court, unless upon a certificate of division of opinion between two judges presiding at the trial. A person accused of murder or other crime might be tried, and, if convicted by the jury, sentenced before a single judge, perhaps only a district judge; and if so convicted and sentenced, there was no way in which the judge's rulings could be reviewed by this court. Act of April 29, 1802, c. 31, § 6, 2 Stat. 159; Rev. Stat. §§ 651, 697; *United States* v. *More*, 3 Cranch, 159, 172; *Ex parte Kearney*, 7 Wheaton, 38, 42; *Ex parte Gordon*, 1 Black, 503; *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Perrin*, 131 U. S. 55.

By the acts of February 6, 1889, c. 113, § 6, and March 3, 1891, c. 517, indeed, a person convicted of murder or other infamous crime in a Circuit Court of the United States may bring the case to this court by writ of error, although the United States cannot do so. 25 Stat. 656; 26 Stat. 827; *United States* v. *Sanges*, 144 U. S. 310. But the right of review, so given to this court, cannot supersede or impair the rightful power of the jury under the Constitution, in deciding the issue submitted to them at the trial.

There may be less danger of prejudice or oppression from judges appointed by the President elected by the people, than from judges appointed by a hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield — from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law — of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy.

Upon these considerations, we are of opinion that the learned judge erred in instructing the jury that they were

bound to accept the law as stated in his instructions, and that this error requires the verdict to be set aside as to both defendants.

But we are also of opinion that the judge committed an equally grave error in declining to submit to the jury matter of fact involved in the issue on trial.

It clearly appears, that the jury were not only instructed that, while they had the physical power to return a verdict of manslaughter, yet they must take the law from the court; but that they were also instructed that, if they found these defendants guilty of any crime, it could not properly be manslaughter. There can be no doubt upon the record before us, and it is admitted in the opinion of the majority of the court, that the judge denied the right of the jury to find as a fact that the defendants had been guilty of manslaughter only. Nor can there be any doubt that the jury were thereby led to agree upon a verdict of guilty of murder, to the great prejudice of the defendants.

In a case in which the jury, as appeared by their inquiries of the court, were in doubt whether the homicide committed by the defendants was murder or manslaughter, to instruct them that they could not acquit the defendants of murder and convict them of manslaughter only, but must find them guilty of murder or of no crime at all, does not appear to us to differ, in principle, from instructing them, in a case in which there was no question of manslaughter, that there was no evidence upon which they could acquit the defendant, or do anything but convict him of murder.

This is not a case in which the judge simply declined to give any instructions upon a question of law which he thought did not arise upon the evidence. But, after giving sufficient definitions, both of murder and of manslaughter, he peremptorily told them that they could not convict the defendants of manslaughter only, and thereby denied the right of the jury to pass upon a matter of fact necessarily included in the issue presented by the general plea of not guilty.

This appears to us to be inconsistent with settled principles of law, and with well considered authorities.

As said by this court, speaking by Mr. Justice Clifford, "In criminal cases, the true rule is that the burden of proof never shifts; that in all cases, before a conviction can be had, the jury must be satisfied from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation that the defendant is guilty in the manner and form as charged in the indictment." *Lilienthal's tobacco* v. *United States*, 97 U. S. 237, 266. See also *Potter* v. *United States*, 155 U. S. 438; *Commonwealth* v. *McKie*, 1 Gray, 61; *People* v. *Downs*, 123 N. Y. 558.

Upon the trial of an indictment under a statute of the Territory of Utah, establishing two degrees of murder, with different punishments, the jury were instructed, "that an atrocious and dastardly murder has been committed by some person is apparent, but in your deliberations you should be careful not to be influenced by any feeling;" and the defendant was found guilty of murder in the first degree, and sentenced to death. This court, upon writ of error to the Supreme Court of the Territory, reversed the judgment, because that instruction must have been regarded by the jury as "an instruction that the offence, by whomsoever committed, was murder in the first degree; whereas it was for the jury, having been informed as to what was murder, by the laws of Utah, to say whether the facts made a case of murder in the first degree or murder in the second degree;" and "the prisoner had the right to the judgment of the jury upon the facts, uninfluenced by any direction from the court as to the weight of the evidence." *Hopt* v. *Utah*, 110 U. S. 574, 582, 583.

As stated by the Chief Justice, speaking for this court, in a case of murder, decided at the last term, "It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury; and if no rule of law is incorrectly stated, and the matters of fact are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. *Rucker* v. *Wheeler*, 127 U. S. 85,

93; *Lovejoy* v. *United States*, 128 U. S. 171, 173. But he should take care to separate the law from the facts, and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *M'Lanahan* v. *Universal Ins. Co.*, 1 Pet. 170, 182. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments." *Starr* v. *United States*, 153 U. S. 614, 624, 625.

The Supreme Court of Michigan, speaking by Chief Justice Cooley, in setting aside a verdict of murder, in a case in which the homicide was admitted, and the only question was whether it was murder or manslaughter, said: "The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal, because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law, and, as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice. But to give it full effect, the jury must be left to weigh the evidence, and to examine the alleged motives by their own tests. They cannot properly be furnished for this purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they cannot conscientiously say they believe such an intent to exist." *People* v. *Garbutt*, 17 Michigan, 9, 27.

In *The King* v. *Burdett*, cited in the earlier part of this opinion, Mr. Justice Best said: "If there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a judge as to evidence applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of

the defendant, a judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the judge." And Lord Tenterden, in words peculiarly applicable to the present case, said: "In cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck, or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction." "The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement." 4 B. & Ald. 95, 121, 161, 162.

The care with which courts of the highest authority have guarded the exclusive right of the jury to decide the facts in a criminal case is exemplified in a very recent case before the Judicial Committee of the Privy Council, in which, under section 423 of the Criminal Law Amendment Act, 1883, (46 Vict. c. 17,) authorizing the judge presiding at a criminal trial to reserve questions of law for review, with a proviso that no judgment should be reversed "unless for some substantial wrong or other miscarriage of justice," the questions reserved were whether certain evidence had been improperly admitted, and whether, if the court came to the conclusion that it was not legally admissible, the court could nevertheless affirm the judgment if it was of opinion that, independently of that evi-

dence, there was sufficient evidence to support the conviction, and that the accused was guilty of the offence with which he was charged. It was argued that if, without the inadmissible evidence, there was evidence sufficient to sustain the verdict and to show that the accused was guilty, there had been no substantial wrong or miscarriage of justice in affirming a judgment upon the conviction by the jury. But Lord Chancellor Herschell, speaking for six other law lords as well as for himself, held otherwise, and said: "It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence — that is to say, what the law regards as evidence — establishes the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a jury, the judgment passed upon him is made to depend not on the finding of the jury, but on the decision of the court. The judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords. It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases." *Makin* v. *Attorney General*, (1894) App. Cas. 57, 69, 70.

By section 1035 of the Revised Statutes, "in all criminal causes, the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged: Provided, that such attempt shall be itself a separate offence." The defendants, therefore, under this indictment, might have been convicted of murder, or of manslaughter, or of an assault only. Having pleaded not guilty, they could only be convicted by the verdict of a jury. If a homicide was committed with malice, it was murder; if committed without malice, but without any lawful excuse, it was manslaughter only. The

burden of proof at every step was upon the government. In order to obtain a conviction of murder, it must prove beyond a reasonable doubt that the homicide was committed with malice. The question whether, taking into consideration all the circumstances in evidence, as well as the credibility of the several witnesses, there was a criminal homicide, and, if so, whether it was murder or only manslaughter, could be finally decided against the defendants by the jury alone. According to the settled practice of the courts of the United States, indeed, the court, even in a criminal case, may express its opinion to the jury upon any question of fact, provided that it submits that question to the jury for decision. But the court in this case went beyond this, and distinctly told the jury that, if they found that a felonious homicide had been committed by the defendants, they could not properly convict them of manslaughter, which was equivalent to saying that, if any crime was proved, it was murder. This instruction had the direct tendency, and the actual effect, of inducing the jury to return a verdict of guilty of the higher crime. The jury may have been satisfied that the defendants killed the mate without lawful excuse, and may yet have had doubts whether, upon so much of the testimony as they believed to be true, the killing was malicious and therefore murder. That doubts had occurred to the jurors upon this point is shown by the questions addressed by one of them to the presiding judge. The judge dispelled those doubts, not by further defining the distinction as matter of law between murder and manslaughter, but by telling the jury that as matter of fact they could not convict the defendants of manslaughter only. He thus substituted his own decision upon this question of fact for the decision of the jury, to which the defendants were entitled under the Constitution and laws of the United States. If all the justices of this court should concur in the opinion of the judge below upon this question of fact, still the defendants have not had the question decided by the only tribunal competent to do so under the Constitution and laws.

For the twofold reason that the defendants, by the instructions given by the court to the jury, have been deprived, both

of their right to have the jury decide the law involved in the general issue, and also of their right to have the jury decide every matter of fact involved in that issue, we are of opinion that the judgment should be reversed, and the case remanded with directions to order a new trial as to both defendants.

In re ROBERTSON, Petitioner.

ORIGINAL.

No number. Submitted January 21, 1895. — Decided January 22, 1895.

Applications to this court for a writ of error to a state court are not entertained unless at the request of a member of the court, concurred in by his associates.

The decision of the highest court of a State that it was competent under an indictment for murder simply, to try and convict a person of murder in the first degree if the homicide was perpetrated in the commission of or attempt to commit robbery, presents no Federal question for consideration.

When the record in a case brought here from the highest court of a State by writ of error discloses no Federal question as decided by that court, there is nothing in the case for this court to consider.

William Robertson was convicted of murder in the first degree, at the December term, 1892, of the county court of Franklin County, Virginia, and sentenced to be hanged February 3, 1893. A petition for writ of error was denied by the Circuit Court of Franklin County, but the writ was subsequently allowed by one of the judges of the Supreme Court of Appeals of Virginia, which court on November 8, 1894, affirmed the judgment of the county court. 20 S. E. Rep. 362. Robertson was resentenced to be executed December 21, 1894, and a respite granted until January 25, 1895. He then applied for a writ of error from this court, to one of the Justices thereof, which was denied, whereupon his counsel brought the matter to the attention of the court under the misapprehension that he had been directed to do so by that Justice with the assent of his brethren.

In Virginia, every homicide is presumed to be murder in the second degree; murder in the second degree is punishable by imprisonment; murder in the first degree by death; and, under the statute, murder in commission of, or attempt to commit, robbery, is murder in the first degree. Code Va. § 3662.

One of the errors assigned below was that the county court overruled the motion of defendant to exclude all evidence tending to show that he robbed the deceased, his contention being that inasmuch as the indictment was in the ordinary form and did not charge that the homicide was committed in the commission of robbery, it was not competent to prove the robbery in order to raise the offence to murder in the first degree. The same question was also presented by an instruction asked on behalf of defendant and refused. The Supreme Court of Appeals held that whatever might be the rule elsewhere, it was competent in Virginia, under indictment for murder simply, to try and convict a person of murder in the first degree if the homicide was perpetrated in the commission of or attempt to commit robbery. It was urged on the application here that where robbery was relied on to raise homicide to murder in the first degree, two distinct acts constituted the offence, to wit, the killing and the robbery or attempt to commit robbery; and that to condemn the accused to death because the killing was in the commission of, or attempt to commit, robbery, under an indictment not charging him with the latter, was to deprive him of his life without due process of law.

Mr. L. W. Anderson for petitioner.

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

Applications to this court for a writ of error to a state court are not entertained unless at the request of one of the members of the court concurred in by his associates. In this case there seems to have been some misunderstanding on the part of counsel as to the practice, in view of which, and considering that this is a capital case and that the day appointed for the

execution of the sentence is very near, we have examined the application, and are of opinion that the question of the sufficiency of the indictment is not a Federal question, and that no Federal question appears upon the record to have been presented to the Supreme Court of Appeals of Virginia, and therefore, upon the authority of *Leeper* v. *Texas*, 139 U. S. 462, and *Duncan* v. *Missouri*, 152 U. S. 377,

The writ of error is not allowed.

DUNBAR *v.* UNITED STATES.

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

No. 693. Argued December 5, 6, 1894. — Decided January 28, 1895.

In an indictment for smuggling opium a description of the property smuggled as "prepared opium, subject to duty by law, to wit, the duty of twelve dollars per pound," is a sufficient description of the property subjected to duty by paragraph 48 of § 1 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567.

It is no valid objection to an indictment that the description of the property in respect to which the offence is charged to have been committed is broad enough to include more than one specific article; and any words of description which make clear to the common understanding that in respect to which the offence is alleged to have been committed are sufficient.

A defendant who waits till after verdict before making objection to the sufficiency of the indictment waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn.

One good count in an indictment containing several, is sufficient to sustain a judgment.

United States v. *Carll*, 105 U. S. 611, distinguished from this case.

A charge that the defendant wilfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States smuggled and clandestinely introduced into the United States prepared opium carries with it a direct averment that he knew that the duties were not fully paid, and that he was seeking to bring such goods into the United States without their just contribution to the revenues, and is therefore not subject to the objection that a *scienter* is not alleged.

An objection to the admissibility of testimony as to a count upon which the accused is acquitted is immaterial.

Statement of the Case.

Secondary evidence is admissible to show the contents of letters in the possession of the defendant in a criminal proceeding, when he refuses to produce them on notice to do so, and cannot be compelled to produce them.

When a competent witness testifies that a writing which he produces was received by him and that a defendant on trial in a criminal proceeding admitted that he sent it to him, a foundation is laid for the introduction of the writing against the defendant, although not in his handwriting.

An instruction objected to as misrepresenting the testimony and as attempting to enforce as a conclusion from the misrepresented testimony that which was only a possible inference therefrom, is examined and held to fairly leave the question of fact to the jury, and not to overstate the inference from it, if found against the defendant.

An instruction to the jury that "a reasonable doubt is not an unreasonable doubt, that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; you are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," gives all the definition of reasonable doubt which a court can be required to give.

On July 14, 1893, there was returned into the District Court of the United States for the District of Oregon an indictment against the defendant, William Dunbar, now plaintiff in error, charging him in five counts, under § 2865, Rev. Stat., with the crime of smuggling. On November 25, 1893, there was also filed in the same court a second indictment charging him in nine counts with a violation of § 3082, Rev. Stat.

Section 2865 provides: "If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, . . . every such person . . . shall be deemed guilty," etc. The charge in the third count of the first indictment was, "that on the 2d day of September, 1892, in the State of Oregon and in the District of Oregon and within the jurisdiction of this court, the said William Dunbar did, on the steamship Haytian Republic, a steamship plying between the port of Portland, Oregon, in the United States, and Vancouver, in the province of British Columbia,

Statement of the Case.

Dominion of Canada, wilfully, unlawfully, and knowingly and with intent to defraud the revenues of the United States smuggle and clandestinely introduce into the United States, to wit, into the State of Oregon, and within the jurisdiction of this court, and from a foreign country, to wit, the province of British Columbia, in the Dominion of Canada, certain goods, wares, and merchandise, to wit, a large quantity of prepared opium, being about 1400 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, of the value of $15,400, subject to duty by law, to wit, a duty of twelve dollars ($12) per pound, and which should have been invoiced, without paying or accounting for said duty or any part thereof and without having said opium or any part thereof invoiced, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America." The fourth count was different only in the time and the amount of opium charged to have been smuggled.

Section 3082 is as follows: "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined," etc. The substance of the second, fourth, and fifth counts of the second indictment was that the defendant did "wilfully, unlawfully, and knowingly and with intent to defraud the revenues of the United States smuggle and clandestinely introduce into the United States" certain amounts of prepared opium. The ninth count charged that "on the 5th day of February, 1893, said William Dunbar, in the District of Oregon and within the jurisdiction of this court, did wilfully, unlawfully, fraudulently, and knowingly and with intent to defraud the revenues of the United States facilitate the transportation after importation of a large quantity of prepared opium to wit, about 200 pounds of prepared opium, the exact number of pounds being to the grand jury unknown, which pre-

pared opium was subject to a duty by law, to wit, to a duty of twelve dollars ($12) per pound, and which should have been invoiced, and which prepared opium on said 5th day of February, 1893, had been knowingly, wilfully, unlawfully, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States and into the District of Oregon and within the jurisdiction of this court, from a foreign country, to wit, from the province of British Columbia, Dominion of Canada, and upon which prepared opium no duty had been paid or accounted for according to law, and none of said prepared opium had been invoiced, he, the said William Dunbar, then and there well knowing that no duty had been paid or accounted for according to law on said prepared opium, and that none of said prepared opium had been invoiced, and that the same and the whole thereof had been unlawfully, wilfully, knowingly, and fraudulently brought, imported, smuggled, and clandestinely introduced into the United States and into the District of Oregon from said foreign country, said province of British Columbia, in said Dominion of Canada as aforesaid; that the said William Dunbar did then and there facilitate the transportation of said opium, after importation, by packing the same in trunks and causing the same to be transported as baggage from Portland, Oregon, to San Francisco, California, contrary to the —— of statute in such cases made and provided and against the peace and dignity of the United States."

On November 27, 1893, the court made an order consolidating the two cases for trial. Upon the trial of the consolidated cases the jury returned a verdict of guilty, as charged in the six counts above referred to of the two indictments. A motion for a new trial having been overruled, judgment was entered sentencing the defendant to pay a fine of $1000, and to be imprisoned for a term of two years. To reverse such judgment and sentence the defendant sued out this writ of error.

Mr. John H. Mitchell for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendants in error.

Opinion of the Court.

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

The first question presented for our consideration is as to the sufficiency of these counts in the indictment. The description of the property charged to have been smuggled is "prepared opium . . . subject to duty by law, to wit, the duty of twelve dollars per pound."

The revenue act of October 1, 1890, c. 1244, 26 Stat. 567, commonly known as the "McKinley act," was in force at the time of the commission of these alleged offences, and the only clauses in it in terms prescribing a duty on opium imported from foreign countries are paragraphs 47 and 48 of section 1, which read:

"47. Opium, aqueous extract of, for medicinal uses, and tincture of, as laudanum, and all other liquid preparations of opium, not specially provided for in this act, forty per centum ad valorem.

"48. Opium containing less than nine per centum of morphia, and opium prepared for smoking, twelve dollars per pound; but opium prepared for smoking and other preparations of opium deposited in bonded warehouse shall not be removed therefrom without payment of duties, and such duties shall not be refunded."

The contention is that opium is dutiable only in certain specified forms and conditions, as follows: aqueous extract of opium for medicinal uses; tincture of opium, as laudanum; all other liquid preparations of opium not specially provided for in the act; opium containing less than nine per centum of morphia; and opium prepared for smoking; that there is nothing known to the revenue law simply as "prepared opium," and, therefore, that a charge of bringing in prepared opium" without any payment of duty states nothing which the law prohibits. It is true that the language of paragraph 48 is "opium prepared for smoking," while the indictment reads "prepared opium," and thus does not limit the description by stating the purpose for which the opium charged to have been smuggled was prepared. Opium may,

it is said, be prepared for many uses; the statute only imposes a duty on "opium prepared for smoking;" hence the indictment is not precise, as it must be, because the terms of description are broad enough to include opium prepared for purposes other than smoking, and not subject to any duty.

But although these are purely statutory offences, it is unnecessary to resort to the very words of the statute. The pleader is at liberty to use any form of expression, provided only that he thereby fully and accurately describes the offence; and the entire indictment is to be considered in determining whether the offence is fully stated. The argument made by counsel omits to notice other words, which clearly limit any generality in the term "prepared opium," and so limit it as to bring the article charged to have been smuggled within the bounds of the statute. The description is not merely of "prepared opium," but of such opium "subject to duty by law, to wit, the duty of twelve dollars per pound." In other words, the defendant is charged to have smuggled that kind of prepared opium which is subject by law to a duty of twelve dollars a pound. Turning to paragraph 48 we find that "opium prepared for smoking" is the only "prepared opium" expressly subject to such duty. It is no answer to this to say that opium containing less than nine per cent of morphia is also subject to the same duty, and that the term "opium" in this clause is broad enough to include both crude and prepared opium. For, if "opium" as there used does not exclusively refer to crude opium, and if opium prepared for other uses than that of smoking is, when containing less than nine per cent of morphia, subject to the duty of twelve dollars a pound, "prepared opium subject to duty of twelve dollars per pound" can mean only opium prepared for smoking, which, irrespective of the amount of morphia contained in it, is subject to that duty, or opium having less than nine per cent of morphia and prepared for other uses, which is also subject to like duty. In either case the property charged to have been smuggled is property within the very terms of paragraph 48.

Further, paragraph 48 is not the statute describing the offences and imposing the penalties. Sections 2865 and 3082

are the penal sections, and the description in the one is "goods, wares, and merchandise subject to duty by law," and in the other simply "merchandise." While in an indictment under those sections it might not be sufficient to use only those words in describing the property charged to have been smuggled, because they are too general and do not sufficiently identify the property, yet, any words of description which make clear to the common understanding the articles in respect to which the offence is alleged are sufficient. There can be no doubt that the defendant knew exactly what he was charged with having smuggled, and that the description was so precise and full that he could easily use a judgment under these indictments in bar of any subsequent prosecution. It is true some parol testimony might be required to show the absolute identity of the smuggled goods, but such proof is often requisite to sustain a plea of once in jeopardy. It is no valid objection to an indictment that the description of the property in respect to which the offence is charged to have been committed is broad enough to include more than one specific article. Thus, an indictment charging the larceny of "a horse, the property of A B," is not overthrown by proof that A B is the owner of many horses, any one of which will satisfy the mere words of description. Yet, to make available a judgment on such an indictment in bar of a subsequent prosecution, something beside the record might be required to identify the property mentioned in the two indictments. See *United States* v. *Claflin*, 13 Blatchford, 178. In that case, which was one of smuggling, the description was "certain goods, wares, and merchandise, to wit: six cases containing silk goods of the value of $30,000, a more particular description of which is to the jurors unknown," and it was held sufficient. The rule is that if the description brings the property, in respect to which the offence is charged, clearly within the scope of the statute creating the offence, and at the same time so identifies it as to enable the defendant to fully prepare his defence, it is sufficient.

Further, no objection was made to the sufficiency of the indictments by demurrer, motion to quash, or in any other

manner until after the verdict. While it may be true that a defendant by waiting until that time does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defence, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law.

In this connection, also, reference may be made to section 1025, Revised Statutes, which provides that "no indictment . . . shall be deemed insufficient . . . by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This, of course, is not to be construed as permitting the omission of any matter of substance, *United States* v. *Carll*, 105 U. S. 611, but is applicable where the only defect complained of is that some element of the offence is stated loosely and without technical accuracy. For these reasons we are of opinion that the first and principal challenge of the indictment cannot be sustained.

A second objection, which is made to all of these counts with the exception of the ninth in the second indictment, is that a *scienter* is not alleged. But one good count is sufficient to sustain the judgment, and as it is conceded that the ninth is not open to the objection, it is perhaps unnecessary to consider whether the others are justly exposed to such criticism. Nevertheless, we have carefully examined them and are of the opinion that to none is this objection well taken. They charge that the defendant "did wilfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce, into the United States" the prepared opium. It is stated in 1 Bishop Crim. Pro. (3d ed.) § 504, that "the words 'knowingly' or 'well knowing' will supply the place of a positive averment

that the defendant knew the fact subsequently stated." And to like effect are the authorities generally. The language of the indictment quoted excludes the idea of any unintentional and ignorant bringing into the country of prepared opium upon which the duty had not been paid, and is satisfied only by proof that such bringing in was done intentionally, knowingly, and with intent to defraud the revenues of the United States. Indeed, the word "smuggling," as used, carries with it the implication of knowledge. In Bouvier, vol. 2, p. 528, smuggling is defined: "The fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited." And such is the general understanding of its meaning. We have, therefore, both the use of a term which implies intentional misconduct and a specific averment that what was done was done wilfully, knowingly, and with intent to defraud. But it is said that there should be a specific averment that the defendant knew that the duty had not been paid on the opium, and in support of that contention *United States* v. *Carll*, *supra*, is referred to. In that case an indictment charging the defendant with passing a counterfeited obligation of the United States was held fatally defective in failing to allege that the defendant knew that the obligation was counterfeited, and this notwithstanding that the language of the indictment closely followed the words of Rev. Stat. § 5431, the section under which it was found, and which provides that "every person who, with intent to defraud, passes, utters, publishes, or sells . . . any falsely made, forged, counterfeited, or altered obligation, or other security, of the United States, shall be punished," etc., the court saying that "knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object." But the analogy between the two cases is not perfect. The purpose of the statute in that case is the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals. Hence it is not suffi-

cient to charge that a party is trying to defraud an individual, and, in carrying that fraud into execution, uses a bond or note of the United States which he may suppose to be genuine, but which in fact is counterfeit. For that discloses no criminal intent in respect to the bond or note, but only a criminal intent as against the individual sought to be defrauded, an intent which may exist independent of any knowledge of the character of the bond or note. The purpose of the sections under which these indictments were found is the protection of the revenues of the United States, and while those revenues may be in fact lessened by one ignorantly and innocently bringing into the country property subject to duty upon which the duty is not paid, there can be no intent to defraud those revenues unaccompanied by knowledge of the fact that the duties have not been paid. The wrongful intent charged is not to violate the revenue laws of the United States, which might be satisfied, as suggested by counsel, by proof that defendant wilfully, knowingly, unlawfully, and fraudulently failed to have the opium invoiced or included in the manifest of the cargo of the steamship, or to pass the packages containing it through the custom-house, or submit to the officers of the revenue for examination. An intent to defraud the revenues implies an intent to deprive such revenues of something that is lawfully due them, and there can be no such intent without knowledge of the fact that there is something due. So, when the charge is made that the defendant wilfully, unlawfully, and knowingly, and with intent to defraud the revenues of the United States, smuggled, and clandestinely introduced into the United States, prepared opium, it carries with it a direct averment that he knew that the duties were not fully paid, and that he was seeking to bring such goods into the United States without their just contribution to the revenues. For these reasons we think that this objection to the indictment also fails.

Again, it is insisted that the court erred in permitting one Nathan Blum, an accomplice who had turned State's evidence, to give testimony as to the contents of a letter he had written to the defendant, and also of letters written by defendant to parties in British Columbia. According to the bill of ex-

ceptions the testimony in respect to the first letter was given by the witness while testifying as to the third count of the second indictment, and as the jury found the defendant not guilty under that count, the error, if error there was, may be considered as immaterial.

With reference to the letters written by the defendant, the witness testified that they were all copied in the letter-books belonging to the Merchant Steamship Company, and were all in the possession of the defendant. Whereupon the following proceedings were had, as shown by the bill of exceptions:

"Mr. Gearin, (counsel for the United States): Counsel says they have not had any notice. We now give counsel and the defendant notice to produce these letters and the copies they have — the letters written to Dunbar and letter-press copies of letters written by him.

"Mr. McGinn, (counsel for defendant): There are no such letters in existence. We have not got any such letters.

"Court: If you have the letter-books of the company you can produce them.

"Mr. McGinn: Does your honor make a ruling on the request of counsel?

"Court: You have objected to this evidence on the ground that he has not produced these letters. The witness says they are in the letter-book itself of Dunbar & Company.

"Witness: Yes, sir.

"Court: Counsel has notified you that you may produce these letter-books.

"Mr. McGinn: We have no such letters and never have had.

"Court: You may produce the letter-books if you want to."

No objection was made to the time or manner in which this notice was given; no suggestion that the defendant wished time to look over the letter-books and among his papers to see what he could find corresponding in any degree to the description given by the witness. On the contrary, the positive declaration was that he had no such letters, and never had them. Under those circumstances there was no error in permitting the witness to testify as to what he claimed

to have been in the letters. According to his testimony the originals or the letter-press copies thereof were in the possession of the defendant, and as the defendant failed to produce them, and could not be compelled to produce them, the door was opened for secondary evidence of their contents. Of course, whether any such letters were ever written, and what, if written, they contained, presented a question of fact depending on the credibility of the witness, and that question of fact was for the consideration of the jury, and not for the determination of the court.

Again, error is alleged in respect to the admission in evidence of a certain telegram. The facts in respect to this matter are as follows: The witness Blum was stating that defendant telegraphed certain things to him. An objection being raised, he produced a type-written telegram, and said that he received it from the defendant. It was further objected that it was not the original, the one prepared and signed by the defendant; whereupon the witness testified that it was delivered to him by the telegraph company, and that he afterwards talked with the defendant about it, who confirmed it and admitted that he had sent it. Thereupon the court permitted the telegram to be read in evidence. In this there was no error. Whatever may be the rule in other cases, an admission by defendant that the writing which is offered is the message which he sent, is sufficient to justify its introduction in evidence. An admission as to a writing is like an admission of any other fact, and when a competent witness testifies that a certain writing, which he produces, was received by him, and that the defendant admitted that he sent it to him, he has laid the foundation for the introduction of the writing, and this though it be not in the handwriting of the defendant.

Again, it is objected that the court erred in permitting a witness, Sigmund Baer, to testify that he had appropriated the proceeds of the sale of some of the opium charged to have been smuggled, in part to take up a draft drawn by the defendant, on the ground that the paper was itself the best evidence as to the party by whom it was drawn. The wit-

ness at first called the paper a note, but afterwards said that it was a draft drawn by the defendant on Blum, and was held by a bank for collection; that he paid the money to the bank, took up the draft, and forwarded it to Blum. The record is silent as to whether this paper was produced in evidence or not, but even if produced it would not disclose by whom, or with what moneys it was paid, or what disposition was made of it after payment. Those were independent facts, to be shown by other testimony, and it was not error to permit the witness to give such other testimony. The substantial matter was the disposition of the moneys realized from the sale of the opium, and the witness who handled such moneys was competent to testify as to the disposition he made of them. Part he used in taking up a draft, and part he deposited to the credit of the defendant in the Anglo-California Bank. This he said he did in obedience to instructions. Calling the paper a draft drawn by defendant on Blum was a mere general description, and as the receipt of the paper and its subsequent transmission to Blum were only incidental to the disposition of the moneys, it was not improper to thus generally describe it. In this connection we may notice the following instruction:

"The ninth count charges the defendant with having facilitated the transportation of 200 pounds of opium on the 5th day of February, 1892. Now, this is the opium that it is claimed was sold probably by Sigmund Baer. I think it is claimed to be the opium sold by Sigmund Baer, as is claimed, for Dunbar and Blum. Sigmund Baer testifies that Dunbar's drafts were paid out of the sale of opium, and it is claimed it was the sale of this opium, and that the balance of the money after the payment of the draft was deposited to Dunbar's credit. If that is so, the circumstances would be inconsistent with innocence on the part of Dunbar of this transportation, and the tendency would be to connect Dunbar with it, because ordinarily men do not deposit money to pay the debts of other people or deposit it to the credit of other people unless that money belongs to those people and there is some understanding that it is to be done. Dunbar has denied that he has any

knowledge of any transaction of this character. Whether this denial is overcome by the testimony on the part of the government is left to your judgment."

The complaint of this is, first, that it misrepresents the testimony; and, second, that it attempts to enforce as an absolute conclusion from such testimony, thus misrepresented, that which is only a possible inference therefrom. We do not think that it is justly exposed to this criticism. It refers to the testimony of the witness Baer, and, stating that the defendant denies any knowledge of the transaction as testified to by Baer, submits to the jury the question as to whether this denial is overcome by the testimony offered by the government. If so overcome, and the jury find that not only was the money, the proceeds of the sale of the smuggled opium, in fact applied to defendant's benefit, but also that it was so applied with his knowledge, a legitimate inference would be that he was connected with the importation, for ordinarily men do not dispose of money in the manner indicated, unless it belongs to the party for whom it is so used. This instruction, it must be borne in mind, is given in reference to that count in the indictment which charges the defendant with facilitating the transportation of the opium, and not those which charge him with being himself the party who was guilty of smuggling. If he knowingly permits the appropriation of the proceeds of the smuggled opium to his own benefit, either in the payment of his drafts or in increasing the amount of his account at the bank, he is helping to make successful the unlawful venture, and certainly those facts would be inconsistent with the idea of his entire innocence in respect to the matter. It will also be borne in mind that this instruction is not that if these things be so the defendant must be found guilty, but only that they are inconsistent with his innocence in respect to the transportation. We think that the question of fact was fairly left to the jury, and that the inference from those facts, if found against the defendant, was not too strongly stated.

Again, error is alleged in the instructions in respect to the matter of reasonable doubt. It is urged that the court failed

to instruct the jury as to what constitutes a reasonable doubt, and that in speaking of it it used the term "strong probabilities." Repeated attempts have been made by judges to make clear to the minds of the jury what is meant by the words "reasonable doubt;" but, as said by Mr. Justice Woods, speaking for this court, in *Miles* v. *United States*, 103 U. S. 304, 312, "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." And so, when the court in this case said to the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt — that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," it gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities," yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. *Hopt* v. *Utah*, 120 U. S. 430, 439; *Commonwealth* v. *Costley*, 118 Mass. 1, 23.

It is further objected that the court erred in stating to the jury that the testimony of certain witnesses was of the character of corroborating testimony, that is, testimony tending to support that given by accomplices. As the record fails to preserve all the evidence, either that of the accomplices, or that of the corroborating witnesses, we are unable to say from the reference thereto made by the court in its charge that there was any error in this respect. So far as we can gather from what is before us it would seem that the court made no mistake in pointing out certain items of testimony as corroboratory to that furnished by the accomplices. One purpose in

these references, as stated in the charge, was to indicate to the jury that as to certain counts there could be no conviction, because as to them the testimony was only that of an accomplice and uncorroborated. Of course the defendant cannot complain of an instruction that no conviction can be had on any count supported by only the uncorroborated testimony of an accomplice.

These are the substantial questions presented by counsel. We have examined them all carefully, and are of the opinion that no substantial error appears in the record. The judgment is, therefore,

Affirmed.

Mr. Justice Field dissented.

DELAWARE AND HUDSON CANAL COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 452. Submitted January 7, 1895. — Decided January 14, 1895.

Reversed upon the authority of *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 153 U. S. 628.

The Delaware and Hudson Canal Company was held liable in the trial court, whose judgment was affirmed by the Supreme Court of Pennsylvania, for the amount of a tax of three mills upon bonds originally issued and sold by the company in the State of New York, but held in the year 1890 by residents of Pennsylvania. The tax was imposed upon the bondholders. The liability of the company was maintained because of the failure of its treasurer, when paying interest in the city of New York, to deduct therefrom the amount of the tax and pay the same into the state treasury of Pennsylvania. The company, which is a corporation of the State of New York, constructed a portion of its improvements within the limits of

Pennsylvania, in pursuance of certain statutes of that State defining the terms and conditions upon which they might be so constructed. In its original appeal and in its assignment of errors the company denied the authority of the State of Pennsylvania to impose upon it or its treasurer, when paying interest in New York, the duty of assessing and collecting this Pennsylvania state tax, and further urged that the imposition upon it of this duty as a further condition to its doing business in Pennsylvania worked an impairment of the obligation of the contract contained in the original legislation, in pursuance of which it entered the State and constructed its works.

Mr. M. E. Olmsted for plaintiff in error.

Mr. W. U. Hensel, Attorney General of the State of Pennsylvania, and *Mr. James A. Stranahan* for defendant in error.

The assignments of error raise substantially the same questions as were presented to this court in *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 153 U. S. 628. By reference to the record, it will appear that in the trial court and in the Supreme Court of Pennsylvania the two cases were considered identical in principle. It is conceded by the Commonwealth that there is no substantial distinction between them. The Erie case was thoroughly and fully discussed upon either side, and the Commonwealth of Pennsylvania, having nothing further to add to its views as then presented, respectfully submits the case at bar for such action as to this honorable court may seem proper.

The Chief Justice: Judgment reversed with costs upon the authority of *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 153 U. S. 628, and cause remanded for further proceedings consistent with the opinion in that case.

Reversed.

LAZARUS *v.* PHELPS.

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

No. 105. Argued December 12, 1894. — Decided January 28, 1895.

In an action to recover the rental value of plaintiff's land alleged to have been wrongfully taken possession of and occupied by defendant for grazing purposes, a former judgment in plaintiff's favor against the defendant for a like possession and occupation of those lands terminating before the commencement of this action, is admissible in evidence against defendant.

A party who is not prejudiced by an erroneous ruling of the judge in the trial below has no right to complain of it here.

The court having instructed the jury that the obligation of the defendant rested entirely upon the theory that he had stocked the plaintiff's lands to their full capacity and enjoyed their exclusive use, it would have been irrelevant to further charge that defendant's liability was limited to the consumption by his own stock.

THIS was an action originally begun by William Walter Phelps to recover of the plaintiff in error, Samuel Lazarus, the rental value of 186,880 acres of land in Texas, from February 5, 1890, at 8 cents per acre. The allegation of the petition was that defendant permitted large herds of his cattle and horses to graze upon plaintiff's lands and used them for pasturage for other cattle, for which he received hire.

The evidence showed that Phelps was the owner in fee simple of 149,716 acres of land situated in four different counties in Texas. The land was in sections of 640 acres each, alternating with like sections owned by the public school fund of Texas, plaintiff owning the odd-numbered and the fund owning the even-numbered sections. In July, 1887, defendant Lazarus rented from the State, for four years from that date, the alternate sections of land so owned by it. Prior to the time of Lazarus' lease, Phelps had a much larger quantity of land, but before the trial had sold 30,000 acres.

Opinion of the Court.

Plaintiff's lands had been rented to Curtis and Atkinson upon a lease which expired on April 15, 1887. Curtis and Atkinson built wire fences around the land, or a greater portion of it, enclosing both the lands owned by the plaintiff and those owned by the State, which were subsequently leased to defendant. The fence was partly upon plaintiff's land, and partly upon the school land. Phelps had no cattle within the enclosure, but the settlers, some 150 in number, had about 3000 head of cattle running at large and mingling with defendant's cattle. Defendant had within the enclosure a number of cattle estimated by the witnesses at 10,500 head.

Plaintiff introduced testimony, which was objected to, showing that on September 17, 1888, he had instituted a suit similar to this one, against the defendant, and on February 5, 1890, recovered a judgment for the use and occupation of the land to that date. Plaintiff's evidence tended to show that the land had been stocked to its full capacity. Defendant's evidence tended to prove the contrary. Plaintiff also offered evidence showing the value of the land for grazing purposes, during the time covered by this suit, to have been four cents per acre per annum, or $5988.14. The trial resulted in a verdict and judgment for plaintiff in the sum of $5460.32. Defendant thereupon sued out this writ of error.

Mr. F. C. Dillard for plaintiff in error.

Mr. Leigh Robinson for defendants in error.

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

A similar case between the same parties was before this court, and is reported in 152 U. S. 81. In that case the rental value of the same lands from April 15, 1887, to February 5, 1890, was recovered, and the judgment sustained by this court.

1. The first error assigned is to the introduction of the record of that case. The proof was that, on September 17,

1888, plaintiff instituted a suit in the same court, upon a petition containing allegations similar to those in this case, against the defendant for the use of the land after the expiration of the Curtis and Atkinson lease, and in such suit recovered judgment for the use and occupation of said lands up to February 5, 1890, in the sum of $8417. This evidence was offered to establish the fact that defendant did have exclusive possession of said land as charged by plaintiff, and to show that plaintiff had claimed for the use and value of his land from the time of the original occupation of the same by the defendant.

If this had been a mere action of trespass on lands, although the trespass was a continuous one, it might well be said that proof that certain trespasses were committed upon divers days and times before a certain date had no legal tendency to prove that the same trespasses continued beyond that date. But the petition in that case, which is admitted by the bill of exceptions to have been similar to the one filed in the case under consideration, averred not only that defendant, without lawful authority and by force of arms, entered upon such lands, and pastured his cattle there, but that during the whole of said time he converted the said land to his own use, and appropriated and took to himself all its benefits; that at the expiration of the lease to Curtis and Atkinson, the said Lazarus, defendant, purchased all the cattle of the said Curtis and Atkinson, which were then running upon the said lands; that defendant, instead of surrendering said lands to the said plaintiff, as the said Curtis and Atkinson were bound to do, maintained possession thereof, and has since maintained the fence around the whole of said lands, excluding others and the cattle of others therefrom, and "*has held, and is now holding, the exclusive possession of the same to his own use and benefit.*" In other words, the basis of the petition was not only the depasture of these lands, but the exclusive use and occupation of the same. The verdict and judgment in that case settled the fact that the defendant was in the use and occupation of said lands up to February 5, 1890, and, in the absence of evidence to the contrary, such possession would be presumed to continue after that date.

Possession of real property once proven to exist is presumed to continue. *Brown* v. *King*, 5 Met. (Mass.) 173; *Gray* v. *Finch*, 23 Connecticut, 495; *Currier* v. *Gale*, 9 Allen, 522; *Smith* v. *Hardy*, 36 Wisconsin, 417; *Bayard's Lessee* v. *Colefax*, 4 Wash. C. C. 38. As the evidence was offered to establish exclusive possession in the defendant, we think the record of the former judgment was competent.

2. Exception was also taken to the charge of the court that, if the jury believed from the evidence that since February 5, 1890, the defendant had possession of the lands of the plaintiff within said enclosure, and claimed and exercised the exclusive use and enjoyment of plaintiff's lands for grazing purposes, and attempted to exclude others therefrom, either by maintaining fences or line riding, or by force through his employés, or by any or all these means, then they should find for the plaintiff such sum as the evidence showed the reasonable value of the use and occupation of plaintiff's lands so had by defendant for grazing purposes, from said 5th day of February, 1890, to the date of trial. Defendant excepted to this charge on the ground that an attempt to exclude strangers from the pasture would not render him liable, there being no attempt to exclude plaintiff or any one claiming under him.

Had all the lands within the enclosure belonged to the plaintiff, the action of the defendant, in excluding others therefrom, would have been evidence from which the jury might reasonably infer that defendant claimed the exclusive right of possession of the lands; but the argument is that, as the alternate sections had been leased by the defendant, he had a lawful right to exclude every one from the enclosure, so far as he had leased it, except the plaintiff or his lessees, and as he could not exclude others from his own lands without also excluding them from the plaintiff's, the court erred in leaving this fact to the jury as an assertion of an exclusive right to the possession of plaintiff's lands. He had as much right as the plaintiff to exclude strangers from the enclosure, since in depasturing plaintiff's lands, they would also depasture his own. But the decisive answer to this argument is that the proposition of the court was not laid down in the alternative,

that is, that if the defendant exercised the exclusive use and enjoyment of the plaintiff's lands, *or* attempted to exclude others therefrom, he would be liable; but, after charging them that they must find an exclusive use and enjoyment of the lands by the defendant, the court added a further requirement, which appears to have been unnecessary, that they must also find that he had attempted to exclude others therefrom. Perhaps, however, all that was meant was to call the attention of the jury to this fact as tending to prove a claim of exclusive possession. The court evidently proceeded upon the theory that, under the pleadings in the case, the plaintiff could only recover by showing an exclusive use and enjoyment of his lands by the defendant, and that it was not enough simply to show that he had pastured certain of his cattle there, without also showing that he had stocked the lands to their full capacity. In this view, it was quite unnecessary to add the instruction that they must further find that he had attempted to exclude others therefrom; but this took nothing from what the court had previously charged, and was an instruction of which the plaintiff rather than the defendant had a right to complain. It added to the plaintiff's burden of showing an exclusive enjoyment of his lands that of showing that defendant had also attempted to exclude strangers. But it did not relieve him from the duty of showing such exclusive use and enjoyment. In other words, the defendant was not prejudiced by the error and has no right to complain. *Lancaster* v. *Collins*, 115 U. S. 222.

3. In this connection, too, defendant requested the further charge that where several persons own separate tracts of land in the same enclosure, each one has the right to place enough stock therein to consume the grass upon his part of the lands, and is not liable to the others therefor; but if he places therein more stock than his part of the land will reasonably maintain, he will be liable to the other owners for the excess, and no more; and also that if the jury believed from the evidence that plaintiff's grass was consumed by stock of defendant's and other persons, then defendant would only be liable for the part consumed by his own stock, to be ascertained by appor-

tioning the total damage in the proportion that the number of his stock bears to the total number doing the damage.

But, as already stated, the court put the whole liability of the defendant upon the theory that he had enjoyed the exclusive use and occupation of plaintiff's lands, and had stocked them to their full capacity. If this be so, (and there was evidence to that effect,) then undoubtedly plaintiff would be entitled to recover the entire rental value of the lands for grazing purposes. If it were not so, then under the charge of the court the plaintiff could recover nothing, though defendant may have pastured thousands of his cattle upon these lands. Whether the court was correct in its view that, under the pleadings, plaintiff could not recover for a partial depasturage of his lands, is quite immaterial, since if the jury had found such partial depasturage it would have been their duty, notwithstanding, to have returned a verdict for the defendant. In the opinion of the court, the whole obligation of the defendant rested upon the fact that he had stocked the plaintiff's lands to their full capacity, and had thus enjoyed their exclusive use and occupation. The charge requested was, therefore, irrelevant.

There was no error in the action of the court, and its judgment is, therefore, *Affirmed.*

In re STREEP, Petitioner.

ORIGINAL.

No number. Submitted January 21, 1895. — Decided January 28, 1895.

The judge in a Circuit Court having settled and signed a bill of exceptions, this court will not, on an application, supported by affidavits that the bill as settled and signed is incorrect, issue a writ of mandamus requiring him to resettle them.

THIS was an application by Louis F. Streep for leave to file a petition for a mandamus requiring the judge of the District Court of the United States for the Eastern District of New

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York, acting as judge of the Circuit Court of the United States for the Southern District of New York, to resettle the bill of exceptions in a certain cause lately pending in said Circuit Court, and tried before that judge, wherein the United States were plaintiffs and Louis F. Streep was defendant, as to a certain request to charge, "according to the truth as the same appears by the stenographer's minutes taken on the trial," in respect of which request to charge affidavits to the effect that the bill of exceptions as settled and signed by the judge was incorrect accompanied the application.

Applicant had previously moved in the Circuit Court for such resettlement of the bill of exceptions, and the motion had been denied.

Mr. Frank Warner Angel for the petitioner.

THE CHIEF JUSTICE, after making the above statement, said: The application for leave to file a petition for mandamus is denied. *Ex parte Bradstreet*, 4 Pet. 102; *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 557.

LINDSAY *v.* BURGESS.

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

No. 191. Submitted January 25, 1895. — Decided January 28, 1895.

The assignment in this court of errors to portions of the charge in an action below raises no question for the consideration of this court, unless exceptions were duly taken to them.

EJECTMENT. The court below in its charge to the jury said: "This is an action of ejectment in which the plaintiff claims the legal title to and seeks to recover 5000 acres of land lying in Campbell County, Tennessee. She deraigned her title to the land as follows: On the 2d of August, 1836, said tract of land was entered by Joshua English, Samuel Burgess, and Joseph Peterson by entry No. 843. Subsequent thereto, in

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1838, said English and Burgess removed from Tennessee to Missouri, where they continued to reside till their respective deaths. On August 26, 1845, a grant from the State of Tennessee, numbered 25,338, was issued to 'Joshua English and others' for said 5000-acre tract. This grant has been read in evidence. Joshua English died in 1850, leaving the plaintiff, then the wife of said Samuel Burgess, as his sole surviving child and heir-at-law. Plaintiff's husband died in July, 1874. The court instructs you that said grants from the State of Tennessee vested the legal title to the five thousand acres of land therein described in said Joshua English only, and that upon his death said title descended and vested in plaintiff as his sole heir-at-law. . . . The defendants seek to defeat her title. . . . They set up a tax deed from the sheriff of Campbell County, bearing date December 8, 1845, and registered in May, 1846, which it is claimed operates to divest the title out of plaintiff's father, Joshua English, and vest it in the purchasers under said sheriff's tax deed, through whom the defendants derive title; and, secondly, that under claim of right and color of title they have had seven years' adverse possession of the land in controversy before the present suit was commenced, which adverse possession, under the operation of the Tennessee statutes of limitation, vested them with the title to the land. No question is raised as to the location or identity of the land in controversy. It is conceded that the tract described in the grant and in plaintiff's declaration is the same tract that defendants claim under said tax deed and by virtue of their adverse possession.

"The court instructs you that the tax deed introduced and relied on by defendants is not sufficient to show or establish title to the land; that said tax deed is null and void upon its face and inoperative to divest plaintiff's title."

Verdict for defendant and judgment on the verdict, to which a writ of error was sued out. In this court the assignments of error were: (1) The court erred in charging the jury that the grant relied on by plaintiff below vested title to the land in her ancestor solely. (2) The court erred in charging the jury that the tax deed relied on by defendants

is void upon its face: but the record contained no exception to such instructions.

Mr. W. A. Henderson and *Mr. Leon Jourolomon* for plaintiffs in error.

Mr. W. P. Washburn and *Mr. Jerome Templeton* for defendant in error.

THE CHIEF JUSTICE: Errors are assigned to certain portions of the charge to the jury in this case, but no exceptions were preserved thereto, and no question otherwise raised for our consideration. The judgment is, therefore,

Affirmed.

POSTAL TELEGRAPH CABLE COMPANY *v.* BALTIMORE.

ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

No. 828. Submitted January 21, 1895. — Decided January 28, 1895.

St. Louis v. *Western Union Tel. Co.*, 148 U. S. 92, affirmed and applied to this case.

THIS was an action at law, brought by the city of Baltimore, defendant in error, against The Postal Telegraph Cable Company, plaintiff in error, a corporation created under the laws of the State of New York, in the Court of Common Pleas of Baltimore City, a court of original common law jurisdiction, to recover the sum of $1018.00, with interest from the 15th day of June, 1893, the same being an annual rental fee for the use of the streets of Baltimore, of $2.00 per pole, for 509 telegraph poles, which were owned by the plaintiff in error, and located in and occupying a portion of the public streets of Baltimore. The rental fee was the amount prescribed by Ordinance No. 86 of 1893, to be paid by all companies which

owned and had located in the streets of Baltimore similar poles and similarly used. Judgment below in plaintiff's favor, which judgment was sustained by the Court of Appeals of the State of Maryland. A writ of error being sued out to the latter judgment, the defendant in error moved to dismiss or affirm it on the ground, among others, that "the ordinance in question was based on and passed after the opinion of the Supreme Court of the United States was delivered in *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92 and 149 U. S. 465, and upon the strength of that case the defendant in error relied in the Court of Appeals of Maryland, and now relies in this court."

Mr. Thomas G. Hayes and *Mr. William S. Bryan, Jr.*, for the motion.

Mr. George H. Bates opposing.

THE CHIEF JUSTICE: The judgment is affirmed upon the authority of *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92.

In re CHAPMAN, Petitioner.

ORIGINAL.

No number. Submitted January 22, 1895. — Decided February 4, 1895.

C., being summoned before a committee of the Senate of the United States and questioned there as to certain transactions, declined to answer the questions upon the grounds that they related to his private business, and that they were not authorized by the resolution appointing the committee. He was thereupon indicted in the Supreme Court of the District of Columbia under the provisions in Rev. Stat. §§ 102, 103, 104. He demurred to the indictment, and, the demurrer being overruled, an appeal was taken to the District Court of Appeals, where the indictment was sustained as valid, and the case remanded. He then applied to this court for permission to file a petition for the issue of a writ of *habeas corpus*. *Held*,

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(1) That the orderly administration of justice will be better subserved by declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings;
(2) That if the judgment goes against the petitioner and a writ of error lies, that is his proper and better remedy;
(3) That if a writ of error does not lie, and the Supreme Court of the District is without jurisdiction, the petitioner may then apply for a writ of *habeas corpus*.

It is a judicious and salutary general rule not to interfere with proceedings pending in the Courts of the District of Columbia, or in the Circuit Courts of the United States, in advance of their final determination.

This was an application by Elverton R. Chapman for leave to file a petition for the writ of *habeas corpus*. Petitioner represented that he was unlawfully restrained of his liberty by the United States marshal for the District of Columbia, and stated: That on June 29, 1894, an indictment was returned against petitioner in the Supreme Court of the District of Columbia, holding a criminal term, based upon section 102 of the Revised Statutes of the United States, upon which he voluntarily surrendered himself into the custody of the court, July 2, 1894, and entered into a recognizance for his appearance as he might thereunto be required, and thereupon petitioner filed a demurrer to the indictment; that October 1, 1894, another indictment was found against petitioner under said section, which indictment was returned as a substitute for and in lieu of the former indictment, and a certified copy whereof was annexed to the petition.

The indictment averred that Chapman was summoned and appeared as a witness before a special committee of the Senate of the United States in relation to a matter of inquiry before said committee, and that he refused to answer questions pertinent to the matter of inquiry referred to such committee.

The petition then alleged that petitioner, on October 11, 1894, filed his demurrer to the last named indictment, together with a note appended thereto stating the grounds of the demurrer; that November 17, 1894, the demurrer was overruled and petitioner required to appear and plead; that afterwards the Court of Appeals of the District of Columbia allowed an appeal from the order of the Supreme Court overruling the

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demurrer, and on December 14, 1894, the matter was duly submitted to the Court of Appeals and taken under advisement; that on January 7, 1895, the Court of Appeals gave judgment, affirming the order of the Supreme Court overruling the demurrer and requiring petitioner to plead to the indictment, and the cause was remanded by the Court of Appeals to the Supreme Court to be proceeded in, and is now duly pending in, the last named court.

The petition further stated that, on January 18, 1895, petitioner was surrendered upon his recognizance and committed to the custody of the United States marshal for the District of Columbia, and petitioner charged that his detention was unlawful because in violation of the laws and Constitution of the United States and for want of jurisdiction in the court to make the order of imprisonment.

It was averred that the questions and each of them set forth in the indictment, and which petitioner declined to answer, were questions in regard to the lawful private business of petitioner which he was not bound to answer, and was protected from answering by provisions of the Constitution and laws of the United States; and were questions not authorized by the resolution of the Senate upon which the investigating committee rested its authority; that the conditions under which the questions were asked were not such as authorized the committee to make search into the private affairs of petitioner, nor were they such as authorized or permitted the Senate to demand or compel answers to questions which would disclose the private business of petitioner; that the refusal of petitioner to answer the questions was not a misdemeanor within the true intent and meaning of section 102 of the Revised Statutes; that that section was unconstitutional and void in that it attempted to transfer the power to punish acts constituting contempt of the Houses of Congress, respectively, to the exclusive jurisdiction of the criminal court of the District of Columbia; that if the section was not designed to transfer such jurisdiction to the criminal court, but was designed to add to the power of both Houses to punish for contempt, the power and jurisdiction in the criminal court to

punish the same acts as misdemeanors, then the section was void because in contravention of the Fifth Amendment to the Constitution; that sections 102 and 103 of the Revised Statutes were to be taken together as parts of a single and indivisible scheme, and the provisions of section 102 could not be enforced in disregard of the provisions of section 103 consistently with the intention of Congress, and if section 103 was not capable of being executed because unconstitutional, then section 102 could not be executed; that section 103 was unconstitutional because compelling involuntary answers to questions put by committees of either House of Congress, although the witness might decline to answer on the ground that his testimony or his production of papers might tend to disgrace him or otherwise render him infamous; and that upon these and other grounds petitioner's imprisonment was without any authority of law and in excess of the jurisdiction of the court.

Sections 102, 103, and 104 of the Revised Statutes are as follows:

"SEC. 102. Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

"SEC. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"SEC. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or

the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action."

The Court of Appeals held that section 102 was constitutional and valid; that the inquiry directed by the resolution of May 17, 1894, was within the power of the Senate to execute by requiring witnesses to testify; and that the questions propounded to Chapman were pertinent to the subject-matter given in charge to the committee; and was of opinion that the indictment was good and sufficient. 23 Wash. Law Rep. 17.

Mr. Samuel Shellabarger, *Mr. Jeremiah M. Wilson* and *Mr. George F. Edmunds* for the petitioner.

Mr. Solicitor General opposing.

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

The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors. *Ex parte Watkins*, 3 Pet. 197; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Bigelow*, 113 U. S. 328; *In re Coy*, 127 U. S. 731, 756; *In re Schneider*, *Petitioner*, 148 U. S. 162. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal, *In re Frederich*, *Petitioner*, 149 U. S. 70; *In re Tyler*, 149 U. S. 164, 180, *In re Swan*, 150 U. S. 637, 648; yet in rare and exceptional cases it may be issued although such remedy exists. *Ex parte Royall*, 117 U. S. 241; *New York* v. *Eno*, 155 U. S. 89.

We have heretofore decided that this court has no appellate jurisdiction over the judgments of the Supreme Court of the District of Columbia in criminal cases or on *habeas corpus*. *In re Heath*, *Petitioner*, 144 U. S. 92; *Cross* v. *United States*,

145 U. S. 571; *Cross* v. *Burke*, 146 U. S. 82. But it is contended that under section 8 of the act of February 9, 1893, 27 Stat. 434, c. 74, establishing a Court of Appeals for the District of Columbia, the judgments of the Supreme Court of the District reviewable in the Court of Appeals may be reviewed ultimately in this court even in criminal cases, where the validity of a statute of, or an authority exercised under, the United States is drawn in question. We do not feel constrained, however, to determine how this may be, as we are of opinion that the application must be denied on another ground.

In *New York* v. *Eno*, 155 U. S. 89, the circumstances under which a court of the United States should, upon *habeas corpus*, discharge one held in custody under the process of a state court were considered, as they had previously been in *Ex parte Royall*, 117 U. S. 241, and the views expressed in the latter case reiterated with approval. It was 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 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 in a state court against a prisoner on account of the very matter presented for determination by the writ of *habeas corpus;* but that the statute did not imperatively require the Circuit Court by that writ to wrest the prisoner from the custody of the state officers in advance of his trial in the state court; and that while the Circuit Court had the power to do so and could discharge the accused in advance of his trial, it was not bound in every case to exercise such power immediately upon application being made for the writ. The conclusion was that, in a proper exercise of discretion, the Circuit Court should not discharge the petitioner until the state court had finally acted upon the case, when it could be determined whether the accused, if convicted, should be put to his writ of error, or the question determined on *habeas corpus* whether he was restrained of his liberty in

violation of the Constitution of the United States. These principles were fully discussed in the cases of the appeals of Royall from judgments on *habeas corpus* of the Circuit Court of the United States for the Eastern District of Virginia, 117 U. S. 241, and in addition thereto Royall made an original application to this court for a writ of *habeas corpus*, which was denied upon the grounds stated in the previous cases. *Ex parte Royall*, 117 U. S. 254.

It must be admitted that special reasons of great weight exist why this should be the rule in respect of proceedings in a state court which are not applicable to cases in the courts of the United States. Nevertheless we regard it as a judicious and salutary general rule not to interfere with proceedings pending in the courts of the District of Columbia or in the Circuit Courts in advance of their final determination. In *Ex parte Mirzan*, 119 U. S. 584, it was decided that this court would not issue a writ of *habeas corpus*, even if it had the power, in cases where it might as well be done in the proper Circuit Court, if there were no special circumstances in the case making direct action or intervention by this court necessary or expedient. And in *In re Huntington*, 137 U. S. 63, we applied that rule in the case of a person claiming to be detained by a United States marshal for the Southern District of New York, by virtue of an order purporting to be an order of the Circuit Court of the United States for the District of Colorado. In *In re Lancaster*, 137 U. S. 393, it was held that this court would not interfere where petitioners had been indicted in a Circuit Court of the United States and taken into custody, but had not invoked the action of the Circuit Court upon the sufficiency of the indictment by a motion to quash or otherwise, although the contention was that the matters and things set forth and charged in the indictment did not constitute any offence or offences under the laws of the United States or cognizable in the Circuit Court.

In the case before us, the question as to the jurisdiction of the Supreme Court of the District of Columbia has indeed already been passed upon by that court and also by the Court of Appeals, upon a demurrer to the indictment, but the case

has not gone to final judgment in either court, and what the result of a trial may be cannot be assumed. We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. If judgment goes against petitioner and is affirmed by the Court of Appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have. If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may then seek his remedy through application for a writ of *habeas corpus*. We discover no exceptional circumstances which demand our interposition in advance of adjudication by the courts of the District upon the merits of the case before them.

Leave denied.

MR. JUSTICE FIELD dissented.

In re SCHRIVER, Petitioner. Submitted January 22, 1895. Decided February 4, 1895.

THE CHIEF JUSTICE: This is an application for leave to file a petition for *habeas corpus* differing in no material respect from that just considered, and, for the reasons there given, it is denied.

MR. JUSTICE FIELD dissented.

Mr. A. J. Dittenhoeffer for the petitioner.

McGAHAN *v.* BANK OF RONDOUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 104. Argued December 12, 1894. — Decided February 4, 1895.

In a suit of equity to enforce the rights of a mortgagee in mortgaged realty, the defence that the temporary withholding of the mortgage from record invalidated it as against creditors cannot be made in the first

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instance in this court, when the issue is not made by the pleadings and was not otherwise raised in the court below.

Where a deed is executed on behalf of a firm by one partner, the other partner will be bound if there be either a previous parol authority or a subsequent parol adoption of the act.

In such case ratification by the other partner may be inferred from his presence at the execution and delivery of the deed, or from his acting under it or taking the benefits of it with knowledge.

In South Carolina a tenant in common of real estate, who takes sole possession of it, excluding his cotenant, is chargeable with what he has received in excess of his just proportion, and is liable to account to him for the rents and profits of so much of the common property as he has occupied and used in excess of his share.

After the execution and delivery of a mortgage of real estate in South Carolina to a citizen of New York, the estate was sold under a judgment obtained subsequent to the mortgage and the purchasers went into possession. The mortgagee filed a bill in equity against them in the Circuit Court of the United States for the District of South Carolina, asking an injunction against commission of waste, a discovery of the amount and value of trees cut by them since they came into possession, and an accounting to the court for the same, and for a sale of the mortgaged premises for the payment of the mortgage debt. The mortgagor had died before the commencement of the suit, and his heirs were not made parties, they being citizens of the same State as the plaintiff. No objection was made to proceeding in their absence, and a decree of foreclosure and sale was made as to them, and they were further ordered to account for the conversion of the property which they had taken. *Held*,

(1) That as the decree was operative to the extent of the foreclosure and sale, it could be sustained in respect of the accounting;

(2) That the appellants could not insist, in this court, upon an objection which, if sustained, would curtail the relief to which the appellee was entitled, or overthrow the jurisdiction of the Circuit Court.

This was a bill filed by the National Bank of Rondout, New York, in the Circuit Court of the United States for the District of South Carolina, September 26, 1890, against Thomas R. McGahan, D. R. Smith, and E. P. Smith, citizens of South Carolina.

The bill alleged that on November 30, 1883, Walter B. Crane was seized and possessed in fee of all the undivided three-fourths of certain described parcels of land in Williamsburg and Georgetown Counties, South Carolina, known as the Longwood plantation and Britton's Ferry; that on that day,

"in order to secure the endorsement by said Walter B. Crane of four certain promissory notes, amounting in the aggregate to twelve thousand dollars, and every renewal and renewals thereof, said notes being made by David R. Smith and Walter B. Crane under the firm name of D. R. Smith & Co., and endorsed by Walter B. Crane," then held by the National Bank of Rondout, Crane and his wife executed a mortgage on the undivided three-fourths interest in and to said tracts of land, which mortgage was recorded in Georgetown County, February 27, and in Williamsburg County, March 6, 1885.

It was further averred that the debt became due in June and July, 1885; that Crane departed this life September 5, 1887, leaving the debt unpaid and leaving his wife surviving him; that in December, 1887, the bank recovered judgment on the notes in the Circuit Court.

The bill then alleged that after the execution of the mortgage, and subsequent to the record thereof, the real estate included therein was sold by the United States marshal for the District of South Carolina by virtue of certain executions in his hands, and conveyance made to Thomas R. McGahan of "all the right, title, and interest of said firm of D. R. Smith & Co., a firm composed of D. R. Smith and W. B. Crane, and of D. R. Smith individually;" that McGahan took possession and leased the property to Elizabeth P. Smith, the wife of D. R. Smith; that the lands were timber lands of great value because of the timber thereon, and that McGahan and those under him were cutting down and removing the timber, thus committing waste and destroying the value of the security.

The prayer of the bill was that the defendants "may set forth and discover the claim under which they are in possession of said lands and how the same was acquired and upon what facts it is based; that they may be enjoined under the order of this court from committing further waste on said lands, and especially from cutting down and removing any timber from said lands; that they may set forth and discover the amount and number and value of the trees cut by them or any of them or by their authority since the said Thomas R. McGahan came into control or possession thereof or by any

of them under his authority; that they account to the court for the said value; that they be permitted a reasonable time within which to redeem the said mortgage, if perchance it shall appear that they or any of them have the equity of redemption thereof, and that, failing so to do, on a day fixed by your honors, the equity of redemption be barred and the said property be sold and the proceeds of sale applied to the debt of the said bank, with all interest accrued and to accrue thereon; and for such other and further relief in the premises as to your honors may seem meet."

The defence set up in the joint answer of Thomas R. McGahan, D. R. Smith, and E. P. Smith, his wife, was that the lands mentioned in the bill were agreed to be purchased and held as partnership property by D. R. Smith & Company, under articles of copartnership entered into August 30, 1869, by George North, Walter B. Crane, Edward Tompkins, and D. R. Smith, to be used for agricultural purposes and for the manufacture of lumber; that machinery was purchased and a large saw mill erected and other improvements put upon the premises by the copartnership; that thereafter the interest of North and Tompkins in the copartnership was purchased by Crane, who, with the defendant D. R. Smith, continued the business under the firm name of D. R. Smith & Company; that the premises were in the notorious possession of Smith as resident copartner, as and for copartnership property, and that complainant knew or had means of knowledge that it was such; that the mortgage was executed without the knowledge or consent of Smith, and the property so mortgaged was subject to the rights of creditors of the copartnership. And the answer averred that under and by virtue of writs of execution, dated the 28th of April, 1885, on judgments recovered against D. R. Smith & Co. and D. R. Smith individually, the property described in the bill of complaint "was levied upon and sold by said marshal at public outcry, on the 7th day of September, A.D. 1885, to the defendant, Thomas R. McGahan, for the sum of $3850, he being at that price the highest bidder for the same, and a deed of conveyance, dated the said 7th day of September, 1885, was thereafter duly executed by said

marshal to the defendant, Thomas R. McGahan; that the defendant, Elizabeth P. Smith, is now in possession of said premises, under a lease from said Thomas R. McGahan, and carrying thereon the business of manufacturing lumber, and for that purpose has used such timber as was necessary for said purpose. . . .

"And the defendant, Thomas R. McGahan, further answering, alleges that by virtue of said sale and purchase as aforesaid, he became and is the owner of the premises described in said mortgage, and that the said premises having by the terms of the articles of copartnership been held as and for copartnership property were first liable to copartnership debts in priority to the individual interest of the copartners therein, and that by virtue of the sale and his purchase as aforesaid, he is entitled to hold and enjoy the same free from the lien of said mortgage."

At the hearing, on pleadings and proofs, the following matters appeared:

On May 6, 1869, A. W. Dozier conveyed to George North three several tracts of contiguous land, containing in the aggregate five thousand six hundred and twenty acres, situated in the county of Williamsburg in the State of South Carolina, and known as the Longwood plantation, and on June 6, 1869, C. W. Martin conveyed to North a tract of land containing five hundred acres, situated in Williamsburg and Georgetown Counties, known as Britton's Ferry. North, in consideration of $2500, conveyed an undivided one-fourth part of the lands, on July 2, 1869, to Walter B. Crane, and on the same day and for the same consideration conveyed to Edward Tompkins an undivided one-fourth part thereof. Apparently D. R. Smith became the purchaser also of an undivided one-fourth of the lands, and he executed a mortgage of all of his interest therein to Crane and also a like mortgage to Tompkins, August 28, 1869. These mortgages recited that Crane and Tompkins had each lent to Smith the sum of $1322, to enable him to purchase, take, and hold an undivided one-fourth part of the premises, and that it was agreed by and between the said parties that the money so loaned as aforesaid and such as might thereafter

be advanced by Crane and Tompkins to Smith should be a lien and charge upon the interest of Smith in the land and premises thereinafter mentioned and described, and the buildings and erections thereon or which should be thereafter erected.

The record disclosed an undated agreement signed by North, Crane, Tompkins, and Smith, reciting that whereas the parties, described as all of Rondout, New York, had purchased in joint copartnership a plantation on the Great Pedee River in Williamsburg County, State of South Carolina, known as Longwood, and also another plantation, partly in said county and partly in Georgetown County, known as Britton's Ferry, and whereas it was in contemplation to erect a saw mill or mills or other machinery for manufacturing, sawing, and preparing of timber for market now growing upon said plantations or otherwise obtained, and also to cultivate said plantations for the production of grain, cotton, etc., it was agreed that Smith was to take charge of the plantations and superintend the erection of such saw mills as might be necessary and in accordance with the consent of the mutual partners, and that said Smith was to superintend the preparation of the lumber for market and its sale, and to conduct the plantations and lumber business, etc., and whereas Smith was unable to advance or pay his proportion of the capital to make the purchase and develop the same, Crane and Tompkins agreed to advance to Smith $5000 in equal proportions from time to time, and Smith agreed that he would devote his entire time and attention to the partnership and to mortgage his undivided one-fourth interest to Crane and Tompkins for their security, and the agreement concluded: "The business of this firm to be conducted in the name and firm of David R. Smith & Co., and it is understood by the above parties named in this contract that the above agreement is to be in full force and virtue for the term of five years from the first day of May, A.D. 1869, unless otherwise ordered and determined by the mutual consent of the parties concerned."

August 30, 1869, a copartnership agreement was entered into between North, Crane, Tompkins, and Smith, in which North, Crane, and Tompkins are described as of Rondout,

New York, and Smith as of Longwood, South Carolina. This agreement recited that the parties had agreed to become partners together in the cultivation of two plantations on the Great Pedee River in the counties of Williamsburg and Georgetown, known as Longwood and Britton's Ferry, and also in the manufacture and sale of lumber and timber then growing upon said plantations or otherwise purchased or obtained. It was stated, among other things, that Smith, as the active and resident partner, was authorized "to use and sign the name of the firm in all transactions necessary to conduct the business of said copartnership;" that the copartnership was to continue for five years from the first day of May, 1869; and reference was made to an agreement with D. R. Smith bearing date May 1, 1869.

On November 28, 1871, North, in consideration of $4000, conveyed to Tompkins an undivided one-eighth interest in said lands, and on the same day and for the same consideration conveyed an undivided one-eighth to Crane. On December 29, 1871, North, Crane, and Tompkins executed an agreement to the effect that North thereby sold to Crane and Tompkins all his right, title, claim, and interest in the copartnership rights or property for the sum of $8000, North being indemnified as against the liabilities of the firm.

A memorandum was attached to the copartnership agreement dated October 1, 1874, signed by Crane, Tompkins, and Smith, to the effect that Crane and Tompkins had purchased the entire interest of North in the business, and agreeing to continue the same; also a memorandum under date of March 1, 1877, reciting that Tompkins having disposed of his interest to Crane in the agreement, Crane and Smith agree to continue the business until April 1, 1878. On that date, March 1, 1877, an instrument was executed by Crane and Tompkins under seal and witnessed by Smith, apparently intended, in consideration of a deed of certain lots at Rondout, New York, to acknowledge the transfer to Crane of Tompkins' "whole and entire interest in all and every description of property now held in the name and firm of D. R. Smith & Co., located in South Carolina, with lumber and book ac-

counts at Rondout, New York;" and Crane thereby released Tompkins from all debts, dues, and demands owed by D. R. Smith & Co., except seven notes in the National Bank of Rondout, which it was agreed should be continued from one to two years, if required, Tompkins and Crane holding themselves responsible for the notes, but Crane agreeing to pay the notes and indemnify Tompkins from all loss incurred from their extension. Crane and Tompkins also agreed to the dissolution of the firm from date. On April 24, 1877, Tompkins, in consideration of $1322 paid to him by Crane, assigned to Crane the mortgage made by Smith to Tompkins, August 28, 1869.

On November 30, 1883, Crane conveyed to the National Bank of Rondout an undivided three-fourths interest of all the tracts of land known as Longwood and as Britton's Ferry, in consideration of the sum of $12,000, which deed recited: "This grant is intended as a security for the payment of the four certain promissory notes, amounting in the aggregate to twelve thousand dollars, or the renewal or renewals of them, or either, or any of them, together with the lawful discount or interest thereon, said notes being made by David R. Smith and Walter B. Crane, under their firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane, and payable at the National Bank of Rondout." In case of default in payment it was provided that the property might be sold by the parties, and that after payment, from the proceeds, of the indebtedness and costs, the overplus, if any, should be paid, on demand, to Crane, his heirs or assigns. The evidence tended to establish other facts referred to by the Circuit Court.

The Circuit Court, Judge Bond presiding, in its opinion or decree found that Walter B. Crane, the mortgagor, owned the undivided three-fourths of the property described in the bill; "that he mortgaged the same to the National Bank of Rondout in November, 1883, to secure $12,000 of promissory notes, made by David R. Smith and Walter B. Crane, under the firm name of D. R. Smith & Co., and endorsed by Walter B. Crane and Henry M. Crane, and payable at the National

Bank of Rondout; that this mortgage was held by the National Bank of Rondout in its possession and was, at the request of Walter B. Crane, one of the copartners, withheld from registry in South Carolina from the date of its delivery in November, 1883, until the 27th February, 1885, when it was duly recorded in the office of the clerk of the Court of Common Pleas of Georgetown County, South Carolina, and the 6th day of March, 1885, when it was recorded in the office of the register of mesne conveyances for Williamsburg County, in said State; that the notes recited in the mortgage were not paid at maturity and were from time to time renewed, until the 6th, 17th, and 29th days of June and the 3d day of July, 1885, respectively, . . . at the expiration of which times of payment they each became due and since said dates have remained unpaid; that on the 27th April, 1885, certain judgments were recovered in the Circuit Court for the District of South Carolina against D. R. Smith & Co., upon the default of D. R. Smith, the only one of the defendants who was served, and executions were lodged to bind the property of said firm and the individual property of D. R. Smith, but not the separate property of Walter B. Crane; that under said judgments and executions the marshal of this court, at Kingstree, in the county of Williamsburg, on the 7th day of September, 1885, sold the interest of the said D. R. Smith & Company, and the interest of D. R. Smith individually in the real estate of D. R. Smith & Co., for the sum of $3850, to Thomas R. McGahan, one of the defendants in this suit, and on the same day executed and delivered to him as purchaser, a deed of conveyance of the property described in the deed, which is the same property, the three-fourths interest in which was mortgaged by Walter B. Crane to the National Bank of Rondout; that the said Thomas R. McGahan, assuming to be the owner of the entire property, shortly after the said sale to him executed to the defendant, Mrs. Elizabeth P. Smith, wife of the above-named D. R. Smith, a lease of said property, including the mills, machinery, and personal property connected therewith; that since then the said D. R. Smith, as agent for his wife, has been

using the said mill property for their own purposes, and has been carrying on an extensive business in cutting and shipping lumber; that the title to the three undivided one-fourths in the fee of said real estate was conveyed by regular deed to Walter B. Crane, the mortgagor, who, with his wife concurring, conveyed them to the National Bank of Rondout to secure the copartnership debt of D. R. Smith & Co.; that the title deeds to Crane show no trust of any kind qualifying Crane's title; that there was no evidence to show any special trust which would restrict or qualify Crane's right to make an absolute conveyance of his undivided three-fourths interest in said real estate and the improvements thereon, of the nature of fixtures or appurtenances thereto belonging; that there was satisfying evidence that D. R. Smith knew that the mortgage had been given as security for the debt of D. R. Smith & Co.; that he knew that the notes were renewed, and that he by his silence entirely acquiesced in the act of Crane in giving the mortgage to the bank."

The Circuit Court also said:

"It is unnecessary to consider the question whether three-fourths in the land and fixtures appurtenant to the land were or were not partnership property, and whether, as such, were first liable to copartnership debts in priority to the individual interests of the copartners therein, because, assuming this to have been the nature of the property, the mortgage of the partnership assets by one copartner for the benefit of the partnership without the assent of the other partner would in the absence of fraud (which is not here suggested) be undoubtedly valid as a security to a particular creditor to whom it was mortgaged; *a fortiori*, if made with the assent, express or implied, of the other partner, who, as in the case of D. R. Smith, knew of the mortgage, did not object, and who participated in the benefit of the extension of the debt which the firm of D. R. Smith & Co. obtained from the bank.

"The title which Thomas R. McGahan, as purchaser, acquired under the sale and conveyance in September, 1885, made by the marshal under the execution against the firm of D. R. Smith & Co. and the individual interest of D. R. Smith,

could be no better or higher than that which the firm had or could have claimed in the property so sold and conveyed. As D. R. Smith & Co. and D. R. Smith could not have claimed to hold the property in derogation of the right to the three-fourths interest therein of the National Bank of Rondout under the mortgage given to it in 1883 to secure the debt of D. R. Smith & Co., so the defendant Thomas R. McGahan cannot claim against the right of the bank to three undivided fourths in said land and improvements and fixtures."

The court entered a decree annulling the lease made by McGahan to E. P. Smith, and directing an account for three-fourths of the rents and profits from September 7, 1885, when McGahan assumed the ownership and possession of the whole property, and for any waste which might have been permitted between that date and the date of the accounting; foreclosing the equity of redemption of Walter B. Crane and directing a sale of the property, the proceeds after payment of costs to be paid to complainant to be credited on the debt secured by the mortgage.

From this decree defendants prosecuted an appeal.

Mr. J. N. Nathans (with whom was *Mr. Samuel Lord* on the brief) for appellants.

I. The court should have held that the conduct of the mortgagor in withholding the mortgage from record under an agreement with the mortgagor, and for the purpose of giving the firm a fictitious credit was void as against the creditors who had been thereby misled. This defence to the mortgage was not made in the answer, though pressed upon the court at the hearing, and should not be denied to the appellants, if tenable, because of this failure so to make it.

Under section 1776 of the General Statutes of South Carolina, a mortgage of real or personal estate shall be valid so as to affect from the time of delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution, in the office of the

register of mesne conveyances of the county where the property affected thereby is situated in the case of real estate. . . . Provided, nevertheless, that the above-mentioned deeds or instruments in writing if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record.

In *King* v. *Fraser*, 23 S. C. 543, the Supreme Court of South Carolina construing this section, held that by subsequent creditors were meant subsequent lien creditors, and that as against general creditors who became such between the execution of and recording the mortgage was entitled to priority. This does not, however, affect the question of whether the mortgage was valid in its inception, which must be determined on the principles of the common law. At common law it would be an obvious fraud to agree to withhold a mortgage from record to secure a continuing credit for the mortgagor with the public, and record it when the creditors, whose confidence was thus betrayed, would be defeated in recovery of their debts by the interposition of the mortgage.

II. By the articles of copartnership the copartners expressly agree to become copartners in its purchase and cultivation, and in the manufacture and sale of the lumber and timber growing upon it, and provide that the capital to be furnished by them shall be applied to the payment of the purchase money of the land. It was necessary for the ordinary operation of the partnership business, and was actually so employed from the time of the purchase until it was sold under judgment recovered against the partnership and under which McGahan purchased. The improvements consisting of machinery and buildings erected and put upon the lands were paid for with copartnership capital and profits. It is true, conveyances of the legal title were made to the several parties, according to their respective interests as copartners, but though at law this made them tenants in common, in equity the property is deemed copartnership property, and the partnership is the

equitable owner thereof. *Hoxie* v. *Carr*, 1 Sumner, 173; *Hiscox* v. *Phelps*, 49 N. Y. 97; *Cavender* v. *Bulteel*, L. R. 9 Ch. 79.

In this case this results not from any constructive trusts arising from the use of the copartnership assets in the purchase of the land, but is the very basis of the association of the copartnership resting on contract and not implication. That the land was the property of the partnership was known to the bank, and there can be no pretence that it was misled as to the tenure by which the property was held, by the fact that upon the records the legal title stood in the names of the several partners. The continued use and possession of the property by the firm would alone have been constructive notice of the equitable right of the copartnership, (Jones on Mort. § 120,) and this is certainly the law in South Carolina. *Massey* v. *McIlvaine*, 2 Hill Eq. (S. C.) 42; *Stroman* v. *Varn*, 19 S. C. 307.

In South Carolina the general rule is, that one copartner has no power to bind his copartners by deed or other instrument requiring seal. *Stroman* v. *Varn*, 19 S. C. 307; *Sibley* v. *Young*, 26 S. C. 415; *Hull* v. *Young*, 30 S. C. 121.

III. The court clearly erred in holding that it was unnecessary to consider the question whether the three-fourths of the land and fixtures appurtenant thereto were or were not partnership property. If it was partnership property, then the legal title in Crane was held in trust for the partnership, and his individual interest was subordinate to that of the partnership and distinct from it. This individual interest could be sold or mortgaged by him for a copartnership debt if his copartner opposed and protested against a mortgage by the firm of the firm's interest, or for his individual debt. In this case not only the circumstances under which it was given, but the provisions of the mortgage, show that it was not intended to bind the partnership interest. It was executed by Crane individually, in his own name, and not in the name and as the act of the firm or the other copartners. In *Clark* v. *Houghton*, 12 Gray, 38, it was held that the execution of a mortgage of personal property of a partnership by a partner in his individual name passed no title.

IV. A mortgagee is not entitled to rents and profits unless a lien thereon is given in the mortgage. Gen. Stats. S. C., § 2299; *Navassa Guano Co.* v. *Richardson*, 26 S. C. 401. The bank had no better right to the rents and profits as against McGahan than it had against Crane. *Hardin* v. *Hardin*, 34 S. C. 77, 80, 81; *Teal* v. *Walker*, 111 U. S. 242.

McGahan purchased the equity of redemption on the 7th of September, 1885. Not until the 29th of September, 1889, did complainant take any action whatsoever under his mortgage. No receiver was applied for, and even under the law as unmodified by statute in South Carolina, the Circuit Court erred in so decreeing an account of rents and profits to be taken in favor of the bank as against McGahan. If the mortgaged land was not copartnership property McGahan should be liable only to the heirs of Crane, who are not parties to the proceedings.

V. Waste is an injury to the inheritance, and the commission thereof creates a liability only to the owner of the inheritance in remainder and reversion.

Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance. 1 Washburn on Real Property, 110; 4 Kent Com. 76.

A mortgagee in South Carolina has no estate whatsoever, but simply a lien. *Hardin* v. *Hardin*, *supra.*

VI. The mortgage was given to secure the endorsement of Crane on the notes of D. R. Smith & Co., as admitted in the complainant's bill, and there is no evidence that Crane or his estate is insolvent. If even an action on the case in the nature of waste would lie in favor of a mortgagee it should appear that the mortgagor was insolvent and the security insufficient.

Mr. Theodore G. Barker for appellee.

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

It is argued that the Circuit Court should have held that the withholding of the mortgage from record invalidated it as against the creditors of the firm, but no such defence to the mortgage was set up in the answer, and there having been no issue thereon below, it cannot be made in the first instance on appeal. The decree of the Circuit Court refers to no such defence, and it is now too late to raise it. Nor do we find anything from which to conclude that the firm was given a fictitious credit by the conduct of Crane in this particular, or that the withholding of the mortgage from record amounted to a fraud upon creditors of which these defendants could complain. McGahan was not a creditor, but claimed to have been a purchaser after the mortgage had been recorded; D. R. Smith was not a creditor and was not misled; and there is no evidence in the record that any creditor dealt with D. R. Smith & Company on the faith that the three-fourths interest in the lands standing in Crane's name was partnership real estate. The error assigned in this regard is untenable.

The Circuit Judge was of opinion that Crane held the undivided three-fourths of the lands in question in individual ownership in fee, unaffected by any trust, and that it was competent for him to make an absolute conveyance thereof in virtue of such ownership. But, although the deeds were made to North, Crane, Tompkins, and Smith as individuals, and the purchases were made in severalty, and they held, and Crane and Smith subsequently held, as tenants in common, yet if an equity resulted to firm creditors because the purchases were made in furtherance of the joint enterprise, and the lands were devoted to its use, it seems to us nevertheless quite clear that the mortgage by Crane of the three-fourths standing in his name to secure a partnership debt was valid, and could be enforced against these defendants.

The settled rule in this country is, that where a deed is executed on behalf of a firm by one partner, the other partner will be bound if there be either a previous parol authority, or a subsequent parol adoption of the act; and that ratification may be inferred from the presence of the other partner

at the execution and delivery, or from his acting under it or taking the benefits of it with knowledge. 3 Kent, *48; *Cady* v. *Shepherd*, 11 Pick. 400, 405, 406; *Peine* v. *Weber*, 47 Illinois, 41; *Frost* v. *Wolf*, 77 Texas, 455; *Schmertz* v. *Shreeve*, 62 Penn. St. 457; *Wilson* v. *Hunter*, 14 Wisconsin, 683; *Rumery* v. *McCulloch*, 54 Wisconsin, 565; *Pike* v. *Bacon*, 21 Maine, 280; *Russell* v. *Annable*, 109 Mass. 72; *Gunter* v. *Williams*, 40 Alabama, 561; *Sullivan* v. *Smith*, 15 Nebraska, 476.

This is the accepted doctrine in New York: *Smith* v. *Kerr*, 3 Comst. (3 N. Y.) 144; *Graser* v. *Stellwagen*, 25 N. Y. 315; *Van Brunt* v. *Applegate*, 44 N. Y. 544; and in South Carolina: *Stroman* v. *Varn*, 19 S. C. 307; *Salinas* v. *Bennett*, 33 S. C. 285.

In *Stroman* v. *Varn*, the Supreme Court of South Carolina laid down the general rule that one partner might bind his copartners by deed if the others were present and authorized it, or if authority to do so was fairly inferable from the evidence of their conduct and the course of business, and it was held, where there were four partners in a sawmill, two of whom owned the land, and one of the others mortgaged it in the name of the four and signed the firm name, that the mortgage was a valid lien on the land, the two owners having received the consideration and in many ways acknowledged and ratified the mortgage, and that a purchaser of the interest of one of the owners in both land and partnership after record of the mortgage was bound by its lien.

In *Van Brunt* v. *Applegate* it was held that a conveyance by one partner having the legal title to one-half of certain real estate, (the other half being in the other partner,) the whole of which was in equity partnership property, to a creditor of the firm in payment of a partnership debt, vested good title to such undivided half in his grantee, notwithstanding it was executed without the knowledge or consent of the other partner, the firm was insolvent, and its effect was to give a preference to the grantee. The argument that a partner holding the legal title of one-half held a moiety of it for himself and a moiety for his copartner was rejected, and it

was decided that a partner holding the legal title for the firm has the same power over it as over firm personalty, and that his conveyance for firm purposes passes the title free of the firm's equities; that if he were a trustee as to his copartner the separate deeds of both partners would leave one-half the tract unconveyed, but that a joint deed was not necessary to convey the firm title.

In this case the title to three-fourths of the lands stood in Crane. It is said that the legal title to Tompkins' three-eighths (one-eighth having been conveyed by North to Tompkins and one-eighth to Crane) was never conveyed to Crane, but we regard the case made as sufficient in this respect. The bill alleged that Crane was "seized and possessed in fee of all the undivided three-fourths of all those tracts and parcels of land," and this averment was not denied in the answer, while appellants admit that Crane "had the right to compel Tompkins to make a conveyance of the legal title." No question arises as to a conveyance in the name of the firm, as, in order to apply this three-fourths in security or payment of partnership liabilities, a conveyance by Crane in his own name was required, and the mortgage was given by Crane accordingly to secure partnership notes and their renewals, as appeared on the face of the mortgage. The character of the transaction was not changed because Crane may have desired to protect his own endorsements made for the benefit of the firm, nor by the fact that the mortgage, pursuing the legal title, happened to provide that any surplus after sale should be paid to Crane, "his heirs or assigns." Moreover, Smith was not called as a witness, and although the testimony of the president of the bank tended to show that Smith objected to the giving of a mortgage in the name of D. R. Smith & Company, we concur with the finding of the Circuit Judge that Smith knew of the execution by Crane of the mortgage of the three-fourths, which as between them belonged to Crane, and accepted the benefits of the renewals secured thereby without objection. The necessary conclusion is that the partnership indebtedness to the bank was properly secured by the mortgage as against other firm creditors, even if

Crane's title could under some circumstances have been subjected to an equity in favor of the firm.

The bank's rights could not be divested by sale under judgments against D. R. Smith or D. R. Smith & Co., whether the property was held in individual ownership or affected by an equity which passed to the bank in security of firm indebtedness.

Such being the situation, McGahan and his lessee could not claim to occupy under McGahan's purchase the position of a mortgagor in possession, and, indeed, that is not appellants' contention, which, on the contrary, denied the validity of the mortgage altogether. And since they proceeded to cut and sell the timber from the mortgaged premises from September 7, 1885, to the date of the decree in derogation of the rights of both the bank and of Crane, the Circuit Court correctly held them to an accountability for three-fourths of the proceeds thus realized.

As between mortgagor and mortgagee, whether the mortgage be regarded as passing the legal estate or as giving merely a lien for the debt, the right of the mortgagee to be protected from the impairment of his security is alike recognized: Jones on Mort. § 684; *Brady* v. *Waldron*, 2 Johns. Ch. 148; *Nelson* v. *Pinegar*, 30 Illinois, 473; but the mortgagee cannot recover for waste in the cutting of timber from the mortgaged land by the mortgagor unless the severance be wrongful: *Searle* v. *Sawyer*, 127 Mass. 491. So it may be conceded that the mortgagee is not entitled to rents and profits unless a lien thereon is reserved in the mortgage, *Hardin* v. *Hardin*, 34 S. C. 77, 80, 81; and that although the mortgagee may have the right to take possession upon condition broken, if he does not exercise the right he cannot claim the rents, *Teal* v. *Walker*, 111 U. S. 242. But the accounting was not awarded by the Circuit Court as resulting from the application of the doctrine of waste or the right to rents and profits as between mortgagor and mortgagee, but rested on the ground that McGahan acquired nothing more under the sale and conveyance to him than Smith's one-fourth of the property, and that his taking possession of the entire lands

and converting the timber thereon entitled the bank to an account for three-fourths of the property so converted.

If McGahan was accorded the rights of a tenant in common, he could not complain at being subjected to the obligations of that relation. If one exclude his cotenant under a claim of exclusive right or otherwise, the cotenant is entitled to compensation to the extent of the use of which he has been improperly deprived, and it is settled law in South Carolina that the occupying tenant is chargeable with what he has received in excess of his just proportion, and is liable to account to his cotenant for the rents and profits of so much of the common property as he has occupied and used in excess of his share. *Thompson* v. *Bostick*, McMullan Eq. 75, 78; *Hancock* v. *Day*, McMullan Eq. 69, 72; *Holt* v. *Robertson*, McMullan Eq. 475; *Jones* v. *Massey*, 14 S. C. 292; *Scaife* v. *Thomson*, 15 S. C. 337; *Pearson* v. *Carlton*, 18 S. C. 47. The character of McGahan's possession was hostile, and in any view, on general principles of equity, the accounting was properly decreed.

But it is objected that the decree was erroneous in this particular, because the heirs of Crane were not parties to the suit. By the 47th rule in equity, in all cases where it appears to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in its discretion proceed in the cause without making such persons parties, but in such cases the decree is without prejudice to the rights of the absent party. In this case the heirs of Walter B. Crane were not made parties to the bill presumably because jurisdiction would thereby be ousted, but no objection was made to proceeding in their absence, and so far as these defendants are concerned, complainant, if otherwise entitled, was properly allowed to go to a decree of sale and foreclosure as to them, as claiming the equity of redemption or title to that part of the real estate which stood in the name of Crane. And as the decree was operative to this extent, we think it may be sustained in respect of the accounting for the conversion of that

which rendered the security valuable. It is admitted that Crane and his wife, who alone survives him, executed the mortgage, and that the indebtedness is unpaid, while it is evident upon this record that the firm is insolvent.

Under these circumstances we are unable to conclude that appellants are entitled to insist upon an objection in this court, to sustain which would curtail the relief to which appellee was entitled as against them or overthrow the jurisdiction of the Circuit Court. *Keller* v. *Ashford*, 133 U. S. 610, 626, and cases cited. *Decree affirmed.*

MATTOX *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 667. Submitted December 10, 1895. — Decided February 4, 1895.

Caha v. *United States*, 152 U. S. 211, followed in holding that the homicide in question in this case having been committed in December, 1889, before the passage of the act organizing the Territory of Oklahoma, was properly cognizable in the Judicial District of Kansas.

When a person accused of the crime of murder is tried in a District Court of the United States, and is convicted, and the conviction is set aside by this court and a new trial ordered, a properly verified copy of the reporter's stenographic notes of the testimony of a witness for the government at the former trial who was then fully examined and cross-examined, and who died after the first trial and before the second, may be admitted in evidence against the accused on the second trial.

The Constitution should be interpreted in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Charta.

Before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements.

PLAINTIFF in error was convicted on January 16, 1894, in the District Court of the United States for the District of Kansas, of the murder of one John Mullen, which was alleged to have

been committed on December 12, 1889, "within that part of the Indian Territory lying north of the Canadian River and east of Texas and the 100th meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, . . . the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court." The indictment was returned to the September term, 1891, of the District Court at Wichita, at which term defendant was first tried and convicted. From this conviction he sued out a writ of error from this court, which reversed the judgment of the District Court and remanded the case for a new trial. 146 U. S. 140. The case was continued until the December term, 1893, at which term plaintiff was again put upon his trial, and again convicted, whereupon he sued out this writ of error.

This case was argued on the part of the plaintiff in error and submitted on the part of the defendants in error, on the 23d of October, 1894. On the 3d of December, 1894, leave was granted counsel to file further briefs upon the question of the admissibility of alleged contradictory statements, and it was stated that the cause would then be taken on resubmission to the full bench on briefs, if counsel should so indicate. On the 10th of December it was resubmitted.

Mr. L. T. Michener, *Mr. W. W. Dudley*, *Mr. Charles R. Redick*, *Mr. D. C. Lewis*, *Mr. W. K. Snyder* and *Mr. A. S. Browne* for plaintiff in error.

Mr. Assistant Attorney General Conrad for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

Error is assigned to the action of the court below, (1) in assuming jurisdiction of the case; (2) in not remitting the indictment to the Circuit Court for trial; (3) in admitting to the jury the reporter's notes of the testimony of two witnesses at the former trial, who had since died; (4) in refusing to permit the defendant to introduce the testimony of two witnesses to impeach the testimony of one of the deceased witnesses,

upon the ground that the proper foundation had not been laid. We proceed to the consideration of these assignments in their order:

1. The offence was alleged in the indictment to have been committed "within that part of the Indian Territory lying north of the Canadian River and east of Texas and the 100th meridian, not set apart and occupied by the Cherokees, Creeks, and Seminole Indian tribes." By § 2 of the act of January 6, 1883, c. 13, 22 Stat. 400, this territory was expressly "annexed to" and declared "to constitute a part of the United States Judicial District of Kansas." It is true that, by the act of May 2, 1890, c. 182, creating the Territory of Oklahoma, 26 Stat. 81, § 9, jurisdiction over the territory in question was vested in the District Courts of that Territory, but with a reservation that "all actions commenced in such courts," (viz., courts held beyond and outside the limits of the Territory,) "and *crimes committed* in said Territory and in the Cherokee Outlet, prior to the passage of this act, shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this act had not been passed." As the homicide in question was committed in December, 1889, there can be no question but that it was properly cognizable in the Judicial District of Kansas. Indeed, this point is disposed of by the decision of this court in *Caha* v. *United States*, 152 U. S. 211.

2. We are also of opinion that there was no error in not remitting the indictment to the Circuit Court for trial, and in assuming jurisdiction of the entire case. Rev. Stat. § 1039, requiring indictments in capital cases, presented to a District Court, to be remitted to the next session of the Circuit Court for the same district, and there to be tried, has no application to this case, since the subsequent act of January 6, 1883, 22 Stat. 400, to which we have already called attention, vests in the United States District Courts at Wichita and Fort Scott in the District of Kansas "exclusive original jurisdiction of all offences committed within the limits of the Territory hereby annexed to said District of Kansas, against any of the laws of the United States." This act should be read as a qualification

of sec. 1039, or a repeal *pro tanto* of the requirement that indictments shall be remitted to the Circuit Court for trial. A District Court could not be said to have "exclusive original jurisdiction" of a case which it was obliged to remit to another court for trial.

3. Upon the trial it was shown by the government that two of its witnesses on the former trial, namely, Thomas Whitman and George Thornton, had since died, whereupon a transcribed copy of the reporter's stenographic notes of their testimony upon such trial, supported by his testimony that it was correct, was admitted to be read in evidence, and constituted the strongest proof against the accused. Both these witnesses were present and were fully examined and cross-examined on the former trial. It is claimed, however, that the constitutional provision that the accused shall "be confronted with the witnesses against him" was infringed, by permitting the testimony of witnesses sworn upon the former trial to be read against him. No question is made that this may not be done in a civil case, but it is insisted that the reasons of convenience and necessity which excuse a departure from the ordinary course of procedure in civil cases cannot override the constitutional provision in question.

The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the *case of Sir John Fenwick*, 13 Howell's State Trials, 537, 579 *et seq.*, which was a proceeding in Parliament in 1696 by bill of attainder upon a charge of high treason. It appeared that Lady Fenwick had spirited away a material witness, who had sworn against one Cook on his trial for the same treason. His testimony having been ruled out, obviously because it was not the case of a deceased witness, nor one where there had been an opportunity for cross-examination on a former trial between the same parties, the case is nevertheless cited by Peake in his work on Evidence (p. 90) as authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution. The rule in England, however, is clearly the other way. Buller's N. P. 242; *King* v. *Jolliffe*, 4 T. R. 285, 290; *King* v. *Radbourne*, 1 Leach Cr. Law, 457; *Rex* v. *Smith*,

2 Starkie, 208; *Buckworth's case*, T. Raym. 170. As to the practice in this country, we know of none of the States in which such testimony is now held to be inadmissible. In the cases of *Finn* v. *Commonwealth*, 5 Rand. (Va.) 701; *Mendum* v. *Commonwealth*, 6 Rand. (Va.) 704; and *Brogy* v. *Commonwealth*, 10 Grattan, 722, the witnesses who had testified on the former trial were not dead, but were out of the State, and the testimony was held by the Court of Appeals of Virginia to be inadmissible, though the argument of the court indicated that the result would have been the same if they had been dead. In the case of *State* v. *Atkins*, 1 Overton, 229, the former testimony of a witness since deceased was rejected by the Supreme Court of Tennessee, but this case was subsequently overruled in *Kendrick* v. *State*, 10 Humphrey, 479, and testimony of a deceased witness taken before a committing magistrate was held to be admissible. See also *Johnston* v. *State*, 2 Yerger, 58; *Bostick* v. *State*, 3 Humph. 344. The rule in California was formerly against the admission of such testimony; *People* v. *Chung Ah Chue*, 57 California, 567; *People* v. *Qurise*, 59 California, 343; but it is now admitted under a special provision of the code applicable to absent and deceased witnesses, which is held to be constitutional. *People* v. *Oiler*, 66 California, 101. In the case of *State* v. *Campbell*, 1 Rich. (S. C.) 124, the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and of course it was held to be inadmissible.

Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming. The question was carefully considered in its constitutional aspect by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Richards*, 18 Pick. 434, in which it was said that "that provision was made to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled

rules of the common law." The subject was also treated at great length by Judge Drummond in *United States* v. *Macomb*, 5 McLean, 286, and the substance of a deceased witness's testimony given at a preliminary examination held to be admissible. All the cases up to that time were cited in the opinion, and the decision put upon the ground that, the right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read. From the following list of cases it will be seen that the same doctrine prevails in more than a dozen States. *Summons* v. *State*, 5 Ohio St. 325; *Brown* v. *Commonwealth*, 73 Penn. St. 321: in both of which cases the question was elaborately considered. *State* v. *McO'Blenis*, 24 Missouri, 402; *State* v. *Baker*, 24 Missouri, 437; *State* v. *Houser*, 26 Missouri, 431 — a most learned discussion of the subject; *State* v. *Able*, 65 Missouri, 357; *Owens* v. *State*, 63 Mississippi, 450; *Barnet* v. *People*, 54 Illinois, 325; *United States* v. *White*, 5 Cranch C. C. 457; *Robinson* v. *State*, 68 Georgia, 833; *State* v. *Wilson*, 24 Kansas, 189; *State* v. *Johnson*, 12 Nevada, 121; *Roberts* v. *State*, 68 Alabama, 515; *State* v. *Cook*, 23 La. Ann. 347; *Dunlap* v. *State*, 9 Tex. App. 179; *O'Brian* v. *Commonwealth*, 6 Bush, 563; *State* v. *Hooker*, 17 Vermont, 658; *Crary* v. *Sprague*, 12 Wend. 41; *United States* v. *Wood*, 3 Wash. C. C. 440; *State* v. *Valentine*, 7 Iredell, (Law,) 225. While the precise question has never arisen in this court, we held in *Reynolds* v. *United States*, 98 U. S. 145, that if the witness is absent by the procurement or connivance of the defendant himself, he is in no condition to assert his constitutional immunity.

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he

gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question

their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error, (146 U. S. 140, 152,) the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said.

4. Error is also assigned to the action of the court in refusing to permit the defendant to introduce the testimony of two witnesses, James and Violet, to impeach the testimony of Whitman, one of the deceased witnesses, by showing statements made by him contradicting his evidence upon the stand, upon the ground that the proper foundation had not been laid by interrogating Whitman himself as to his having made such contradictory statements.

In this connection the defendant proposed to prove by the witness James that Whitman told him in November, 1892, that he did not see Mattox on the night he did the shooting,

because it was too dark; that he could not tell who did the shooting; that on the next day he told him that all that he had testified to on the former trial was false, and that he wanted to leave the country; and that if he, witness, would go to see his (Mattox's) friends and get him fifty dollars, he would give him (witness) twenty-five and himself take twenty-five, and leave the country; that he did not want to appear against Mattox because what he had sworn to was not true. He also sought to prove by the witness Violet that in January, 1892, Whitman said emphatically and specifically that his testimony against Mattox was given under threats made to him in the corridors of the court-house in Wichita; that just prior to his being called to the witness stand he was approached by one Stiles, who shook his finger in his face and told him that if he dared to utter one word on the witness stand in favor of defendant Mattox, he (Stiles) would see that he was sent over the road; further declaring that if it had not been for such threats his testimony would not have been given as it was.

Objection was made by the district attorney to the introduction of this testimony upon the ground that Whitman had been examined and cross-examined upon the former trial; that the questions could not be propounded to the witnesses James and Violet for the purpose of impeachment, as the government had lost the opportunity, by the death of the witness Whitman, of putting him upon the stand and contradicting them. The facts were that the statements of Whitman, which the defendant proposed to prove by the witnesses James and Violet, were made after the former trial, so that the proper foundation could not have been laid by asking Whitman whether he had made such statements.

The authorities, except in some of the New England States, are almost unanimous to the effect that, before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements. Justice to the witness himself requires, not only that he should

be asked whether he had ever made such statements, but his attention should be called to the particular statement proposed to be proven, and he should be asked whether, at such a time and place, he had made that statement to the witness whose testimony is about to be introduced. This method of impeachment was approved by this court in *Conrad* v. *Griffey*, 16 How. 38, 46, wherein the rule is stated to be "founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enable him to explain the statements referred to, and show that they were made under a mistake, or that there was no discrepancy between them and his testimony." In this case the deposition of a witness taken in the cause was sought to be impeached by a letter of the witness written before his deposition, and addressed to the plaintiff, with an affidavit annexed by him of the same date. The general rule is also approved in *The Charles Morgan*, 115 U. S. 69, 77, although in that particular case it was held that proper foundation had been laid for the introduction of the evidence. The principle was also approved in *Chicago, Milwaukee &c. Railway* v. *Artery*, 137 U. S. 507.

It is insisted, however, that the rule ceases to apply where the witness has died since his testimony was given, and the contradictory statements were either made subsequent to the giving of his testimony, or, if made before, were not known to counsel at the time he was examined; that if such contradictory statements be not admitted, the party affected by his testimony is practically at the mercy of the witness; that the rule requiring a foundation to be laid is, after all, only a matter of form, and ought not to be enforced where it works a manifest hardship upon the party seeking to impeach the witness. The authorities, however, do not recognize this distinction. It is true that in *Wright* v. *Littler*, 3 Burrow, 1244, 1255, the dying confession of a subscribing witness to a deed that he had forged the instrument was admitted by Lord Chief Justice Willes, and afterwards approved by the Queen's Bench, Lord Mansfield delivering the opinion, and that similar evidence was admitted in *Aveson* v. *Kinnaird*, 6

East, 188, 196; but the authority of these cases was seriously shaken by *Stobart* v. *Dryden*, 1 M. & W. 615, in which it was held that the defendant could not give evidence of declarations made by a subscribing witness to a deed, who had since died, tending to show that he had forged or fraudulently altered the deed. In this connection it was said by Baron Parke that, "if we had to determine the question of the propriety of admitting the proposed evidence, on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that at least it was very doubtful whether, generally speaking, it would not cause greater mischief than advantage in the investigation of truth. . . . If any declarations at any time from the mouth of subscribing witnesses who are dead are to be admitted in evidence, . . . the result would be, that the security of solemn instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods, by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting, or explaining by the evidence of the witnesses themselves. The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of reëxamination."

The case of *Ayers* v. *Watson*, 132 U. S. 394, 404, differs principally from the one under consideration in the fact that it was a civil instead of a criminal case. It was an action of ejectment, in which the defendant introduced the deposition of one Johnson, taken in 1878 or 1880 — a surveyor who had made a survey of the land in question. His deposition had been twice taken and used upon former trials, but prior to the last trial he had died. Plaintiff, in rebuttal, offered a deposition of the witness taken in 1860 in a suit between other parties, in which his testimony in regard to the matters to which he testified in the deposition offered by defendant varied materially from these latter depositions. The deposition was held to be inadmissible, Mr. Justice Miller observ-

ing : "While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that in no case has any court deliberately held that after the witness's testimony has been taken, committed to writing and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony. Least of all would this seem to be admissible in the present case, where three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition nor any attempt to call his attention to it. This principle of the rule of evidence is so well understood that authorities are not necessary to be cited."

The cases in the state courts are by no means numerous, but these courts, so far as they have spoken upon the subject, are unanimous in holding that the fact that the attendance of the witness cannot be procured, or even that the witness himself is dead, does not dispense with the necessity of laying the proper foundation. Thus in *Stacy* v. *Graham*, 14 N. Y. 492, 499, counsel, while conceding the rule, relied upon two circumstances to relieve the case from its influence. The first was, that the attendance of the witness could not be procured at the time of the trial; and the second, that the declarations and statements offered to be proved were made after the witness had testified, and were a direct admission that he had sworn falsely. It was held that, if the statements came to the knowledge of counsel afterwards and before the trial, it was his duty to apply for a commission or move a postponement until the evidence could be procured. "The mere absence of the witness," said the court, "has never been considered a reason for allowing his unsworn statements to be proved in order to affect his credibility." The question was

further elaborately considered in *Runyan* v. *Price*, 15 Ohio St. 1, 11, 12, in which one of the subscribing witnesses to a will had died before the trial, and his testimony taken at the probate of the will was read in evidence. The contestants then offered evidence of his declarations respecting the capacity of the alleged testator to make a will at the time the one in question purported to have been made; but these were held, though by a bare majority of the court, to be inadmissible for the purpose of impeaching his testimony.

"It seems to us," said the court, "that to allow the death of the witness to work an exception would be to destroy the principle upon which the rule rests, and deny the protection which it was designed to afford. . . . In relieving one party of a supposed hardship an equally serious one might be inflicted upon the other. . . . Without, therefore, the opportunity to the witness of explanation, or, to the party against whom offered, of reëxamination, we are of opinion that the supposed declarations lack the elements of credibility which they should possess before they can be used legitimately to destroy the testimony of the witness." This case was approved in the subsequent case of *Wroe* v. *State*, 20 Ohio St. 460, 472, in which the statement of a person alleged to have been murdered as to the manner in which he received the wound, which statement was claimed to be inconsistent with his dying declarations, was ruled out upon the ground that it was neither a part of the *res gestæ* nor was it a dying declaration. It was held to be incompetent as original evidence or as impeaching testimony. "To admit it would, to some extent, afford a substitute to the defendant for the loss of cross-examination, but it would deprive the deceased and the State of all opportunity for explanation." In *Craft* v. *Commonwealth*, 81 Kentucky, 250, it was held that where the testimony of a witness, given upon a former trial, was reproduced, the witness having died, testimony to the effect that the witness, subsequent to the former trial, stated that the evidence given by him on that trial was false, was not competent. The rule is put upon the ground that if the impeaching statements were admitted there would be a strong temptation to the fabrication of testimony,

by which important and true evidence might be destroyed. So in *Hubbard* v. *Briggs*, 31 N. Y. 518, 536, the testimony of a deceased witness given on a former trial of the case was read in evidence. Subsequently the defendant offered to read the deposition of this witness in a chancery suit, for the purpose of contradicting his evidence as read, and impeaching him. The testimony was held to have been properly ruled out, no foundation having been laid for it. The fact that the witness was dead was held not to change the rule. See also *Griffith* v. *State*, 37 Arkansas, 324; *Unis* v. *Charlton*, 12 Grattan, 484; *Kimball* v. *Davis*, 19 Wend. 437.

While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. If it were generally understood that the death of a witness opened the door to the opposite party to prove that he had made statements conflicting with his testimony, the history of criminal trials leads one to believe that witnesses would be forthcoming with painful frequency to make the desired proof. The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages and disadvantages of a relaxation of the rule are so problematical that courts have, with great uniformity, refused to recognize the exception.

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

Affirmed.

Mr. Justice Shiras dissenting, with whom concurred Mr. Justice Gray and Mr. Justice White.

Dissenting Opinion: Shiras, Gray, White, JJ.

Clyde Mattox, the plaintiff in error, was tried and convicted of murder in the first degree at September term, 1891, of the District Court of the United States for the District of Kansas. He prosecuted a writ of error to this court, where the judgment of the lower court was reversed, and the case remanded for a new trial. At a subsequent term of the same court a second trial was had, which resulted in a disagreement of the jury; and at December term, 1893, the plaintiff in error was put upon his third trial. He was found guilty, and upon the judgment condemning him to death the present writ of error was taken.

On the last trial of this case the government proved that two of its witnesses on the first trial, Thomas Whitman and George Thornton, had died subsequently thereto, and introduced in evidence, against the objection of the defendant, the notes of their testimony taken down by a stenographer at the prior trial.

The defendant offered to show, by two witnesses, that Whitman, the deceased witness, and whose testimony, preserved in the notes of the stenographer, was necessary to secure a conviction, had, after the former trial, and on two distinct occasions, stated that his testimony at the former trial was given under duress, and was untrue in essential particulars.

The government objected to this evidence, on the ground that the usual foundation had not been laid for the impeachment of the witness by having his attention called to his alleged contradictory statements, and that the death of the witness disabled the government from denying or explaining the statements attributed to him.

The action of the court in sustaining the objection of the government and refusing to admit the impeaching testimony is the only subject of discussion in this opinion.

It is, doubtless, the general rule in the trial of both civil and criminal cases that before testimony can be introduced to discredit a witness by showing that at another time and place he had made statements inconsistent with those made at the trial, he must be asked whether he had made such statements.

This is to give the witness an opportunity either to deny that he made the statements attributed to him, or to explain by showing that such statements, though made, were reconcilable with his testimony, or, perhaps, to withdraw or modify his testimony in the light of a refreshed recollection.

But this general rule is not a universal one, and does not prevail in some courts of very high authority, and Wharton correctly says that in Maine and Massachusetts this rule is not enforced, and in Pennsylvania it is left to the discretion of the judge trying the case to observe it or not. 11 Whart. Crim. Law, § 819.

In *Tucker* v. *Welsh*, 17 Mass. 160, the subject was discussed, and the Supreme Judicial Court of Massachusetts, after referring to *The Queen's case*, 2 Brod. & Bing. 284, 300, declined to follow the rule there laid down, and held that the credit of a witness who has testified orally or by giving his deposition may be impeached by showing that he has made a different statement out of court, either before or after he has given his testimony, and that it is not necessary that the impeached witness be first inquired of as to such different statement, or that he be present when his credit is to be impeached. We shall take occasion hereafter to advert to an observation made by Chief Justice Parker in the course of the opinion.

The subject was also considered by the Supreme Court of Connecticut in the case of *Hedge* v. *Clapp*, 22 Connecticut, 262, and that court declined to accept the rule in *The Queen's case*, preferring the course followed in Massachusetts. It is clearly shown in this opinion that the rule is not a substantive rule of the law of evidence, but is merely one of practice. "In this State," says Chief Justice Church, "we do not believe there has been a uniformity of usage in conducting the examination of witnesses who have made contradictory statements out of court, since *The Queen's case*, although, before that time, a contradiction of a witness might be proved without qualification. . . . We conclude, therefore, that the legal profession here has never considered the law on this subject to be fixed, but has treated the subject rather as a matter of practice in the examination of witnesses, and subject to the

discretion of the court. We do not very well see how an unyielding rule can be prescribed in conformity with the rule claimed, which shall apply consistently in all cases."

However, it must be conceded that the rule has been approved by this court in several cases cited in the majority opinion.

In *Conrad* v. *Griffey*, 16 How. 38, where a letter was written six years before a deposition was taken which the letter was offered to discredit, this court said that it was not probable that, after the lapse of so many years, the letter was in the mind of the witness when his deposition was sworn to, and that the rule requiring the attention of the witness to be called to his prior contradictory statements was a salutary one, and should not be dispensed with in the courts of the United States.

But the question now for consideration is not whether there is such a general rule, but whether it is subject to any exceptions, and particularly whether the facts of the present case do not justify a departure from the rule.

An examination of the authorities will show, as I think, no such current or weight of decision as to preclude this court from dealing with the question as an open one.

The case of *Ayres* v. *Watson*, 132 U. S. 394, is referred to in the majority opinion as differing from the present one only in the fact that it was a civil instead of a criminal case. It is indeed true that it was a civil case, a not unimportant difference, but there was another feature in that case which deprives it of all force as a precedent for our guidance in the question we are now considering. The case there was this: In an action of ejectment which went through several trials, the deposition of one Johnson, a surveyor, taken in 1878, was introduced by one of the parties. This deposition had been twice taken, and used upon the former trials, and prior to the last trial the witness had died. At the last trial the opposite party offered in rebuttal a deposition of the witness taken in 1860, in a suit between other parties, and in which were contained statements materially different from those contained in the later depositions. This court held that, as Johnson's deposition had in three trials been introduced and relied on, in each of which he

had been cross-examined, and no reference was made to his former deposition, nor any attempt to call his attention to it, such prior deposition could not be used after his death to impeach his testimony, and the court said that "this principle of the rule of evidence is so well understood that authorities are not necessary to be cited." It is apparent that, in that case, the opposing party had no less than three opportunities to call the attention of the witness to the existence of his prior deposition, and to cross-examine him upon it. In the present case the contradictory statements sought to be proved were not made till after the prior trials, and therefore there was no opportunity, at any time, for the defendant to call the witness's attention to such statements and to cross-examine upon them. The case of *Ayres* v. *Watson* cannot, therefore, be fairly regarded as at all in point.

No other decision of this court is cited, nor any of the Circuit Courts of the United States. The only English cases cited are three, *Wright* v. *Littler*, 3 Burrow, 1244, 1255; *Aveson* v. *Kinnaird*, 6 East, 188; and *Stobart* v. *Dryden*, 1 M. & W. 615; in the two former of which it was held that confessions of a subscribing witness to a deed that he had forged the deed, could be admitted in evidence in a trial after his death, and in the latter that such confession could not be admitted. The reasons given for excluding the testimony seem to have been chiefly based upon the impolicy of permitting the security of solemn instruments to be impaired by loose declarations of attesting witnesses, and, perhaps, partly upon the general grounds of public policy mentioned by Lord Mansfield in *Walton* v. *Shelley*, 1 T. R. 296, when he said "it is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." It is, therefore, clear that neither this decision, nor the reasons given to support it, furnish any answer to our present inquiry.

Some decisions of state courts are cited, but the most of them seem to have little or no bearing on the exact question we are discussing.

Stacy v. *Graham*, 14 N. Y. 492, was a case where the witness, whose testimony it was proposed to contradict by declarations made elsewhere, was not dead, but merely absent from the court-room, and it was said, "the mere absence of the witness has never been considered a reason for allowing his unsworn statements to be proved in order to affect his credibility." This case, therefore, was merely an application of the general rule.

In *Runyan* v. *Price*, 15 Ohio St. 1, it was held, by three judges against two, that, in a civil case, the testimony of a deceased witness could not be impeached by giving in evidence declarations alleged to have been made by him out of court differing from those contained in his testimony. *Wroe* v. *State*, 20 Ohio St. 460, 472, was a case in which statements made by a deceased person as to the manner in which he received the fatal wound were ruled out because they were neither *res gestæ* nor dying declarations.

Craft v. *Commonwealth*, 81 Kentucky, 250, was a case in which the majority opinion in *Runyan* v. *Price* was cited and followed, and testimony offered to contradict a deceased witness by his own subsequent declarations, as to which he had not been examined, was excluded.

In *Hubbard* v. *Briggs*, 31 N. Y. 536, it was unsuccessfully sought to impeach a witness, who had testified at a former trial of the case in 1863, and afterwards died, by offering his deposition taken twenty years before in a chancery suit between different parties. This was a civil suit, and there had been a stipulation of the parties that the evidence of the witness might be read as he gave it on a former trial. The decision can be sustained on obvious principles apart from the question in hand.

Griffith v. *State*, 37 Arkansas, 324, 331, was a case where the Supreme Court of Arkansas recognized the general rule that it is not competent to contradict a witness by evidence of declarations made out of court without directing his attention to the subject, but the court said: "The court ruled out the impeachment evidence offered on the trial, because it did not appear from the statement of the deceased witness, made on

cross-examination, as reduced to writing by the magistrate, that his attention had been directed to the time and place of the antecedent declarations. This may or may not have been so, and though strictly the ruling of the court was right, it might have been safer, in a case involving liberty, to give the accused the benefit of the doubt."

Unis v. *Charlton*, 12 Grattan, 484, was merely a case illustrating the general rule, and not bearing on our problem. *Kimball* v. *Davis*, 19 Wend. 437, was only to the effect that a living witness, whose testimony had been taken on deposition, cannot be contradicted by his subsequent declarations, where he has not been cross-examined in respect to them, but that the only way for a party to avail himself of such declarations is to sue out a second commission. This is obviously merely a recognition of the general rule, and does not touch the present case.

The entire array of cases cited seems to resolve itself into two cases only in which the question was directly considered and decided: *Runyan* v. *Price*, 15 Ohio St. 1, a civil case ruled by a divided court, and *Craft* v. *Commonwealth*, 81 Kentucky, 250.

In *Hedge* v. *Clapp*, 22 Connecticut, 262, heretofore cited, the court said that while the rule laid down in *The Queen's case* was one to which it would be very well to adhere, yet "it should be subject to such exceptions as a sound discretion may from time to time suggest."

Chief Justice Parker, in *Tucker* v. *Welsh*, 17 Mass. 160,167, said: "It has been suggested that, admitting such evidence proper to impeach a witness who is upon the stand, it ought not to be allowed to impeach a deposition, the witness being absent and having no opportunity to deny or explain. The witness who has testified upon the stand hears, it is true, the evidence which tends to impeach him, or he may be called back for that purpose if he be absent: so where the evidence goes to affect the credibility of a deposition, if it be material, the court would give time for the principal witness to appear or for other depositions to be taken relative to the facts which are proved to impeach him. It may sometimes be inconven-

ient, but if justice requires delay it would be given. Suppose a witness who has once testified should afterwards acknowledge the falsity of his statements and then die; the party interested in his testimony might upon another trial prove what he had once said upon the stand under oath; and shall not the other party be permitted to prove that what he said was a falsehood?"

In *Fletcher* v. *Fletcher*, 5 La. Ann. 406, the rule in *The Queen's case* was approved, and testimony to impeach a witness by showing contradictory statements was ruled out because the necessary foundation had not been laid.

But in *Fletcher* v. *Henley*, 13 La. Ann. 191, 192, such evidence was admitted where it was shown that a seasonable but fruitless effort had been made to examine the witness as to his alleged contradictory statements by taking out a commission for that purpose, but where the return to the commissioner showed that he could not be found.

This brief review of the authorities suffices to show that this question, in the shape in which it is now presented, has never heretofore been considered or decided by this court, and that there has been no such uniform current of decisions in other courts as to constrain us to follow it.

Finding, then, no decisive rule in the authorities, and coming to regard the question as one of reason, it is at once obvious that we are dealing not with any well-settled doctrine of law, prescribed by statute or by a long course of judicial decisions, but with a mere rule of procedure. Undoubtedly, the credit of witnesses testifying under oath should not be assailed by evidence of their statements made elsewhere, without affording them, if practicable, in justice to them and to the party calling them, an opportunity to deny, explain, or admit; but it must not be overlooked that the primary object of the trial is not to vindicate the truth or consistency of witnesses, but to determine the guilt or innocence of the accused. If the evidence tending to show that the testimony of an essential witness cannot be relied on, because he has made contradictory statements elsewhere and at other times, is valid and admissible, as the authorities all concede,

why should the right to put in such evidence be destroyed by the incidental fact that the witness, by reason of death, cannot be produced to deny or to admit that he made such statements? Does not the necessity call for a relaxation of the rule in such a case?

The books disclose many instances in which rules of evidence, much more fundamental and time-honored than the one we are treating, have been dispensed with, because of an overruling necessity.

Thus, the rule which excluded parties from being witnesses was departed from when it was deemed essential to the purposes of justice. In *Clark* v. *Spence*, 10 Watts, 335, it was said: "A party is not competent to testify in his own cause; but, like every other general rule, this has its exceptions. Necessity, either physical or moral, dispenses with the ordinary rules of evidence. In cases against common carriers, the owner has been admitted, *ex necessitate*, to testify to the contents and value of boxes that have been opened and rifled," (see other cases cited by Greenleaf, vol. 1, §§ 348, 349,) and that author sums up the cases by stating: "Where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be obtainable."

In *United States* v. *Murphy*, 16 Pet. 203, 210, the owner of property, alleged to have been stolen on board an American vessel, on the high seas, was held to be a competent witness to prove the ownership of the property stolen, the court saying: "The general rule undoubtedly is, in criminal cases as well as in civil cases, that a person interested in the event of the suit or prosecution is not a competent witness. But there are many exceptions which are as old as the rule itself. Thus, it is stated by Lord Chief Baron Gilbert as a clear exception, that where a statute can receive no execution unless a party interested be a witness, there he must be allowed; for the statute

must not be rendered ineffectual by the impossibility of proof."

But we need not go beyond the very case before us for a striking illustration of the fact that rules of evidence, even when founded in a constitutional provision, may be modified or relaxed when the necessities of a case so require.

The government could not proceed, at the third trial, without producing the testimony of Thomas Whitman and George Thornton. But those witnesses had both died since the prior trials, and the government was driven to rely upon a stenographer's notes of their testimony. It was objected, on behalf of the accused, that the Constitution provides that "in all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him," and it was contended that the word "confront" does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of common law that, in trials by jury, the witness must be present before the jury and the accused, so that he may be confronted — that is, put face to face. But this court, in the opinion of the majority, disposes of this objection by saying: "The primary object of the constitutional provision in question was to prevent depositions on *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. *But general rules of law of this kind, however beneficent in their operation and valuable to the*

accused, must occasionally give way to considerations of public policy and the necessities of the case."

If, then, the right of the accused to confront the witnesses against him, although formally secured to him by the express terms of the Constitution, and being of that importance and value to him as are recognized by the court, may be dispensed with because of the death of a witness, it would seem justly to follow that neither should that death deprive the accused of his right to put in evidence valid and competent in its nature, to show that the witness was unworthy of belief, or had become convinced, after the trial, that he had been mistaken.

It is argued that to permit evidence of statements made by a witness contradictory of his testimony would be "a strong temptation to the fabrication of evidence, by which important and true evidence might be destroyed." This argument overlooks the fact that if witnesses are introduced to testify to the contradictory statements, those witnesses are liable to indictment for perjury. They testify under the sanction of an oath, and of a liability to punishment for bearing false witness. On the other hand, the witness, the notes of whose testimony are relied on as sufficient to secure a conviction of the accused, is no longer within the reach of human justice.

To conclude: The rule that a witness must be cross-examined as to his contradictory statements before they are given in evidence to impeach his credit, is a rule of convenient and orderly practice, and not a rule of the competency of the evidence.

To press this rule so far as to exclude all proof of contradictory statements made by the witness since the former trial, in a case where the witness is dead, and the party offering the proof cannot, and never could, cross-examine him as to these statements, is to sacrifice substance of proof to orderliness of procedure, and the rights of the living party to consideration for the deceased witness.

According to the rulings of the court below, the death of the witness deprived the accused of the opportunity of cross-examining him as to his conflicting statements, and the loss

of this opportunity of cross-examination deprived the accused of the right to impeach the witness by independent proof of those statements; and thus, while the death of the witness did not deprive the government of the benefit of his testimony against the accused, it did deprive the latter of the right to prove that the testimony of the witness was untrustworthy. By this ruling the court below rejected evidence of a positive character, testified to by witnesses to be produced and examined before the jury, upon a mere conjecture that a deceased witness might, if alive, reiterate his former testimony. It would seem to be a wiser policy to give the accused the benefit of evidence, competent in its character, than to reject it for the sake of a supposition so doubtful.

The judgment of the court below ought to be reversed, and the cause remanded, with directions to set aside the verdict and award a new trial.

THE ROLLER MILL PATENT.[1]

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

No. 70. Argued November 12, 1894. — Decided February 4, 1895.

The invention protected by letters patent No. 222,895, issued December 23, 1879, to William D. Gray for improvements in roller mills, is not infringed by the machine used by the defendant in error.

Letters patent No. 238,677, issued March 8, 1881, to William D. Gray for improvements in roller mills, are void for want of novelty.

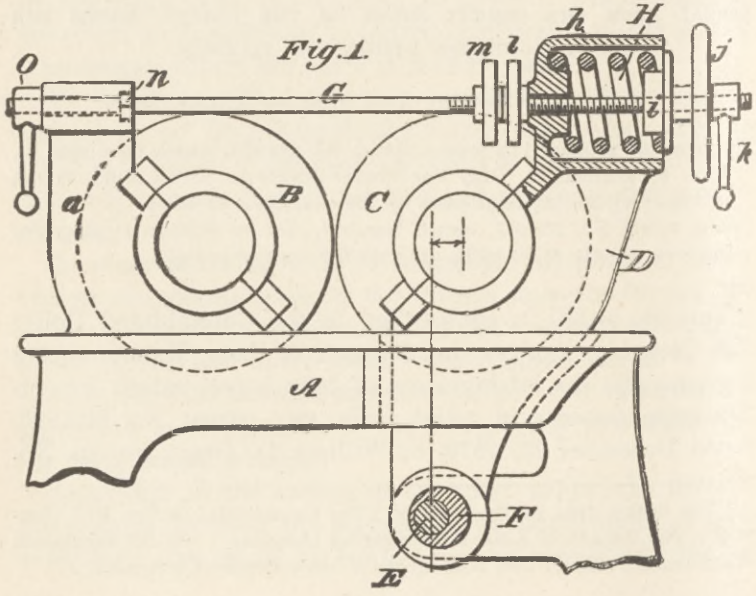
This was a bill in equity filed by the Consolidated Roller Mill Company against the Barnard & Leas Manufacturing Company, for the infringement of four letters patent for certain improvements in roller mills, viz., patent No. 222,895, issued December 23, 1879, to William D. Gray; patent No.

[1] The docket title of this case is "*The Consolidated Roller Mill Company* v. *The Barnard & Leas Manufacturing Company.*" On the suggestion of the court, a shorter title is adopted for convenience of reference.

238,677, issued March 8, 1881, to the same person; reissued patent No. 10,139, issued June 20, 1882, to U. H. Odell; patent No. 269,623, issued December 26, 1882, to Hans Birkholz. As plaintiff asked for a decree only upon the Gray patents, the others will not be further noticed.

The invention covered by patent No. 222,895 "consists in a peculiar construction and arrangement of devices for adjusting the rolls vertically as well as horizontally, whereby any unevenness in the wear of the rolls or their journals or bearings may be compensated for, and the grinding or crushing surface kept exactly in line." In his specification the patentee states that "in the use of roller mills it is found that the roller bearings wear unequally at opposite ends, and also that they wear more rapidly on the under than on the upper side, and that, consequently, the rolls lose their parallelism and their proper vertical height. It is to overcome these difficulties that the present invention is designed; and to this end the parts are constructed and arranged as represented in the accompanying drawings," the most important one of which is here given.

Fig. 1.



Statement of the Case.

The mill shown and described in the patent consisted substantially of the frame A, the roller B revolving in fixed bearings, and the companion roller C, journalled at its ends, and revolving in a swinging arm or support, D, pivoted at its lower end upon a bolt, E, thus enabling the roll to be swung toward or away from the stationary roll B, as required. In order that the arm or support D might be adjusted vertically, and the roll C thereby lifted or lowered, the bolt E was mounted upon an eccentric sleeve, F, such sleeve being furnished with a suitable head to receive a wrench by which to adjust it. "By turning the sleeve F the arm may be moved up or down, as desired, and when the adjustment has been made the sleeve is clamped firmly in place by means of the bolt E, which draws its end against the main frame, the sleeve then becoming the pivot or journal on which the arms or supports D move when being adjusted horizontally."

To provide for an adjustment of the rollers to and from each other horizontally, a rod, G, was extended from the stationary bearing *a* at each side of the machine to the upper end of the swinging arm or support D on the same side. The upper end of each arm or swinging box D is formed with an enlarged spring case or chamber, *h*, perforated on its inner side to permit the passage of the rod or stem G through it, a strong spring, H, being placed in said chamber, and retained therein by means of a washer or plate, *i*, placed upon the rod and held against the spring by a wheel-nut, *j*, which screws upon the threaded end of the rod or bolt G, and is in turn held by a jam-nut, *k*. By turning the nut-wheel *j*, the spring H is compressed, the roll C is crowded toward the roll B, and at the same time the bearing D is held firmly against the nut *l*, and the additional jam-nut *m*. The spring H is designed to permit the swinging roller to give way, in case a stone or nail or other hard substance is caught between the rolls, after the passage of which, the roll, with the aid of the spring, returns at once to its place.

To permit the ready separation of the rolls, the end of the rod G, where it passes through the fixed bearing *a*, has a shoulder, *n*, abutting against such bearing, and acting as a

stop. On the other side of the bearing is a nut, O, threaded on the rod G. By releasing or partially turning off the nut O the roll C is allowed to fall back, and move away from the roll B; but by again turning up the nut the shoulder *n* is brought back accurately to its original position. An eccentric is shown in Fig. 8 as an equivalent of the nut O.

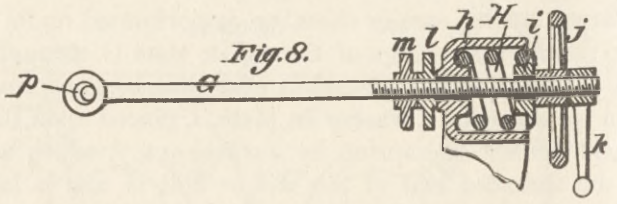
Plaintiff claimed an infringement of the fourth, fifth, and sixth claims of this patent, which were as follows:

"4. In combination with the movable roller bearing, the rod G, adjustable stop device to limit the inward movement of the bearing, an outside spring urging the bearing inward, and adjusting devices, substantially as shown, to regulate the tension of the spring.

"5. In combination with the roller bearing, the adjusting rod provided at one end with a stop to limit the inward movement, a spring, and means for adjusting the latter, and provided at the other end with a stop and holding device, substantially as shown and described.

"6. The combination of the bearing D, rod G, nut *l*, spring H, nut *j*, stop *n*, and nut O."

Fig. 8.



Patent No. 238,677 exhibits a roller mill substantially identical with that of the former patent except in the spreading device, which consists of an eccentric shaft carrying two eccentrics, by which the two ends of the roll are spread at one motion. Each of these shafts is provided with an arm, to which a rod is connected, so that the moving rod simultaneously moved both ends of the movable rolls.

The patentee states the operation of his device as follows: "By moving the rod K, which may be done from either side of the machine, all the eccentrics are operated simultaneously

and the movable rolls thrown instantly into or out of an operative position, and this without destroying the adjustment of the parts which control the exact position of rolls when they are in action."

Plaintiff relies only upon the infringement of the second and third claims, which are as follows:

2. "In combination with the swinging roll-supports E and the rods G connected therewith, the eccentrics H, shafts I, and rod K.

3. "In combination with movable roll-supports E and the rods G adjustably connected thereto, a transverse shaft, I, provided with two eccentrics connected to the rods G at opposite ends of one roll, whereby the roll may be thrown into and out of action instantly without changing the adjusting devices."

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

Mr. George H. Lathrop for appellant.

Mr. Robert H. Parkinson for appellee.

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

From time immemorial wheat has been reduced to flour by grinding it between heavy disks of stone set upon a shaft, the upper one of which revolved, while the nether one remained stationary. The grain being introduced through an opening in the centre of the upper stone, was ground between the burred surfaces of the stones, and gradually found its way outward, until it was discharged from the periphery or skirt of the stones in the form of flour. This ancient method has within the past twenty years given place to a system of crushing between rollers, which appears to have originated in Buda-Pesth in the kingdom of Hungary, and to have been the subject of several foreign patents. These roller mills, which, soon after their invention, were introduced into this country, and have practically superseded in all large flouring

mills the older method of grinding, consist generally of two or more pairs of rollers, mounted in a strong frame, and lying, as a rule, in the same horizontal plane. One of these rolls is fixed, and journalled in a stationary bearing. The other is mounted upon an adjustable bearing, which permits it to yield or give way in case any hard substance enters between the rollers. It is also capable of a slight vertical adjustment, to maintain the exact parallelism of the rolls. While these rolls are not in actual contact when grinding, they are very nearly so, and their adjustment is a matter of extreme nicety. That the grains of wheat may be ground to a fine powder, as well as crushed, the rolls must be slightly corrugated like the ancient burr stones, and must run at different speeds. Their action thus has the tearing effect necessary to reduce the grain to flour. The rolls must be so close together as to reduce the wheat to a fine flour, and at the same time they must not touch, or their surfaces would be ruined.

In order to secure the successful operation of these machines, provision must be made for: 1. A vertical adjustment, to bring the axes of the two rolls into the same horizontal plane, so that, in case of irregular wearing of their surfaces or bearings, the axes may be brought exactly in line. This is called the adjustment for "tram." If the adjustment were defective in this particular, the rolls would grind finer at the centre than at either end, or finer at one end than at the other. 2. A horizontal grinding adjustment, by which the distance between the two rolls is kept precisely the same their entire length, while the rolls are in operation, so that they may not grind unequally at any point. 3. A spring device, by which the rolls are made to yield to a breaking strain, whenever a nail or other hard substance enters between them. 4. A stop and holding device, by which the rolls are spread apart when not in operation, and are thrown together again precisely as before, without a new adjustment. The object of the patent in suit was to provide the means for such vertical and horizontal adjustments; the requisites of such adjustments, except the third, being that they must be fixed and permanent. The object of the third was merely to prevent injury to the rolls

by the entrance of a hard substance, after the passage of which they returned immediately to their former position.

The patent contains seven claims, the second and third of which refer to the device for adjusting the rolls vertically as well as horizontally, while the fourth and fifth, which are the most material in the consideration of this case, refer to the special devices connected with the rod G for supporting the rolls.

To understand accurately the scope of the Gray invention, it is necessary to consider some of the principal foreign patents, as well as the history of the Gray patent in the Patent Office, and the limitations which were imposed by it, and accepted by him before the patent was granted. In his original application, made in July, 1879, Gray stated his invention to consist "in devices for adjusting the rolls vertically, as well as horizontally, whereby any unevenness in the wear of the rolls, or their journals or bearings, may be compensated for, and the grinding or crushing surfaces kept exactly in line;" and also "in the devices for separating the rolls when not in action," and in other details. His claims corresponded with his evident belief that he was the inventor broadly of devices for a roller adjustment, both vertical and horizontal, and were as follows:

"1. In combination with the stationary roll B, the adjustable roll C, mounted in rocking supports, the pivots of which are located in advance of the journals of the roll, substantially as described.

"2. In combination with a stationary roll, an adjustable roll mounted substantially in the manner described, whereby it may be adjusted, both vertically and horizontally.

"3. In a roller-grinding mill, a roll mounted at its ends in arms or supports arranged to be independently adjusted, both vertically and horizontally, substantially in the manner described.

"4. In a combination with the roll C, the independent arms or supports D, mounted upon eccentrics, substantially as shown, whereby either end of the roll may be adjusted vertically.

"5. In combination with the stationary roll B and adjustable roll C, means, substantially such as described, for drawing the roll C to a fixed point."

His application in this form was refused by the Commissioner of Patents in a letter of August 14, 1879, notifying Gray that his invention was not generic, in view of the English patent No. 3328, of 1877, and suggesting that the specification needed revision, making it a clear description of a specific means employed by applicant. In reply to this letter, Gray immediately amended his application by two insertions in the preamble, so that instead of reading "my invention consists in devices for adjusting the rolls vertically as well as horizontally," it reads "consists in *a peculiar construction and arrangement* of devices for adjusting the rolls vertically as well as horizontally," and by inserting the word "special" before the words "devices for separating the rolls when not in action." He also withdrew all his claims and substituted others, limiting his invention to the particular combinations described in his specification.

The English patent to Lake, to which the Patent Office made reference in its letter of August 19, was one of a series of patents issued in different countries to cover certain inventions of one Nemelka, of Simmering, Austria, upon which he obtained two patents in Austria, January 15 and May 22, 1875; a patent in France, June 23, 1875; a patent in England, issued to Lake, February 28, 1878, and a patent in the United States, November 12, 1878. While these patents have a general resemblance to each other, the different forms which Nemelka's inventions took are best shown in the patent to Lake, which may also be taken as representing most truly the state of the art at the time the Gray patent was issued. It would serve no useful purpose to analyze and compare the different shapes which the Nemelka machines took in the Lake patent. The drawings are confused, badly lettered, and difficult to understand. No less than four different forms of the mechanism are shown, varying as among themselves, but all containing provisions for vertical and horizontal adjustments. The machine shown in figures 11, 12, 13, and 15

exhibits a roll vertically adjustable by a set screw underneath it, and adjustable horizontally for parallelism by a sliding bracket, which also supports the bearing of a shaft working in an eccentric journal, and operated by a lever pivoted upon the shaft, by the movement of which the rolls are opened when not in operation. Other forms of the patent apparently show, though somewhat imperfectly, a capability of yielding to spring pressure by means of an india-rubber buffer located at the lower end of a long descending arm of the movable bearing. An exhibit known as Die Mühle also shows very plainly a spring arrangement similarly located by which the movable roll is made to yield to a sudden pressure. Indeed, the Nemelka machines contain devices obviously adopted from earlier and less perfect forms. But as the Nemelka patents exhibit completely the state of the art at the time the Gray patents were taken out, nothing will be gained by reference to prior or other patents.

Gray's improvement consisted in the invention of the rod G, connecting it at either end with the bearing of one of the two rolls, and placing upon one end or the other of it the three forms of horizontal adjustment, leaving the vertical adjustment to be provided for by an eccentric located at the lower end of the swinging bearing D. The devices certainly appear to an advantage, as compared with those shown in the Nemelka patents, and were apparently the first in this country to supersede the ancient millstones; but, after all, they are only special devices for the more perfect and convenient accomplishment of the same, or practically the same, results. It is not a pioneer patent, and is not entitled to that liberality of construction which would have been accorded to it had Gray been the first to devise a scheme for these several adjustments. An examination of the specification and claims of this patent shows the essence of his invention to be the rod G, connecting the bearings of the rollers, with its several provisions for horizontal adjustment as stated in the fourth and fifth claims. These claims are practically for a combination of (1) a movable roller bearing; (2) the rod G; (3) an adjustable stop device to limit the inward movement of the

bearing; (4) an outside spring, urging the bearing inward; (5) means for adjusting the spring; and (6) a stop and holding device at the opposite end of the rod from the spring.

In defendant's machine the same results are brought about, but in a manner which suggests the Nemelka as strongly as the Gray patent. As in the Nemelka patents, the vertical adjustment is accomplished by a set screw, (instead of the eccentric used by Gray,) located at the lower end of the swinging bearing, by the turning of which the bearing is raised or lowered. But as the vertical adjustment cuts no figure in the consideration of this case, it need not be further considered. Parallelism is also secured by horizontal set screws as in the Nemelka devices. There is no rod G connecting the two bearings in the defendant's machine, nor anything that can be said to be a mechanical equivalent for it, as a special device for securing the horizontal adjustments. In lieu of this rod, there is at each end of the adjustable roller an upright rod, encircled by a spiral spring. This spring is operated by a nut which presses upon a horizontal arm of the bearing through which the rod passes. The screwing down or tightening of this nut tends to separate the adjustable roll from its companion, while, if it be loosened, the resilience of the spring pressing upon the under side of the horizontal arm forces the roll back to its place. While this is an *inside* spring and not an "*outside*" one, its effect in urging the bearing *inward* is similar to that of the spring in Gray's patent. This spring is also capable of yielding to a sudden pressure by which the adjustable roll is forced back and separated from its companion, by the passage of any hard substance, and of resuming its original tension after such hard substance has passed between the rolls. There are also two nuts at the lower end of the spiral spring corresponding in position to the adjusting nut *l*, and jam nut *m*, of the Gray patent, although they apparently lack their function in limiting the action of the spring. The stop and spreading device is not connected at all with the rod, which is supposed to correspond with the rod G of the Gray patent, but is located at the bottom of the swinging bearing, and is operated by a lever applied to

an eccentric shaft, as in the Nemelka patent. The resemblance between the two devices, upon which the charge of infringement must ultimately rest, is in the correspondence of the upright rod with its encircling spiral spring with the rod G of the Gray patent. While in one, and perhaps two particulars, it may be said to perform the same function, it certainly has not the stop and holding device of the Gray patent; it is not a horizontal rod; it is not located above the rollers; it does not connect the bearings of the two rollers together; it does not contain any stop and holding device, and, in so far as it accomplishes the same functions as the rod G, it accomplishes them in a manner suggested rather by the Lake than by the Gray patent. Upon the whole, we think the Circuit Court was correct in holding that defendant's machine was not an infringement of the Gray patent. Should this device be adjudged an infringement, we should not know where to draw the line, providing the alleged infringing device accomplished the four results.

If defendant is not held as an infringer of this patent, it cannot be held as an infringer of patent No. 238,677. The mechanism for simultaneously moving both ends of two rolls, which forms the combination of the second claim, and that for moving the two ends of one roll simultaneously, which is covered by the third claim, were found by the court below to have been anticipated in the Nemelka patent, and we see no reason for questioning the finding in that particular.

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

Affirmed.

ANDREWS *v.* SWARTZ.

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

No. 710. Submitted January 21, 1895. — Decided February 4, 1895.

A review by the appellate court of a State of a final judgment in a criminal case is not a necessary element of due process of law, and may be granted, if at all, on such terms as to the State seems proper.

The repugnancy of a state statute to the Constitution of the State will not authorize a writ of *habeas corpus* from a court of the United States, unless the petitioner is in custody by virtue of such statute, and unless also the statute conflicts with the Federal Constitution.

When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offence and of the accused, mere error in the conduct of the trial cannot be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of *habeas corpus*.

THE case is stated in the opinion.

Mr. George M. Shipman for appellant.

Mr. William A. Stryker for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

Andrews, the appellant, was convicted in the Court of Oyer and Terminer for the county of Warren, New Jersey, of the crime of murder in the first degree, and sentenced to suffer the punishment of death.

He applied to the Chancellor of the State for a writ of error, under a statute of New Jersey, providing that "writs of error in all criminal cases not punishable with death, shall be considered as writs of right, and issue of course; and in criminal cases punishable with death, writs of error shall be considered as writs of grace, and shall not issue but by the order of the Chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney general or the prosecutor for the State." Rev. Stat.

N. J. (Revision of 1877) § 83 of Crim. Procedure, p. 283. This application was denied on the 6th of March, 1894.

On the 17th day of April, 1894, two days preceding that fixed for the execution of the sentence of death, the accused presented to the Circuit Court of the United States for the District of New Jersey a petition for a writ of *habeas corpus*, alleging that he was restrained of his liberty in violation of the Constitution and laws of the United States.

The petition alleged that there was no sufficient cause for the restraint of his liberty, and that his detention in custody was illegal for the following reasons:

"First. He is of African race and black in color; that all persons of his race and color were excluded in the drawing of the grand jury which indicted him and from the petit jury which were summoned to try him, and that the sheriff of Warren County, New Jersey, who by the law of said State has sole power to select said jurors, purposely excluded such citizens of African descent.

"Second. That by reason of such exclusion petitioner was denied the equal protection of the laws, and did not have the full and equal benefit thereof in the proceedings for the security of his life and liberty as is enjoyed by white persons and to which he is justly entitled.

"Third. That all persons of African race and of color were excluded from the grand jury by which the indictment against the defendant was found and upon which he was tried, and, consequently, said indictment was illegal and void, and petitioner ought not to have been put to trial upon said indictment, and the trial court was without jurisdiction, and that said persons were qualified in all respects to act both as jurors and grand jurors, but were purposely excluded, and always have been, by the sheriff of Warren County.

"Your petitioner therefore prays that the court will grant to him the writ of *habeas corpus* according to the statute in such case made and provided, and will inquire into the cause of said imprisonment, and vacate and set aside the said verdict of guilty, and stay the judgment of conviction, and that the petitioner may have a new trial, and that he may be dis-

charged from the said imprisonment; and, further, will grant a writ of *certiorari* to the Court of Oyer and Terminer of the county of Warren, commanding them to certify to this court true copies of the lists of grand and petit jurors for the term of December, 1893, and of the indictment and other proceedings in said cause of the *State* v. *George Andrews*, under and by virtue of which petitioner is held in custody."

It was also alleged in the petition that when the accused was arraigned "he called the attention of the court to the manner of selecting jurors and to the fact that citizens of African descent were purposely excluded by the sheriff of Warren County from the grand jury which found the indictment and from the petit jury summoned to try petitioner, and asked for an order of the court to take testimony to prove his allegations, and that, according to the law and practice of the court, petitioner's application should have been entertained and decided upon the merits, and he should have been permitted to take testimony to show the unjust and illegal action of the said sheriff of Warren County, but that the court absolutely refused his motion and refused to hear the proof which petitioner offered himself ready to make and produce, and compelled him to go to trial."

There was annexed to the petition what purported to be a copy of the proceedings before the state court, as reported by a stenographer, and the petitioner averred that by reason of the action of the court in permitting him "to be tried by a jury from which citizens of African descent were purposely excluded he was deprived of the rights and privileges which white persons would enjoy and to which the petitioner is justly entitled."

The Circuit Court refused to issue a writ of *habeas corpus* upon the ground that it appeared upon the face of the application that the accused was not entitled to it. An appeal from that order was allowed in pursuance of the act of Congress in such case made and provided.

The statute of New Jersey entitled "An act regulating proceedings in criminal cases," approved March 27, 1874, (Revision of 1877, p. 266,) which declares that writs of error

in criminal cases punishable with death shall be considered writs of grace and not writs of right, (Ib. 283,) was brought forward from an act passed March 6, 1795. Laws of New Jersey, Revision of 1821, pp. 184, 186, § 13.

The contention of the appellant is that such a statute is in violation of the Constitution of the United States. If it were necessary, upon this appeal, to consider that question, we would only repeat what was said in *McKane* v. *Durston*, 153 U. S. 684, 687: "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review." "It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be proper;" and "whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

Whether, as is contended, the above statute in its application to capital cases is in violation of the constitution of New Jersey, is not necessarily a Federal question, and upon that point we need not, therefore, express an opinion. The repugnancy of a statute to the constitution of the State by whose legislature it was enacted cannot authorize a writ of *habeas corpus* from a court of the United States unless the petitioner is in custody by virtue of such statute, and unless also the statute is in conflict with the Constitution of the United States.

The further contention of the accused is that he is restrained of his liberty in violation of the Constitution and laws of the United States, in that persons of his race were arbitrarily excluded, solely because of their race, from the panel of jurors summoned for the term of the court at which he was tried, and because the state court denied him the right to establish that fact by competent proof.

It is a sufficient answer to this contention that the state court had jurisdiction both of the offence charged and of the accused. By the laws of New Jersey the Court of Oyer and Terminer and general jail delivery has "cognizance of all crimes and offences whatsoever which, by law, are or shall be of an indictable or presentable nature, and which have been or shall be committed within the county for which such court shall be held." Rev. Stat. N. J. 272, § 30. If the state court, having entered upon the trial of the case, committed error in the conduct of the trial to the prejudice of the accused, his proper remedy was, after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, thence upon writ of error to this court, if the final judgment of such state court denied any right, privilege, or immunity specially claimed, and which was secured to him by the Constitution of the United States. Even if it be assumed that the state court improperly denied to the accused, after he had been arraigned and pleaded not guilty, the right to show by proof that persons of his race were arbitrarily excluded by the sheriff from the panel of grand or petit jurors solely because of their race, it would not follow that the court lost jurisdiction of the case within the meaning of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on *habeas corpus* unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void. *Ex parte Siebold*, 100 U. S. 371, 375; *In re Wood*, 140 U. S. 278, 287; *In re Shibuya Jugiro*, 140 U. S. 291, 297; *Pepke* v. *Cronan*, 155 U. S. 100. When a state court has entered upon the trial of a criminal case, under a statute not repugnant to the Constitution of the United States, and has jurisdiction of the offence and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a court of the United States to review the proceedings upon writ of *habeas corpus*.

The application to the Circuit Court for a writ of *habeas corpus* was properly denied, and the judgment must be

Affirmed.

HUDSON v. PARKER.

ORIGINAL.

No. 9. Original. Submitted January 7, 1895. — Decided February 4, 1895.

A writ of error, under the act of March 3, 1891, c. 517, § 5, from this court to a Circuit or District Court of the United States, in a case of conviction of an infamous and not capital crime, may be allowed, the citation signed, and a supersedeas granted, by any justice of this court, although not assigned to the particular circuit; and the same justice may order the prisoner, after citation served, to be admitted to bail, by the judge before whom the conviction was had, upon giving bond in a certain sum, in proper form and with sufficient sureties; and if that judge declines so to admit to bail, because in his opinion the order was without authority of law, and the bond if given would be void, he may be compelled to do so by this court by writ of mandamus.

This was a petition for a writ of mandamus to the Honorable Isaac C. Parker, the District Judge of the United States for the Western District of Arkansas, to command him to admit the petitioner to bail on a writ of error from this court, dated August 14, 1894, upon a judgment rendered by the District Court for that district at May term, 1894, to wit, on July 21, 1894, adjudging him, upon conviction by a jury, to be guilty of an assault with intent to kill, and sentencing him to imprisonment for the term of four years at hard labor at Brooklyn in the State of New York.

The petition alleged that Mr. Justice Brewer, the justice of this court assigned to the eighth circuit, in which the District Court was held, being absent from that circuit and from the city of Washington, the petitioner, on August 14, 1894, presented to Mr. Justice White, at chambers in this city, a petition for a writ of error upon that judgment, and for a supersedeas and bail pending the writ of error; and that Mr. Justice White signed and endorsed upon that petition the following order:

"Writ of error, to operate as a supersedeas, allowed, returnable according to law, the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to the approval of the District Judge.

"E. D. WHITE,

"Justice Supreme Court of the United States.

"Washington, August 14, 1894."

The petition for a mandamus further alleged that on September 3, 1894, after the writ of error had been issued, and the citation served upon the United States, the petitioner presented to the District Judge in open court, and requested him to approve, a bond in the sum of $5000, executed by himself, as principal, and by four persons, residents of the Western District of Arkansas, as sureties, who (as appeared by their affidavits annexed to the bond) were worth in their own right, over and above their debts and liabilities and the property exempt by law from execution, the sum of $17,500.

This bond, which was filed with the petition for a mandamus, was dated August 27, 1894; recited that the petitioner had sued out a writ of error from this court, upon which a citation had been issued and served upon the United States, and that the petitioner had, by order of Mr. Justice White, been admitted to bail, pending the writ of error, in the sum of $5000; and was conditioned that the petitioner should prosecute his writ of error with effect and without delay, and should abide the judgment of this court, and, if this court should reverse the judgment of the District Court, appear in that court until discharged according to law.

The petition for a mandamus further alleged that, upon the presentation of this bond to the District Judge, he refused to approve it, or to discharge the petitioner, and made and signed an order, which, after reciting the application to him for the approval of the bond, and the order of Mr. Justice White, proceeded and concluded as follows:

"It is found by the judge of this court, that the above order is made without authority of law, and is therefore invalid, and that the bond approved by him in obedience to

it would be null and void, and that there would be no obligation of the sureties to have the principal in court when and where he is required by the terms of the bond to appear, nor would there be any obligation resting on the principal to appear as required by the terms of the bond.

"For the above reasons, the judge of this court refuses to approve the bond tendered by defendant; and further, it is noted that defendant has made no legal tender of bail.

"I. C. PARKER,

"United States District Judge."

The petition for a writ of mandamus also alleged that the writ of error had been duly entered and was pending in this court, and the petitioner was still confined in prison at Fort Smith in the State of Arkansas; and prayed that the order of Mr. Justice White might be affirmed by this court, and the District Judge be ordered to approve the bond and discharge the petitioner, or that his bond might be approved by this court and the petitioner discharged, and for all other proper relief.

This court gave leave to file the petition, and granted a rule to show cause why a peremptory mandamus should not issue as prayed for.

The District Judge, in his return to the rule, stated that, on August 6, 1894, (as appeared by the record,) he ordered that, upon the filing of an assignment of errors, the clerk issue a writ of error taking the case to this court; but that, at the request of the petitioner's counsel, stating that they had not determined whether they would take the case to this court, the writ of error was not immediately issued by the clerk; and that the application to Mr. Justice White for a writ of error, and for supersedeas and bail, was made before the writ of error was issued; that, when Mr. Justice White's order was made, there had been no citation served, but (as the record showed) the citation, signed by him on August 15, 1894, was not served until August 21, 1894; and that, after Mr. Justice White's order, "the petitioner, with others, was tried and convicted of conspiracy to run away the principal witness against him in the above entitled cause; that one of

the conspirators gave evidence against him, and that he is now in jail at Fort Smith, Arkansas, on that charge."

The return also set forth at length various reasons of law why a writ of mandamus should not issue, which may be briefly stated as follows:

First. That the petitioner had a clear, adequate, and complete remedy, by applying to Mr. Justice Brewer, the justice assigned to the eighth circuit, for the approval of the bond.

Second. That under paragraph 2 of Rule 36 of this court, the matter of admitting to bail and approving the bond was a matter requiring the exercise of judicial power and discretion, involving the decision of questions of law and the ascertainment of facts, and could not be controlled by writ of mandamus.

Third. That the bond, if given, would be void, because by paragraph 2 of Rule 36 a person convicted and sentenced for crime could only be admitted to bail after citation served.

Fourth. That the bond would be void, because, by paragraph 2 of Rule 36, Mr. Justice White, not being the justice of this court assigned to the eighth circuit, (according to the last allotment, made April 2, 1894, 152 U. S. 711,) nor a judge of the Circuit Court of that circuit, nor the district judge of any district in that circuit, had no authority to make the order.

Fifth. That paragraph 2 of Rule 36 was void, for want of power in this court, either by the common law, or under any act of Congress, to order bail to be taken after conviction and sentence of such a crime as that of which the petitioner had been convicted.

The District Judge, in concluding his return, submitted the questions involved to the judgment of this court; stated that he would, as a matter of course, enforce by order any decision given by this court in the premises; and prayed to be dismissed without day.

The petitioner demurred to the return.

Mr. William M. Cravens and *Mr. A. H. Garland* for the petitioner, submitted on their brief.

Mr. Solicitor General and *Judge Isaac C. Parker* in person, opposing, submitted on their briefs.

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

By express acts of Congress, beginning with the first organization of the judicial system of the United States, this court and the Circuit and District Courts are empowered to issue all writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Act of September 24, 1789, c. 20, § 14; 1 Stat. 81, 82; Rev. Stat. § 716; *Stockton* v. *Bishop*, 2 How. 74; *Hardeman* v. *Anderson*, 4 How. 640; *Ex parte Milwaukee Railroad*, 5 Wall. 188. Under the first judiciary act, this court had power "to make and establish all necessary rules for the orderly conducting of business" in all the courts of the United States. Act of September 24, 1789, c. 20, § 17; 1 Stat. 83. And successive statutes recognized its power to make rules, not inconsistent with the laws of the United States, prescribing the forms of writs and other process, at common law, as well as in equity or admiralty, in those courts. Acts of May 8, 1792, c. 36, § 2; 1 Stat. 276; May 19, 1828, c. 68, §§ 1, 3; 4 Stat. 281; August 23, 1842, c. 188, § 6; 5 Stat. 518; *Wayman* v. *Southard*, 10 Wheat. 1, 27–29; *Bank of United States* v. *Halstead*, 10 Wheat. 51; *Beers* v. *Haughton*, 9 Pet. 329, 360; *Ward* v. *Chamberlain*, 2 Black, 430, 436. Since the act of June 1, 1872, c. 255, § 5, indeed, the practice, pleadings, and forms and modes of proceeding, in actions at law in the Circuit and District Courts of the United States, are required to conform, as near as may be, to those existing at the time in like causes in the courts of record of the State within which they are held, any rule of court to the contrary notwithstanding. 17 Stat. 197; Rev. Stat. § 914. But this act does not include the manner of bringing cases from a lower court of the United States to this court. *Chateaugay Co., petitioner*, 128 U. S. 544; *Fishburn* v. *Chicago &c. Railway*,

137 U. S. 60. Under section 917 of the Revised Statutes, therefore, by which (reënacting to this extent the provision of the act of 1842) "the Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process," this court has power to regulate the manner of proceeding, or "mode of process," in taking bail, upon writs of error from this court to the Circuit Court or District Court, in civil or criminal cases. Act of September 24, 1789, c. 20, § 33; 1 Stat. 91; Rev. Stat. § 1014; *Beers* v. *Haughton*, above cited; *United States* v. *Knight*, 14 Pet. 301; *United States* v. *Rundlett*, 2 Curtis, 41.

By section 4 of the act of March 3, 1891, c. 517, the review, by appeal, writ of error, or otherwise, of judgments of the Circuit Courts or District Courts, can be had only in this court, or in the Circuit Courts of Appeals, according to the provisions of this act. By section 5, "appeals or writs of error may be taken from" the Circuit Courts or District Courts "direct to" this court "in cases of conviction of a capital or otherwise infamous crime," as well as in certain other classes of cases. 26 Stat. 827. And by section 11, "all provisions of law, now in force, regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." 26 Stat. 829. But as to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the Circuit Court or the District Court, Congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system.

By those statutes, upon writs of error from this court to the Circuit Courts or District Courts of the United States, as well as upon writs of error from this court to the courts of

the several States, any justice of this court — not necessarily the justice assigned to the circuit in which the other court is held — may, in or out of court, allow the writ of error, sign the citation, take the requisite security for the prosecution of the writ of error, and grant a supersedeas when the writ of error does not of itself operate as a stay of proceedings, as it does if filed and security given within sixty days after the judgment complained of. Rev. Stat. §§ 999, 1000, 1002, 1003, 1007; *Sage* v. *Railroad Co.*, 96 U. S. 712; *Hudgins* v. *Kemp*, 18 How. 530; *Peugh* v. *Davis*, 110 U. S. 227.

In *Claasen's case*, 140 U. S. 200, it was adjudged, upon full consideration, that by the act of 1891 a writ of error from this court to the Circuit Court, in the case of a conviction of a crime infamous but not capital, was a matter of right, without giving any security; that the citation might be signed by a justice of this court, under Rev. Stat. § 999; that a supersedeas might be granted, not only by this court, under § 716, but by a justice thereof, under § 1000; and that, if the justice signing the citation directed that it should operate as a supersedeas, the supersedeas might be obtained by merely serving the writ within the time prescribed in § 1007. Mr. Justice Blatchford, in delivering the unanimous judgment of the court accordingly, said: "To remove all doubt on the subject, however, in future cases, we have adopted a general rule, which is promulgated as Rule 36 of this court, and which embraces, also, the power to admit the defendant to bail after the citation is served." 140 U. S. 205, 207, 208.

By that rule, which was promulgated May 11, 1891, the same day on which that judgment was delivered, "An appeal or a writ of error from a circuit court or a district court direct to this court," in the cases provided for in sections 5 and 6 of the act of 1891, "may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal." And by paragraph 2 of the same rule, "Where such writ

of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the Circuit Court, or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." 139 U. S. 706.

This court cannot, indeed, by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other courts of the United States, or of a justice or judge of either, under the Constitution and laws of the United States. *Poultney* v. *La Fayette*, 12 Pet. 472; *The St. Lawrence*, 1 Black, 522, 526; *The Lottawanna*, 21 Wall. 558, 576, 579. Nor has it assumed to do so.

On the contrary, the rule in question was adopted by this court under and pursuant to its power to make rules, prescribing the forms of writs and process, and regulating the practice upon appeals or writs of error; and was so framed as to give effect to the appellate jurisdiction conferred by the act of 1891, in the manner most consistent with the provisions of the various acts of Congress concerning the same matter.

There can be no doubt, therefore, that under the acts of Congress, the decision of this court in *Claasen's case*, above cited, and the first paragraph of Rule 36, Mr. Justice White, although not the justice of this court assigned to the eighth circuit, was authorized to allow the writ of error, to operate as a supersedeas, and to sign the citation.

The next question is of the validity of his order, so far as regards admitting the prisoner to bail pending the writ of error.

Recurring once more to Rule 36, and to the decision in *Claasen's case*, which were considered and promulgated together, and mutually serve to explain each other, the matter stands thus: The first paragraph of the rule, embracing all cases, civil or criminal, of which this court has appellate jurisdiction under the act of 1891, provides that the writ of error may be allowed, in term time or vacation, "and the proper security be taken," the citation signed, and a supersedeas granted, "by any justice of this court." In *Claasen's case*, it was held that, in the case of an infamous crime, the writ of

error was a matter of right, and that no security, such as is necessary in a civil case, was required. The only "proper security," then, in a criminal case, is security for the appearance of a prisoner admitted to bail. Within the very terms of the rule, therefore, any justice of this court, although not assigned to the particular circuit, would seem to have the power to permit bail to be taken. But the power rests upon broader grounds.

The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error.

The statutes as to bail upon arrest and before trial provide that "bail may be admitted" upon all arrests in capital cases, and "shall be admitted" upon all arrests in other criminal cases; and may be taken in capital cases by this court, or by a justice thereof, or by a circuit court, a circuit judge or a district judge, and in other criminal cases by any justice or judge of the United States or other magistrate named. Rev. Stat. §§ 1014–1016.

Under the act of March 3, 1879, c. 176, upon writs of error from the Circuit Court to review judgments of the District Court upon convictions in criminal cases, the justice of this court assigned to the circuit, or the circuit judge — that is to say, any member of the appellate court, except the district judge, presumably the judge who rendered the judgment below — might allow the writ, to operate as a supersedeas, and might take bail for the defendant's appearance in the Circuit Court. 20 Stat. 354; *United States* v. *Whittier*, 11 Bissell, 356. And upon a writ of error from this court to the highest court of a State to review a decision against a right claimed under the Constitution and laws of the United States, and which lies both in criminal and in civil cases, and operates as a supersedeas under the same circumstances in the one as in the other, bail may be taken pending the writ of error; but, because of the relation between the two governments, in

the court of the State only, it being enacted by the act of July 13, 1866, c. 184, § 69, in accordance with the practice previously prevailing in some States, that the plaintiff in error, if charged with an offence bailable by the laws of the State, shall not be released from custody until final judgment upon the writ of error, "or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the state court, shall be given;" or, if the offence is not so bailable, until such final judgment. 14 Stat. 172; Rev. Stat. § 1017; *Cohens* v. *Virginia*, 6 Wheat. 264; *Worcester* v. *Georgia*, 6 Pet. 515, 537, 562, 567; *Bryan* v. *Bates*, 12 Allen, 201. By these statutes, bail after conviction was provided for in every class of writs of error pending in the courts of the United States in cases of bailable offences; for, when they were enacted, no writ of error lay from this court to the Circuit Court or District Court in any criminal case.

By the act of February 6, 1889, c. 113, § 6, it was enacted that final judgments of any court of the United States upon conviction of a crime punishable with death might, upon the application of the defendant, be reviewed by this court "upon a writ of error, under such rules and regulations as said court may prescribe;" and that every such writ of error should "be allowed as of right, and without the requirement of any security for the prosecution of the same, or for costs;" and should "during its pendency operate as a stay of proceedings upon the judgment, in respect of which it is sued out," and might be immediately filed in this court; but should not be sued out or granted, except upon a petition filed, with the clerk of the court in which the trial was had, during the same term, or within sixty days after its expiration. 25 Stat. 656.

Although that act expressly recognized the power of this court to make rules regulating the proceedings upon writs of error in capital cases, yet, as by its terms the writ was to be allowed as of right, without requiring any security, and was of itself to operate as a stay of proceedings, no rule upon the subject was considered necessary, and none was made by this court. It can hardly be doubted, however, that Congress intended that the allowance of the writ of error and stay of

proceedings, while suspending the execution of the sentence, should neither have the effect of discharging the prisoner from custody, nor of preventing his being admitted to bail, upon sufficient cause shown, pending the writ of error; and, no special provision upon the subject of bail in a capital case after conviction having been made by act of Congress or rule of court, it would seem that it might be taken by the justice or judge who allowed the writ of error.

But, however it may be in a capital case, it is quite clear, in view of all the legislation on the subject of bail, that Congress must have intended that under the act of 1891, in cases of crimes not capital, and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice or judge. And we are of opinion that any justice of this court, having power, by the acts of Congress, to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has the authority, as incidental to the exercise of this power, to order the plaintiff in error to be admitted to bail, independently of any rule of court upon the subject; and that this authority is recognized in the first paragraph of Rule 36.

Having the authority to order bail to be taken, the same justice might either himself approve the bail bond; or he might order that such a bond should be taken in an amount fixed by him, the form of the bond and the sufficiency of the sureties to be passed upon by the court whose judgment was to be reviewed, or by a judge of that court; or he might leave the whole matter of bail to be dealt with by such court or judge.

Upon a writ of error in a civil case, the requisite security is ordinarily taken by the justice or judge who allows the writ and signs the citation. *Jerome* v. *McCarter*, 21 Wall. 17. But where the bond taken is insufficient in law, this court, in the exercise of its inherent jurisdiction as a court of error, may direct that the writ be dismissed, unless the plaintiff in error gives security sufficient in this respect, to be taken and approved by any justice or judge who is authorized to allow the writ of error and citation. *Catlett* v. *Brodie*, 9 Wheat. 553, 555; *O'Reilly* v. *Edrington*, 96 U. S. 724.

This court, in the lawful exercise of its power to prescribe the forms of process and to regulate the practice upon writs of error, has said, in paragraph 2 of Rule 36, that, in the case of a conviction of an infamous crime, "the Circuit Court, or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed."

The necessary consequence is that that part of the order of Mr. Justice White, which required "the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to approval by the District Judge," was a valid exercise of his authority to order bail, in an amount fixed by him, to be taken by the District Judge, leaving the form of the bond, and the sufficiency of the sureties, to be passed upon by the latter.

A writ of error, allowed out of court, is neither considered as brought, even for the purpose of computing the time of limitation of suing it out, nor does it operate as a supersedeas, until it has been filed in the clerk's office of the court to which it is addressed. *Credit Co.* v. *Arkansas Railway*, 128 U. S. 258, 260, and cases cited; *Foster* v. *Kansas*, 112 U. S. 201. By the order of Mr. Justice White, the allowance of the writ of error, to operate as a supersedeas, was not to take effect until the approval of the bond by the District Judge; and when the bond was presented to the District Judge for approval, the writ of error had been filed in the clerk's office of the District Court, and the citation had been issued and served. The objection that the petitioner could only be admitted to bail after citation served has therefore no application to this case.

The discretion of a judge, indeed, in a matter entrusted by law to his judicial determination, cannot be controlled by writ of mandamus. But if he declines to exercise his discretion, or to act at all, when it is his duty to do so, a writ of mandamus may be issued to compel him to act. For instance, a writ of mandamus will lie to compel a judge to settle and sign a bill of exceptions, although not to control his discretion as to the frame of the bill. *Ex parte Bradstreet*, 4 Pet. 102; *Ex parte*

Crane, 5 Pet. 190; *Chateaugay Co., petitioner*, 128 U. S. 544, 557. See also *Ex parte Morgan*, 114 U. S. 174; *Ex parte Parker*, 120 U. S. 737; *Parker, petitioner*, 131 U. S. 221; *Virginia* v. *Paul*, 148 U. S. 107, 123, 124.

If, as suggested in the return, the petitioner is also in custody under a subsequent conviction for another offence, that custody will not be affected by admitting him to bail in this case.

Were the question here only as to what persons should be accepted as sureties on the bond, or as to their sufficiency, there would be no ground for issuing a writ of mandamus. *Ex parte Taylor*, 14 How. 3; *Ex parte Milwaukee Railroad*, 5 Wall. 188. But in the case before us, the District Judge has not exercised any discretion in the matter, but has declined to act at all, and has refused to approve the bond, solely because, in his own words, "it is found by" him that the order of Mr. Justice White was made without authority of law, and that the bond, if approved, would be void.

As the District Judge, in so refusing to approve the bond, appears to have acted under a misunderstanding of the powers of this court and of its justices, and of his own duty in the premises, and as in his return he expresses his readiness to enforce any decision of this court, it appears to us to be more just to him, as well as more consistent with the maintenance of the rightful authority of this court, to sustain this petition, and enable bail to be taken before him in accordance with the order heretofore made, than to dismiss these proceedings, and to deal with the matter over his head, as it were, by having the petitioner admitted to bail by this court, or by the justice thereof assigned to the eighth circuit.

We do not anticipate that there will be any occasion for the actual issue of a writ of peremptory mandamus; but, should it become necessary to do so in order to secure the rights of the petitioner, his counsel may move for the writ at any time. The present order will be

Petitioner entitled to writ of mandamus to the District Judge to admit the petitioner to bail on his giving bond in proper form and with sufficient sureties.

Dissenting Opinion: Brewer, Brown, JJ.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

I am unable to concur in all the views expressed in the opinion of the court. Agreeing that this court has power to admit to bail in criminal cases pending proceedings in error, I reach this conclusion in a different way, and deduce the right to let to bail solely from the grant of jurisdiction over the proceedings in error. As said in *Ex parte Dyson*, 25 Mississippi, 356, 359: "The right of a prisoner to bail, after conviction, is not regulated by the Constitution or by statute, and is governed by the rules and practice of the common law. It seems to be fully and clearly established that the Court of King's Bench could bail in all cases whatsoever, according to the principles of the common law; the action of that court not being controlled by the various statutes enacted on the subject of bail, but regulated and governed entirely by a sound judicial discretion on the subject. 2 Hale P. C. 129; 4 Co. Inst. 71; 4 Com. Dig. 6, tit. (f. 3;) 1 Bacon's Ab. 483-493; 2 Hawk. P. C. 170; Cowp. 333. In the exercise of this discretion the court in some instances admitted to bail, even after verdict, in cases of felony, whenever a special motive existed to induce the court to grant it. 1 Bac. Abr. 489–490; 2 Hawk. P. C. 170."

So, when jurisdiction is given over proceedings in error in criminal cases, that jurisdiction carries with it, by implication, the power to make all orders necessary and proper not merely for bringing up the record, but also for the custody of the defendant pending the hearing of his allegations of error. But that jurisdiction is vested in this court as a court, and not in any single justice.

There have been five separate enactments of Congress in reference to the letting to bail and the review of judgments in criminal cases. First, for bail before trial. (Secs. 1014, 1015, and 1016, Rev. Stat.) These sections name the judicial officers by whom bail may be taken. Second, in respect to judgments in criminal cases in the state courts, brought here on error. (Sec. 1017, Rev. Stat.) In this section there is

specific provision in reference to the matter of bail. Third, the act of March 3, 1879, c. 176, providing for a review by the Circuit Court of judgments in the District Court in criminal cases. 20 Stat. 354. In this act express authority is given for bail, and the officers named by whom such bail may be taken. Fourth, the act of February 6, 1889, c. 113, 25 Stat. 655, granting a writ of error from this court to bring up the judgments of any inferior courts of the United States in capital cases. Nothing is said in this act in respect to the matter of bail, but the allowance of the writ is made to operate as a stay of proceedings. Fifth, the act of March 3, 1891, c. 517, 26 Stat. 826, — the act under which this controversy has arisen—which provides for a review by this court of the final judgments of Circuit or District Courts in cases of "convictions of capital or otherwise infamous crimes." In this statute also there is no mention of bail.

I fail to appreciate the argument that because Congress has made specific provision for bail in criminal cases before conviction, it is to be assumed that it intended that bail should likewise be allowed in all cases after conviction; or that, because in two statutes, contemplating review of judgments in criminal cases, it made like specific provision in respect to letting to bail, it intended the same grant of power in two other and later statutes granting a right of review — in which it said nothing in respect to bail. In other words, an omission apparently made *ex industria* implies the same intention as an express provision fully stated. On the contrary, as I understand it, the logic of all differences in substantial provisions between earlier and later statutes is indicative of difference rather than identity of purpose.

"Indeed, the words of a statute, when unambiguous, are the true guide to the legislative will. That they differ from the words of a prior statute on the same subject, is an intimation that they are to have a *different* and not the *same* construction." *Rich* v. *Keyser*, 54 Penn. St. 86, 89.

Where the later of two acts upon limited partnerships omitted the infliction, prescribed by the earlier, of a penalty for the omission of certain matters required by both, the court

said: "We must presume that the [earlier] act . . . and the decisions under it were well known to the law makers at the time the [later] act . . . was passed. The omission to prescribe the penalty . . . is good reason for concluding that no such liability was intended." *Eliot* v. *Himrod*, 108 Penn. St. 569, 573. See Endlich on the Interpretation of Statutes, § 384.

Neither can I gather from the legislation authorizing bail before trial, or that provision for bail in cases brought to this court from conviction in state tribunals, or that authorizing bail in cases taken from the District to the Circuit Court, the evidence of a settled policy on the part of Congress that bail should be allowed in all cases, capital or otherwise, brought here on error from a final judgment of the Circuit or District Court. Indeed, with reference to this matter of policy it was well said in *Hadden* v. *The Collector*, 5 Wall. 107, 111: "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinion, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

Nevertheless, I agree with the majority, that this court has power to prescribe by rule all matters of detail in respect to procedure which are not in terms fixed or denied by statute. It has exercised such power and passed a rule concerning the letting to bail in which, as I have hitherto supposed, it determined the whole matter.

It is idle to say that there is no difference between the supersedeas of a judgment and the letting to bail. When a sentence of death is stayed by this court, it does not follow, as a matter of course, that the party sentenced is to be discharged from custody and permitted to go where he pleases; and the same is true in case of a sentence to confinement and hard labor in the penitentiary. The stay of execution simply prevents the hanging or the removal of the party to the penitentiary. But it is unnecessary in view of the language of this court to make any argument to show that the two things are different. In

In re Claasen, 140 U. S. 200, 208, the court said: "We hold, therefore, that the allowance of the *supersedeas* in the present case was proper, and we deny the motion to set it aside. To remove all doubt on the subject, however, in future cases, we have adopted a general rule, which is promulgated as Rule 36 of this court, (see 139 U. S. 706,) and which embraces, also, the power to admit the defendant to bail after the citation served."

The rule there indicated was put into two paragraphs, one of which provides among other things for a supersedeas and the other for admitting to bail. This court then, certainly, understood that there was a difference between the two, and did not add a second paragraph to regulate a matter which was fully regulated by the first. It is also true that in the first paragraph provision is made for the taking of security, but taking security is not technically letting to bail, and the provision in reference to security evidently refers to those cases in which the sentence of the trial court directs the payment of a fine. In respect to such a sentence, "security" is an apt and suitable word.

Now, the idea of a rule is that it makes full provision for everything within the scope of its general purpose, and when this court, by the second paragraph, named certain judicial officers as the ones to admit to bail, it was a declaration, first, that this court had power to pass such a rule; and, second, upon the principle, *expressio unius exclusio alterius*, that it had named therein all the judicial officers who were to exercise that particular authority. There is in its language nothing to suggest that it was intended to be cumulative, or that in addition to certain officers given by law the right to admit to bail, other officers were by it given the like power. It is well to note the very words of the rule:

"1. An appeal or a writ of error from a Circuit Court or a District Court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled 'An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, may

be allowed, in term time or in vacation, by any Justice of this court, or by any Circuit Judge within his circuit, or by any District Judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

"2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed."

No one can read this rule, and particularly the second paragraph, without understanding that by it this court had named the officers, and the only officers, who should have the power to admit to bail. Certainly such has been the understanding of bench and bar through the country.

In *United States* v. *Simmons*, 47 Fed. Rep. 723, 724, Judge Benedict says: "The rules of the Supreme Court of the United States (Rule 36) permit persons convicted, when they appeal to the Supreme Court of the United States, to be admitted to bail, but leave the question of admitting to bail to the discretion of the court below."

Can there be any doubt as to the meaning of the second paragraph? It says: "The Circuit Court or District Court, or any justice or judge thereof." Surely, that does not mean any Circuit Court or any District Court, or any justice or any judge thereof, but the court in which the case was tried. If it was intended by the second paragraph to give to any justice of this court the power to admit to bail, why was not the language of the first paragraph repeated, or a mere reference made to the words of description therein? Why was the careful language used which unquestionably limits to the judicial officers of the circuit in which the case was tried? It says "any justice or judge thereof." Section 605, Revised Statutes, contains these words: "The words 'circuit justice' and 'justice of a circuit,' when used in this title, shall be understood to designate the justice of the Supreme Court who

is allotted to any circuit." Did not this court, when it framed this paragraph, understand what the statute had declared to be the meaning of the words "justice of a circuit?" If the power belonged to all the justices of the court, either independently of the rule or by virtue of the first paragraph, why in this second paragraph mention the justice of the circuit? I confess my inability to see any reason therefor.

Hence I am forced to the conclusion that if the order of Mr. Justice White, who was not the justice of the eighth circuit, is to be construed as a command in respect to bail, it was beyond the scope of the rule. I think, however — and in this I must also differ from the majority — that, reasonably construed, it may be taken as a supersedeas, the power to grant which is unquestioned, and a reference of the matter of bail to the trial judge.

Indeed, the conclusion reached by the court seems to work out this curious result, that one judge, by virtue of his power to allow a writ of error, can command another judge to perform the ministerial duty of approving a bail bond. Suppose a criminal case is tried by a justice of this court while holding the Circuit Court, can it be that the circuit judge, exercising the power given to him by the first paragraph of this rule, can allow a writ of error, and couple with it a command to the circuit justice to approve a bail bond against his judgment of the propriety of letting to bail, and such command be enforced by a writ of mandamus from this court? I submit the query without further comment.

I am authorized to say that Mr. Justice Brown concurs in these views.

Mr. Justice White took no part in the decision of this case.

EMERT *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 120. Argued and submitted December 14, 1894. — Decided March 4, 1895.

A statute of a State, by which peddlers of goods, going from place to place within the State to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents or products of the State and those of other States, is not, as to peddlers of goods previously sent to them by manufacturers in other States, repugnant to the grant by the Constitution to Congress of the power to regulate commerce among the several States.

Machine Co. v. *Gage*, 100 U. S. 676, approved and followed.

THIS was an information, filed July 27, 1889, before a justice of the peace in the county of Montgomery and State of Missouri, for a misdemeanor, by peddling goods without a license, in violation of a statute of the State, contained in chapter 137, entitled "Peddlers and their licenses," of the Revised Statutes of Missouri of 1879, the material provisions of which are copied in the margin,[1] and which is reënacted as chapter 125 of the Revised Statutes of 1889.

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[1] SEC. 6471. Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except books, charts, maps and stationery, by going from place to place to sell the same, is declared to be a peddler.

SEC. 6472. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors.

SEC. 6473. Every license shall state the manner in which the dealing is to be carried on, whether on foot, or with one or more beasts of burden, the kind of cart or carriage, or, if on the water, the kind of boat or vessel to be employed.

SEC. 6476. Any person may obtain a peddler's license by application to the collector of the county in which he intends to carry on his trade, by paying the amount levied on such license.

SEC. 6477. There shall be levied and paid, on all peddlers' licenses, a state tax of the following rates: First, if the peddler travel and carry his goods on foot, three dollars for every period of six months; second, if one or more horses or other beasts of burden, ten dollars for every period of six months; third, if a cart or other land carriage, twenty dollars for every

Statement of the Case.

The information alleged that the defendant on June 26, 1889, in that county, "did then and there unlawfully deal in the selling of goods, wares and merchandise, not being books, charts, maps or stationery, by going from place to place, in a cart or spring wagon with one horse, to sell the same, and did then and there, while going from place to place to sell said goods, wares and merchandise aforesaid, unlawfully sell one sewing machine to David Portucheck, without then and there having a license as a peddler, or any other legal authority to sell the same; against the peace and dignity of the State."

The defendant pleaded not guilty, and was adjudged to be guilty, and sentenced to pay a fine of fifty dollars, and costs. He appealed to the circuit court of the county; and in that court the parties, for the purpose of dispensing with evidence, agreed in writing, signed by their attorneys, that the case might be decided by the court on the following agreed statement:

"1st. That for more than five years last past the Singer Manufacturing Company has been, and still is, a corporation duly organized under the laws of the State of New Jersey, and a citizen of that State.

"2d. That on and prior to June 26, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company on a salary for his services, and at said time, in

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period of six months; fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period not less than five days; and such license may be renewed, at the expiration of the first license, for any period not greater than six months, on payment of fifty cents a day, the number of days to be specified in such license. Any county court may, by an order of record, require all peddlers doing business in their county to pay a license tax, not greater than that levied for state purposes.

SEC. 6478. Every person who shall be found dealing as a peddler, contrary to law or the terms of his license, shall forfeit, if a foot peddler, the sum of ten dollars; on one or more beasts of burden, twenty-five dollars; in a cart or other land carriage, fifty dollars; in a boat or other vessel, one hundred dollars.

SEC. 6479. Every peddler shall, upon the demand of any sheriff, collector, constable, or citizen householder of the county, produce his license, and allow the same to be read by the person making the demand; and, in default thereof, shall forfeit the sum of ten dollars.

pursuance of said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain New Singer Sewing Machine, which, on said day, he offered for sale to various persons at different places in said county; and that on said day the defendant did find a purchaser for said machine, and did sell and deliver the same to David Portucheck in said county.

"3d. That said Singer machine in question was manufactured by said Singer Manufacturing Company at its works in the State of New Jersey, and that said sewing machine belonged to and was the property of said company, and that it was forwarded to this State by said company, and by it delivered to the defendant as its agent for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars; that the defendant had no peddler's license at said time."

The court adjudged that the defendant was guilty as charged in the information, and that he pay a fine of fifty dollars, and costs. The defendant moved for a new trial, because the facts in the agreed statement constituted no offence; and because the statute on which he had been charged and convicted, being chapter 137 of the Revised Statutes of 1879, was in contravention of section 8 of article 1 of the Constitution of the United States, and void in so far as it affected him. The motion for a new trial, as well as a motion in arrest of judgment, was overruled; and the defendant, upon the ground that a constitutional question was involved, and assigning as errors the same causes as in his motion for a new trial, appealed to the Supreme Court of the State, which affirmed the judgment. 103 Missouri, 241.

The defendant sued out this writ of error, which was allowed by the presiding judge of that court, upon the ground that there "was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity."

Argument for Plaintiff in Error

Mr. Lawrence Maxwell, Jr., and *Mr. Seneca N. Taylor* for plaintiff in error.

The plaintiff in error submits that the transaction in which he was engaged and for which he was punished was interstate commerce. If so, it was not competent for the State of Missouri to tax him for the privilege of making the sale. The Singer Manufacturing Company is not contesting the right of the State of Missouri to tax its property within that State *as property* in accordance with the rules governing the taxation of other property, and as the coal was taxed in *Brown* v. *Houston*, 114 U. S. 622. It simply insists that under the Federal Constitution it has the right, in the absence of congressional prohibition, not only to carry the goods which it manufactures in New Jersey into the State of Missouri, but to sell them in that State, and that the State of Missouri has no power to prevent it from making such sales or to tax it for the *privilege.*

I. The tax complained of is not a tax upon the property of the Singer Company in Missouri. The company is taxed upon its property in that State under the general revenue laws of the State. This is an additional tax for the privilege of selling its machines in a certain way.

It is sometimes said that a license tax is in effect a tax upon property, but it is submitted that the statement is not accurate. A tax upon property, as property, is assessed with reference to the amount and value of the property; but the statute complained of takes no account of the amount or value of property. The tax is in terms and effect a license tax for the privilege of selling or offering to sell goods during a certain time in a certain way, to wit, "by going from place to place and selling the same," without reference to the amount or value of the goods carried or sold.

With respect to the particular machine in question the agreed statement of facts shows nothing more than that it was manufactured by the Singer Company at its works in New Jersey, and was forwarded as a matter of interstate commerce to Emert, as its agent in Missouri, to be sold by him on

its account, and that he made the sale on its account. It does not appear that Emert ever carried with him or ever sold or delivered any machines save this one, or that he ever carried this machine or had it in his possession at any time prior to the day of sale, and the assumption to the contrary in the opinion of the Supreme Court of Missouri is not warranted by the facts; but if this court shall assume without evidence, especially in a criminal case, that the Singer Company sends its machines from its factory in New Jersey to offices or depots in the State of Missouri, and that they are kept at such agencies for sale, the general revenue laws of the State provide for the taxation of such stocks of machines as property.

Rev. Stats. Missouri, 1889, c. 111, § 6894, provide that "Every person or copartnership of persons, who shall deal in the selling of goods, wares, and merchandise, including clocks, at any store, stand, or place occupied for that purpose, is declared to be a merchant."

Section 6896 provides that "Merchants shall pay an *ad valorem* tax equal to that which is levied upon real estate, on the highest amount of all goods, wares, and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday of March and the first Monday in June in each year: *Provided*, That no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other State, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Subsequent sections provide for returns and assessments in accordance with the foregoing rule of taxation, so that the Singer Company with respect to stocks of machines held by it at any of its offices in the State is compelled to pay an *ad valorem* tax, equal to that which is levied on real estate, on the highest amounts of goods, wares, and merchandise which it has in its possession or under its control, at any time between the first Monday in March and the first Monday in June in each year. This writ of error does not involve the right to levy such taxes.

Argument for Plaintiff in Error.

II. The right secured by the Federal Constitution to the citizens of other States to engage in commerce with the citizens of Missouri includes not only the right to import their goods into Missouri, but to sell them there after importation. The right to import is of no benefit, shorn of the right to sell. Missouri can no more prevent or tax the one than the other.

In *Brown* v. *Maryland*, 12 Wheat. 419, Chief Justice Marshall said (p. 439): "There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

Again at page 446 he said: "If this power [of Congress to regulate interstate commerce] reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell.

"If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?"

Again, on page 448 he said: "We think, then, that if the power to authorize a sale exists in Congress, *the conclusion that the right to sell is connected with the law permitting importation as an inseparable incident is inevitable.*" And again, on page 449: "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State."

The question whether the right to import an article of interstate commerce from one State to another includes by necessary implication the right to sell it was much considered in *Bowman* v. *Chicago and Northwestern Railway*, 125 U. S. 465, but was not decided. The argument there was "that the right of a State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former." "The argument," said Mr. Justice Matthews, "is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed; but the right to prohibit sales, so far as conceded to the States, arises *only after the act of transportation has terminated*, because the sales which the State may forbid are of things within its jurisdiction."

The views held by Mr. Justice Matthews upon the main question are easily discovered from the following passage from his opinion (page 499): "It is easier to think that the right of importation from abroad and of transportation from one State to another includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among

the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case."

In his separate concurring opinion Mr. Justice Field, after examining the question, says (page 505): "Assuming, therefore, as correct doctrine that the right of transportation carries the right to sell the article imported, the decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing," etc.

The precise question came up later in *Leisy* v. *Hardin*, 135 U. S. 100. The conclusion of the court is shown by the following passage from the opinion of Mr. Chief Justice Fuller (page 124): "The plaintiffs in error are citizens of Illinois, are not pharmacists and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago &c. Railway*, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time 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."

The argument by which this conclusion was reached and the effect of the decision in *Brown* v. *Maryland* are shown in a previous passage from the opinion of the Chief Justice on page 110.

III. If the transaction in which Emert was engaged was interstate commerce, the imposition of a license tax is a "regulation" within the meaning of the Constitution.

In *Brennan* v. *Titusville*, 153 U. S. 289, 304, Mr. Justice Brewer, speaking of *Welton* v. *Missouri*, 91 U. S. 275, said: "It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce." And again, page 298: "It is true,

also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce."

IV. It is immaterial that the statute "regulates" those who are engaged in internal commerce equally with those engaged in interstate commerce. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Asher* v. *Texas*, 128 U. S. 129; *Brennan* v. *Titusville*, 153 U. S. 289.

A State cannot prevent a person from engaging in interstate commerce or tax him for the privilege, and it does not acquire the right to do so by also regulating persons engaged in internal commerce of the same sort. The prohibition is not against regulating interstate commerce by a discriminating regulation, but against regulating it at all.

The case of *Machine Co.* v. *Gage*, 100 U. S. 676, overlooks this fundamental distinction. It is the case upon which the decision of the Supreme Court of Missouri is based, and is a constant source of confusion. It is submitted that it should now be overruled in terms as it has been in effect by numerous subsequent decisions of this court.

In *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 497, Mr. Justice Bradley said: "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall. 232."

Speaking of the decision in *Robbins* v. *Shelby Taxing District*, Mr. Justice Brewer, in *Brennan* v. *Titusville*, 153 U. S. 289, 304, said: "The statute made no discrimination between those who represented business houses out of the State and those representing like houses within the State. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the

ground that, whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for business houses outside of the State (and who were therefore engaged in interstate commerce) any burden by way of a license tax."

V. It is immaterial that the Singer Company is a corporation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Crutcher* v. *Kentucky*, 141 U. S. 47.

The doctrine is now firmly settled that interstate commerce by a corporation is entitled to the same protection as when carried on by individuals.

VI. The question, after all, is simply whether the transaction in which Emert was engaged and for which he was punished was interstate commerce. If so, it was not within the regulating power of the State of Missouri. What Emert did was to negotiate the sale of merchandise. That was clearly an act of commerce, and the only question is whether it was domestic commerce or interstate commerce. It is admitted (*Brennan* v. *Titusville*) that if Emert had negotiated the sale prior to the arrival of the machine in Missouri the transaction would have been an act of interstate commerce. Why? Because it was a step taken for the purpose of effecting a sale and delivery in one State of goods from another State. But what difference does it make whether the sale precedes the arrival of the goods or is made contemporaneously with their arrival or after their arrival, provided the goods remain the property of the shipper until sold, and were shipped by him for the sole purpose of being sold in the State to which they were sent. The protection of the Constitution is not confined to interstate commerce in which sale precedes shipment. It extends to all interstate commerce, whether the vendor sells in advance of shipping or whether he accompanies the goods personally or by agent into the foreign State to sell them there as best he can and as soon as he can. It will be noticed that it is not the fact of sale that makes one liable under the Missouri statute. It is for the privilege of *trying* to sell "by going from place to place" that the tax is imposed.

We submit that where a thing like a machine is sent from one State to another for the sole purpose of being there sold, then the State to which it is sent cannot "regulate" the manner in which it shall be sold by forbidding the owner to go "from place to place to sell the same." If the States can establish that regulation, there is no limit to the restrictions which they may impose upon interstate commerce. The only safe doctrine is that announced in *Brown* v. *Maryland* and reaffirmed in *Leisy* v. *Hardin* — that "the right to sell any article imported is an inseparable incident of the right to import it." It was contended by the dissenting justices in the latter case that this right of sale is subject to the exercise of the police power of the State in the case of deleterious substances, but no such question is involved at bar. Upon the vital question that the Federal Constitution guarantees the right to sell as an inseparable incident of the right to import, there was no disagreement. We respectfully submit that the judgment should be reversed.

Mr. R. F. Walker, Attorney General of the State of Missouri, for defendant in error, submitted on his brief.

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

From early times, in England and America, there have been statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses to practise their trade.

In Tomlin's Law Dictionary are these definitions: "*Hawkers.* Those deceitful fellows who went from place to place, buying and selling brass, pewter, and other goods and merchandise, which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that with *hawks* seek their game where they can find it. They are mentioned in Stat. 33 Hen. VIII, c. 4." "*Hawkers, Pedlars, and Petty Chapmen.* Persons travelling from town to town with goods and merchandise. These were under the control of commissioners for

licensing them for that purpose, under Stats. 8 & 9 Wm. III, c. 25; 9 & 10 Wm. III, c. 25 [9 Wm. III, c. 27]; 29 Geo. III, c. 26."

The act of 50 Geo. III, c. 41, repealed the prior acts, and imposed a penalty on "any hawker, pedlar, petty chapman, or any other trading person or persons, going from town to town, or to other men's houses, and travelling, either on foot, or with horse or horses," and exposing to sale, or selling goods, wares or merchandise by retail. Upon an information in the Court of Exchequer to recover penalties under that act, Baron Graham said: "The object of the legislature, in passing the act upon which this information is founded, was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury; and, on the other, to guard the public from the impositions practised by such persons in the course of their dealings; who, having no known or fixed residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." *Attorney General* v. *Tongue*, (1823) 12 Price, 51, 60.

In Massachusetts, both before and after the adoption of the Constitution of the United States, successive statutes imposed penalties on hawkers, peddlers and petty chapmen. 7 Dane Ab. 72; Stats. 1713–14, c. 7; (1 Prov. Laws, 720;) 1716–17, c. 10; 1721–22, c. 6; 1726–27, c. 4; (2 Prov. Laws, 47, 232, 385;) 1785, c. 2; 1799, c. 20; 1820, c. 45; Rev. Stats. 1836, c. 35, §§ 7, 8. The statute of 1846, c. 244, repealing the earlier statutes, imposed a penalty on "every hawker, peddler or petty chapman, or other person, going from town to town, or from place to place, or from dwelling-house to dwelling-house in the same town, either on foot, or with one or more horses, or otherwise carrying for sale, or exposing to sale, any goods, wares or merchandise," (with certain exceptions,) without first obtaining a license, as therein provided.

In a case under that statute, Chief Justice Shaw said: "The leading primary idea of a hawker and peddler is that of an

itinerant or travelling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, (though perhaps not essential,) by a hawker is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by an actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish. But our statute goes further, and not only proscribes actual hawkers and peddlers, whose employment is that of travelling traders, and thus seems to refer to a business or habitual occupation; but it extends to all persons, doing the acts proscribed." *Commonwealth* v. *Ober*, (1853) 12 Cush. 493, 495.

In that case, it was objected that the statute was repugnant to the Constitution of the United States, because at variance with the exclusive right of Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. To which Chief Justice Shaw answered: "The law in question interferes with none of these." "We consider this as wholly an internal commerce, which the States have a right to regulate; and, in this respect, this law stands on the same footing with the laws regulating sales of wine and spirits, sales at auction, and very many others, which are in force and constantly acted upon." 12 Cush. 497.

In Michigan, a city ordinance, passed under authority of the legislature, prohibiting peddling without a license from the mayor, was held constitutional; and Chief Justice Cooley said: "That the regulation of hawkers and peddlers is important, if not absolutely essential, may be taken as established by the concurring practice of civilized States. They are a class of persons who travel from place to place among strangers, and the business may easily be made a pretence or a convenience to those whose real purpose is theft or fraud. The

requirement of a license gives opportunity for inquiry into antecedents and character, and the payment of a fee affords some evidence that the business is not a mere pretence." *People* v. *Russell*, (1883) 49 Mich. 617, 619.

In the courts of many other States, statutes imposing a penalty for peddling, without a license, all goods of particular kinds, and not discriminating against goods brought from other States, or from foreign countries, have been held not to be repugnant to the Constitution of the United States. *Cowles* v. *Brittain*, (1822) 2 Hawks, 204; *Wynne* v. *Wright*, (1834) 1 Dev. & Bat. 19; *Tracy* v. *State*, (1829) 3 Missouri, 3; *Morrill* v. *State*, (1875) 38 Wisconsin, 428; *Howe Machine Co.* v. *Cage*, (1876) 9 Baxter, 518; *Graffty* v. *Rushville*, (1886) 107 Indiana, 502; *State* v. *Richards*, (1889) 32 West Virginia, 348; *Commonwealth* v. *Gardner*, (1890) 133 Penn. St. 284.

The statute of Missouri, under which the conviction in the case at bar was had, is contained in a separate chapter of the Revised Statutes of the State, entitled "Peddlers and their licenses," and relating to no other subject. By this statute, "whoever shall deal in the selling of" any goods, wares or merchandise, (except books, charts, maps and stationery,) "by going from place to place to sell the same, is declared to be a peddler;" and is prohibited from dealing as a peddler without a license. Rev. Stat. of 1879, §§ 6471, 6472. The license is required to state how the dealing is to be carried on, whether on foot, or with one or more beasts of burden, a cart or wagon, or a boat or vessel; and may be obtained by any person paying the tax prescribed, according to the manner in which the business is carried on. §§ 6473, 6476, 6477. Any person dealing as a peddler, without a license, whether with a pack, a wagon, or a boat, is to pay a certain penalty, which, in the case of peddling in a cart or wagon, is fifty dollars. § 6478. And any peddler, who refuses to exhibit his license, on demand of a sheriff, collector, constable, or citizen householder of the county, is to forfeit the sum of ten dollars. § 6479.

The facts were agreed, that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defend-

ant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county in the State of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him.

The Supreme Court of the State, in its opinion, understood and assumed the effect of those facts to be as follows: "The defendant was engaged in going from place to place, selling and trying to sell sewing machines, in Montgomery county in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler; and, having no license from the State, he became liable to the penalties imposed by the statute, unless, for any reason, he was exempt from the operations of the law." 103 Missouri, 247. It is argued by one of his counsel that this was an unwarranted conclusion from the facts agreed. But the construction of those facts does not present a Federal question, except so far as it involves the constitutionality of the statute. Upon any construction, it is clear that the defendant was engaged in going from place to place within the State, without a license, soliciting orders for the sale of sewing machines, having with him in the wagon at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. The conclusion that such dealings made him a peddler, within the meaning of the statute of the State, and of the information on which he was convicted, presents of itself no constitutional question.

Opinion of the Court.

The facts appear to have been agreed for the purpose of presenting the question whether the statute was repugnant to the Constitution of the United States. This was the only question discussed in the opinion of the Supreme Court of Missouri. And it is the only one of which this court has jurisdiction upon this writ of error.

The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door.

If this question were now brought before this court for the first time, there could hardly be a doubt of the validity of the statute. But it is not a new question in this court.

The decision at October term, 1879, in the case reported as *Machine Co.* v. *Gage*, 100 U. S. 676, affirming the judgment of the Supreme Court of Tennessee in *Howe Machine Co.* v. *Cage*,

9 Baxter, 518, is directly in point. The facts agreed, upon which that case was submitted, as shown by the record, were as follows: The Howe Machine Company, a corporation of Connecticut, manufactured sewing machines at Bridgeport in that State, and had an office at Nashville in the State of Tennessee, and sent an agent into Sumner county, for the purpose of selling or peddling machines, who travelled through the country, in a wagon with one horse, for the purpose of exhibiting and offering for sale the company's machines; that the machines offered for sale and sold by him were manufactured in Connecticut, and brought into Tennessee for sale; and that he paid, under protest, a tax required of him under the statutes of Tennessee for the privilege or license to peddle or sell the machines of the company in Sumner County. By those statutes, "all articles manufactured of the produce of the State" were exempt from taxation; and "all peddlers of sewing machines" were required to pay a tax of fifteen dollars. The Supreme Court of Tennessee having held that the latter provision "levied a tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material, or of manufacture," this court, speaking by Mr. Justice Swayne, considered itself "bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute;" and decided that "the statute in question, as construed by the Supreme Court of the State, makes no such discrimination. It applies alike to sewing machines manufactured in the State, and out of it. The exaction is not an unusual or unreasonable one. The State, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden." 100 U. S. 677, 679.

It has been strenuously argued that that decision is inconsistent with earlier and later decisions of this court upon the subject of the powers of the several States as affected by the grant by the Constitution to Congress of the power to regulate commerce. It becomes necessary, therefore, to examine those decisions with care, beginning with the earlier ones.

In the leading case of *Brown* v. *Maryland*, (1827) 12

Wheat. 419, in which it was adjudged that a statute of Maryland, requiring, under a penalty, importers or other persons selling foreign goods by the bale or package, to take out and pay for a license, was repugnant to the Constitution of the United States, both as laying an impost or duty on imports without the consent of Congress, and as inconsistent with the power of Congress to regulate commerce with foreign nations, Mr. Taney and Mr. Johnson, for the State of Maryland, argued that the tax was "laid upon the same principle with the usual taxes on retailers, or innkeepers, or hawkers and pedlars, or upon any other trade exercised within the State." 12 Wheat. 425.

Chief Justice Marshall, in answering that argument, said: "This indictment is against the importer for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages and travelling with them as an itinerant pedlar. In the first case, the tax intercepts the import as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall also have purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them he can as little object to paying for this service as for any other, for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make sales in a peculiar way." 12 Wheat. 443.

A like distinction was recognized in the United States Internal Revenue Act of 1862, in which "peddlers" were distinguished from "commercial brokers" and were subjected to a different license tax. Among "commercial brokers" was classed "any person or firm, except one holding a license as wholesale dealer or banker, whose business it is, as the agent of others, to purchase or sell goods, or seek orders therefor, in original or unbroken packages or produce." "Peddlers" were thus defined: "Any person, except persons peddling newspapers, Bibles or religious tracts, who sells or offers to sell, at retail, goods, wares or other commodities, travelling from place to place, in the street, or through different parts of the country, shall be regarded as a peddler, under this act." Act of July 1, 1862, c. 119, § 64, cls. 14, 27; 12 Stat. 457, 458.

In *Woodruff* v. *Parham*, (1868) 8 Wall. 123, it was adjudged by this court, speaking by Mr. Justice Miller, that a uniform tax imposed by ordinance of the city of Mobile, under authority from the legislature of Alabama, on all sales by auction in the city, was constitutional, because it was "a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens; and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void." 8 Wall. 140.

In *Hinson* v. *Lott*, 8 Wall. 148, decided at the same time, it was adjudged by this court, speaking by the same eminent justice, that a statute of that State, imposing a tax of fifty cents per gallon, to be paid by the distiller, on all intoxicating liquors manufactured within the State, and a like tax, to be paid by the importer, on all intoxicating liquors introduced into the State for sale, was constitutional, on the ground "that

no greater tax is laid on liquors brought into the State than on those manufactured within it," and "that, whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment, as to liquors manufactured within the State, the tax on those who sold liquors brought in from other States was only the complementary provision, necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States." 8 Wall. 153.

In *Ward* v. *Maryland*, (1870) 12 Wall. 418, a statute of Maryland, requiring all traders residing within the State to take out licenses at certain rates, and subjecting to indictment and penalty persons not residents of the State, who, without taking out a license at a higher rate, should sell or offer for sale, by card, sample, or trade list, within the limits of the city of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State, was held to be unconstitutional, because it imposed a discriminating tax upon the residents of other States.

In *Welton* v. *Missouri*, (1875) 91 U. S. 275, a statute of Missouri, by which "whoever shall deal in the selling of patent or other medicines, goods, wares or merchandise, except books, charts, maps and stationery, which are not the growth, produce or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler," and which prohibited, under a penalty, dealing as a peddler, without taking out a license and paying a certain sum therefor, but required no license for selling, by going from place to place, any goods, the growth, produce or manufacture of the State, was held, by reason of such discrimination, to be unconstitutional and void as applied to a peddler within the State of sewing machines manufactured without the State. Mr. Justice Field, in delivering judgment, said: "The commercial

power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void." And he referred to the passages in the opinions in *Brown* v. *Maryland*, and in *Woodruff* v. *Parham*, above cited, as supporting the conclusion. 91 U. S. 282. The statute of Missouri, now before the court, omits the discriminating words, "which are not the growth, produce or manufacture of this State," upon which that decision was grounded.

In *Cook* v. *Pennsylvania*, (1878) 97 U. S. 566, in which a tax upon auctioneers, measured by the amount of their sales, was held to be invalid as to sales by auction of imported goods in the original package, the statute under which the tax was imposed made a discrimination against imported as compared with domestic goods; and the decisions in *Woodruff* v. *Parham*, *Hinson* v. *Lott*, and *Welton* v. *Missouri*, above cited, were referred to as controlling. 97 U. S. 569, 573.

The decision in *Machine Co.* v. *Gage*, 100 U. S. 676, above stated, is thus shown to have been in exact accordance with the law as declared in previous decisions. Indeed, *Woodruff* v. *Parham*, *Hinson* v. *Lott*, *Ward* v. *Maryland*, and *Welton* v. *Missouri*, were cited in its support. 100 U. S. 679.

That decision is no less consistent with the subsequent decisions of this court, as will appear by an examination of them.

In *Webber* v. *Virginia*, (1880) 103 U. S. 344, 347, this court, speaking by Mr. Justice Field, affirmed the doctrine that "the right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the State;" and the reason why a tax imposed by a statute of Virginia upon persons selling, without license, patented articles not owned by them, was

held to be invalid, as applied to sales of sewing machines manufactured in another State, was that the statute made "a clear discrimination in favor of home manufacturers and against the manufacturers of other States." 103 U. S. 350.

In *Brown* v. *Houston*, (1885) 114 U. S. 622, coal brought in flatboats from Pittsburg to New Orleans was still afloat in the Mississippi River after its arrival, in the same boats, and in the same condition in which it had been brought, and was held in order to be sold on account of the original owners by the boatload. Yet this court unanimously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid; and, speaking by Mr. Justice Bradley, said: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans." "The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State — that being their place of destination for use or trade — if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce, which would have the objectionable effect referred to." 114 U. S. 632–634.

In *Walling* v. *Michigan*, (1886) 116 U. S. 446, the statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed different taxes upon the business of selling or soliciting the sale of intoxicating liquors, according as the liquors were manufactured within the State, or were to be sent from another State; and this court, again

speaking by Mr. Justice Bradley, declared that the police power of the State "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 between the States, and thus usurp one of the prerogatives of the national legislature." 116 U. S. 460.

In *Robbins* v. *Shelby Taxing District*, (1887) 120 U. S. 489, indeed, the majority of the court held that a statute of Tennessee, requiring "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein by sample," to pay a certain sum weekly or monthly for a license, was, as applied to persons soliciting orders for goods on behalf of houses doing business in other States, unconstitutional as inconsistent with the power of Congress to regulate commerce among the several States.

But in the opinion of the majority of the court, delivered by Mr. Justice Bradley, it was expressly affirmed that a State, although commerce might thereby be incidentally affected, might pass "inspection laws to secure the due quality and measure of products and commodities," and "laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community;" and might impose "taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States;" and also "taxes upon all property within the State, mingled with and forming part of the great mass of property therein;" although it could not "impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce." 120 U. S. 493, 494.

The distinction on which that judgment proceeded is

clearly brought out in the following passages of the opinion: "As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston*, 114 U. S. 622. When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another State, and that they be not taxed by reason of being brought from another State, but only taxed in the usual way as other goods are. *Brown* v. *Houston*, *qua supra*; *Machine Co.* v. *Gage*, 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself." "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." 120 U. S. 497.

The decision in *Machine Co.* v. *Gage*, as to a peddler carrying with him for sale goods already in the State, was thus expressly recognized, and was distinguished from the case, then before the court, of a drummer, selling, or soliciting orders for, goods which were at the time in another State. And in the dissenting opinion, delivered by Chief Justice Waite, in which two other justices concurred, it was assumed, as incontrovertible, that another provision of the same statute, requiring a license fee from all peddlers within the district, could not be held unconstitutional in its application to peddlers who came with their goods from another State, and expected to go back again. 120 U. S. 501.

In *Asher* v. *Texas*, (1888) 128 U. S. 129, and in *Brennan* v. *Titusville*, (1894) 153 U. S. 289, the decision in *Robbins* v. *Shelby Taxing District* was followed. *Asher's case* was strictly one of a drummer soliciting orders on behalf of manufacturers residing in another State, and was decided upon the ground that the circumstances in that case and in *Robbins's case* were substantially the same. 128 U. S. 131. In *Bren-*

nan's case, it was expressly agreed by the parties that the goods offered by him for sale in Pennsylvania were afterwards sent by their owner in the other State directly to the purchasers. 153 U. S. 290. The case of *Stoutenburgh* v. *Hennick*, (1889) 129 U. S. 141, in which an act of the legislature of the District of Columbia, taxing commercial agents, "offering for sale goods, wares or merchandise, by sample, catalogue or otherwise," was held to be unconstitutional, as applied to a commercial agent offering for sale goods of a Maryland house, did not substantially differ in principle or in circumstances.

In *Leloup* v. *Mobile*, (1888) 127 U. S. 640, in which a general license tax, imposed by a statute of Alabama on a telegraph company, affecting its entire business, interstate as well as domestic or internal, without discrimination, was held unconstitutional, Mr. Justice Bradley, in delivering judgment, took occasion to observe that "there are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company;" and to repeat that "this exemption of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State, as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce." 127 U. S. 647, 649. See also *Pullman's Car Co.* v. *Pennsylvania*, (1891) 141 U. S. 18; *Ficklen* v. *Shelby Taxing District*, (1892) 145 U. S. 1; *Postal Telegraph Co.* v. *Charleston*, (1894) 153 U. S. 692; *Postal Telegraph Co.* v. *Adams*, (1895) 155 U. S. 688.

In *Dent* v. *West Virginia*, (1889) 129 U. S. 114, this court upheld the validity of a statute of West Virginia, requiring every person practising medicine in the State to obtain a certificate from the state board of health; and, 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 of deception and fraud." 129 U. S. 122.

In *Leisy* v. *Hardin*, (1890) 135 U. S. 100, a statute of a State, prohibiting the sale of intoxicating liquors without a license, was, as applied to a sale of liquors in the original packages and by the person who had brought them into the State from another State, held to be inconsistent with the power of Congress to regulate commerce among the several States; and that conclusion was reached by applying to the case the rule laid down by Chief Justice Marshall in *Brown* v. *Maryland*, above cited, and stated by the present Chief Justice in these words: "That the point of time, when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer." 135 U. S. 110. The decision, made at the same time, in *Lyng* v. *Michigan*, was to the same effect. 135 U. S. 161. Presently after those decisions, Congress, by the act of August 8, 1890, c. 728, enacted that all intoxicating liquors or liquids brought into or remaining in a State should, upon their arrival therein, be subject, like domestic liquors, to the operation of laws enacted by the State in the exercise of its police powers. 26 Stat. 313. After Congress had thus, as said by the Chief Justice, "declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature," this court unanimously held that intoxicating liquors, brought into a State before this act of Congress, were subject to the operation of the earlier statutes of the State, remaining unrepealed. *In re Rahrer*, (1891) 140 U. S. 545, 560, 564.

In *Plumley* v. *Massachusetts*, decided at the present term, the question, as stated by the court, was, "Does the freedom of commerce among the States demand a recognition of the right to practise 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?" After reviewing many of the cases, citing the passages above quoted from the opinions in *Walling* v. *Michigan* and in *Dent* v. *West Virginia*, and distinguishing *Leisy* v. *Hardin*, the court answered the question in the negative; and therefore held that the statute of Massachusetts, prohibiting the sale of oleomargarine colored to imitate butter, was constitutional and valid, as applied to a sale by an agent within the State of articles manufactured in another State by citizens thereof. 155 U. S. 461, 468, 471–474.

The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders. *Judgment affirmed.*

In re LEHIGH MINING AND MANUFACTURING COMPANY, Petitioner.

ORIGINAL.

No number. Submitted January 28, 1895. — Decided March 4, 1895.

A corporation organized under the laws of Pennsylvania brought an action in ejectment in the Circuit Court of the United States in the Western District of Virginia. The defendant by plea set up that a conveyance of the land had been made to the Pennsylvania corporation collusively, and for the purpose of conferring jurisdiction on the Circuit Court. The court was of opinion that the allegations of the plea were sustained, and dismissed the action for want of jurisdiction. The plaintiff duly excepted and the exceptions were allowed and signed. The plaintiff then prayed for a writ of error to this court upon the question of jurisdiction, and a writ was allowed "as prayed for" at the same term of court. At a subsequent term the plaintiff applied to the court below for an order certifying the question of jurisdiction to this court pursuant to § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826. This application being denied, the plaintiff applied to this court for leave to file

Statement of the Case.

a petition for a writ of *mandamus* requiring the court below to certify the question of jurisdiction to this court. *Held,* that leave should be denied, as, independently of other considerations, the requisition of the statute in that respect had already been sufficiently complied with.

THE Lehigh Mining and Manufacturing Company, alleging itself to be "a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of the said State of Pennsylvania," brought its action of ejectment in the Circuit Court of the United States for the Western District of Virginia against J. J. Kelly, Jr., and others, tenants and lessees of Kelly, to recover the land described in the declaration. The defence pleaded not guilty, and also filed two pleas to the jurisdiction of the court. These pleas averred that for ten years prior to the commencement of the action in ejectment the Virginia Coal and Iron Company, a corporation existing under the laws of Virginia and a citizen of Virginia, had been claiming title to the lands of the defendant Kelly described in the declaration; that immediately preceding the commencement of the action the Virginia Coal and Iron Company, its stockholders, officers, and members, organized, under the laws of the State of Pennsylvania, the Lehigh Mining and Manufacturing Company, to which the Virginia Company conveyed said land in order to enable the Lehigh Company to institute suit in the Circuit Court, said Lehigh Company being simply another name for the Virginia Company, being composed of the same parties, and organized alone for the purpose of taking a conveyance of the land from the Virginia Company, and the Virginia Company making the conveyance, fraudulently and collusively, for the purpose of conferring jurisdiction on the Circuit Court. Issue was joined upon the pleas, and on the 30th day of May, 1894, was tried by the court, Hon. John Paul, District Judge, holding the Circuit Court, presiding, upon an agreed statement of facts, which recited, among other things, that the Lehigh Company in the month of February, 1893, was organized under the laws of Pennsylvania by the individual stockholders and officers of the Virginia Company, a corporation organized and existing under the laws of Virginia and a citi-

zen of that State, and that the land in controversy was conveyed by the Virginia Company to the Lehigh Company; "that the purpose of organizing said Lehigh Mining and Manufacturing Company, and in making to it said conveyance, was to give to this court jurisdiction in this case, but that said conveyance passed to said Lehigh Mining and Manufacturing Company, all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance, said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of the Lehigh Mining and Manufacturing Company and has no interest therein whatever." The court, being of opinion that "the organization by the individual stockholders and officers of a corporation existing under the laws of one State of a corporation under the laws of another State, for the express purpose of bringing a suit in the Federal court to try the title to a tract of land claimed by the former corporation and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court;" that the suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of the court; and that the plaintiff had been collusively made a party to it for the purpose of making a case cognizable in the Federal court, sustained the pleas and dismissed the action.

The judgment of the court was as follows:

"This day came again the parties by their attorneys, and on motion of the defendants to dismiss this suit, because instituted and prosecuted in fraud of the jurisdiction of the court, by consent of the parties the cause came on to be heard upon the two pleas in writing to the jurisdiction heretofore filed in the case, at the proper time, and general replication thereto, and the agreed statement of facts signed by the attorneys and filed therein, the exceptions indorsed thereon; and the court having fully considered the said two pleas, the agreed statement of facts aforesaid, and the exception to a certain paragraph in the said agreed statement of facts, and argument of counsel, doth

consider that the said exceptions are not well taken and overrule the same. And the court further considers that the said pleas be and they are hereby sustained. And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit."

Thereupon the plaintiff upon the same day, May 30, 1894, tendered the court a bill of exceptions, which was that day signed, sealed, and made part of the record by the District Judge. This bill of exceptions contained the two pleas and the agreed statement of facts, and declared that the court "held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court the plaintiff did then and there except." The plaintiff thereupon prayed for a writ of error from the Supreme Court of the United States, which was allowed by the following order under the hand of the District Judge and entered of record:

"The plaintiff, considering itself aggrieved by the rulings of said court in the said case, in which final judgment was rendered at the May term, 1894, to wit, on May 30, 1894, of said Circuit Court held at this place, dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof, and having on the thirtieth day of May, 1894, filed its bill of exceptions, and having on this day filed its assignment of errors and its petition praying for a writ of error to said judgment and proceedings to the Supreme Court of the United States upon the said question of jurisdiction, and praying that said writ of error be allowed it to the said Supreme Court of the United States, and that a full transcript of the record and proceedings in said cause, duly authenticated, be sent to said Supreme Court.

"Now on this day, to wit, May 30, 1894, it is ordered and considered by this court that said writ of error be allowed and awarded as prayed for, . . ."

On November 23, 1894, at a subsequent term of the court to

that at which the judgment dismissing the cause for want of jurisdiction had been entered, the Lehigh Company applied to the District Judge holding the Circuit Court for the Western District of Virginia to enter an order certifying the question of jurisdiction to the Supreme Court of the United States pursuant to the fifth section of the Judiciary Act of March 3, 1891. This application was denied upon the ground that the question of jurisdiction had already been sufficiently certified, and further that, if not, the court had then no power to enter the order requested.

The Lehigh Mining and Manufacturing Company applied to this court for leave to file a petition, setting forth the foregoing facts in substance, for a *mandamus* requiring the District Judge for the Western District of Virginia, holding the Circuit Court of the United States for that district, to certify the question of jurisdiction and to enter the order tendered by petitioner, November 23, 1894.

Mr. R. A. Ayers for petitioner. *Mr. J. F. Bullitt, Jr.*, *Mr. R. C. Dale*, *Mr. A. L. Pridemore*, *Mr. E. M. Fulton*, and *Mr. J. G. White* were with him on the brief.

Mr. F. S. Blair opposing. *Mr. C. T. Duncan* and *Mr. H. S. K. Morrison* were with him on the brief.

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

In *Maynard* v. *Hecht*, 151 U. S. 324, we held that in the instance of an appeal or writ of error from a Circuit Court upon the question of jurisdiction under the fifth section of the Judiciary Act of March 3, 1891, a certificate by the Circuit Court presenting such question for determination was required in order to invoke the exercise by this court of its appellate jurisdiction. The first of the six classes of cases described in that section in which a writ of error or appeal could be taken or brought directly to this court from the Circuit Courts was: "In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified

to the Supreme Court from the court below for decision." We were of opinion that the intention of Congress as to the certification mentioned in that section, and also in section six in relation to the Circuit Courts of Appeals, was to be arrived at in the light of the rules theretofore prevailing in reference to certificates on division of opinion. Rev. Stat. §§ 650, 651, 652, 693, 697. In reference to such certificates it was provided that the point on which the disagreement occurred should be certified during the trial term, and it is argued that by analogy the certificate of the Circuit Courts, under the act of March 3, 1891, c. 517, 26 Stat. 826, must also be made at the term at which the final judgment or decree is entered; and, moreover, that as, after the close of such term, the parties are out of court and the litigation there at an end, the court has no power to grant such certificate, and cannot certify, *nunc pro tunc*, if no such certificate was made or intended to be made at the term, as was the case here. But it is unnecessary to determine how this may be, as we think the District Judge was quite right in holding that the question had already been sufficiently certified. The question involved was only the question of jurisdiction, and the judgment not only recited that for reasons in writing, filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction; but the District Judge certified in the bill of exceptions that it was "held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed"; and, in the order allowing the writ of error, certified in effect that it was allowed "upon the question of jurisdiction."

We observed in *United States* v. *Jahn*, 155 U. S. 109, 112, that "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." If in this case the jurisdiction had been sustained and the defendants had preserved the question by certificate in the form of a bill of exceptions and the cause had subsequently proceeded to a final decree against them, it would seem that they could have brought the case, at the proper time, on the question of jurisdiction solely, directly to this court, although not compelled to do so.

At all events, where the question is certified as it was here, we think the requisition of the statute sufficiently complied with. *Leave denied.*

BROWN *v.* WEBSTER.

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

No. 160. Submitted January 16, 1895. — Decided March 4, 1895.

The measure of damages for the purpose of jurisdiction, in an action against the grantor of real estate on the warranty of title in his deed of conveyance, is the purchase money paid with interest.

THE plaintiff below, defendant in error, bought in 1881 from the defendant below, with full warranty, a tract of land, the purchase price of which was $1200. In 1886, one Thomas Hugh sued to recover the land in question, averring that he had a superior title to that which had been purchased and conveyed as above stated. This action culminated in a final judgment, ousting the defendant therein from the property. The plaintiff here, who was defendant in the suit in ejectment, then brought this suit in the Circuit Court of the United States for the District of Nebraska, to recover the sum of $6342.40 and costs. The alleged cause of action was the sale,

the warranty, and the eviction, and the sum above mentioned was laid as the amount of damages claimed. The defendant demurred, on the ground that the court had no jurisdiction of the subject of the action, "for that it appears on the face of said amended petition that the amount in controversy herein between the plaintiff and defendant, exclusive of interest and costs, does not exceed the sum and value of $2000." A plea was subsequently filed, but by order of the court was stricken from the record. The demurrer was overruled. After answer filed, the case was submitted to the court without the intervention of a jury; judgment was thereupon rendered for the plaintiff in the sum of $2030, and the defendant brought the case here by error.

Mr. J. H. Blair and *Mr. H. C. Brome* for plaintiff in error.

Mr. Frank W. Hackett for defendant in error.

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

The only error complained of here is the absolute want of jurisdiction in the court below, which it is asserted is apparent on the face of the record. The argument is that the matter in dispute did not exceed $2000, exclusive of interest and costs, and hence the alleged want of jurisdiction. The demand of the plaintiff was for damages in the sum of $6000. This was the principal controversy. It is insisted, however, that, as under the law of Nebraska, damages in case of eviction involved responsibility only for the return of the price with interest thereon, and the price here was only $1200, the sum in controversy could not exceed $2000, exclusive of interest. That is to say, as the measure of the damage was price and interest, the price being below $2000, the jurisdictional amount could not be arrived at by adding the interest to the price. This contention overlooks the elementary distinction between interest as such and the use of an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand. As we have said, the

recovery sought was not the price and interest thereon, but the sum of the damage resulting from eviction. All such damage was, therefore, the principal demand in controversy, although interest and price and other things may have constituted some of the elements entering into the legal unit, the damage which the party was entitled to recover. Whether, therefore, the court below considered the interest as an instrument or means for ascertaining the amount of the principal demand, is wholly immaterial, provided the principal demand as made and ascertained was within the jurisdiction of the court. Indeed, the confusion of thought which the assertion of want of jurisdiction involves is a failure to distinguish between a principal and an accessory demand. The sum of the principal demand determines the question of jurisdiction; the accessory or the interest demand cannot be computed for jurisdictional purposes. Here the entire damage claimed was the principal demand without reference to the constituent elements entering therein. This demand was predicated on a distinct cause of action — eviction from the property bought. Thus considered, the attack on the jurisdiction is manifestly unsound, since its premise is that a sum, which was an essential ingredient in the one principal claim, should be segregated therefrom, and be considered as a mere accessory thereto.

Judgment affirmed.

BANK OF RONDOUT *v.* SMITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 113. Argued December 13, 1894. — Decided March 4, 1895.

A decree by a Circuit Court dismissing a bill in equity as to one defendant who had demurred, leaving the case undisposed of as to other defendants who had answered, does not dispose of the whole case, and is not a final decree from which an appeal can be taken to this court.

THIS was a bill filed by the National Bank of Rondout, New York, against David R. Smith, in his own right and as

surviving copartner of D. R. Smith & Company, E. P. Smith, Thomas R. McGahan, Daniel C. Stelling, Moses Brown and others, composing the firm of M. Brown, Sons & Company, in the Circuit Court of the United States for the District of South Carolina, alleging that the bank recovered a judgment in that court December 15, 1887, against D. R. Smith, surviving copartner of D. R. Smith & Company, for the sum of $13,844.74 and costs of suit, "and is entitled to recover against the said D. R. Smith as surviving copartner of D. R. Smith & Company and individually, and to be paid out of the property of said firm and out of the individual property of said David R. Smith, the above-named sum, with interest on the said debt." It was then averred that, April 27, 1885, judgment was recovered in said Circuit Court by default for $9397.17 in favor of Daniel C. Stelling, a citizen of the State of Georgia, against the firm of D. R. Smith & Company, on service of process on D. R. Smith; and that on the same day judgment was rendered by default for $1446.83 in favor of M. Brown, Sons & Company, citizens of Pennsylvania, against D. R. Smith & Company on service of process on D. R. Smith; that executions were issued on these judgments and delivered to the United States marshal for the District of South Carolina, April 28, 1885; were levied April 30, 1885; and certain tracts of timber lands, and a steam saw mill, engines, boilers, etc., sold thereon at about one-tenth the value of the property to one Thomas R. McGahan, and a deed of conveyance made to him September 7, 1885; that immediately thereafter Mrs. E. P. Smith, the wife of D. R. Smith, was put in possession by McGahan, and had been using the property, and in the actual reception of the rents and profits thereof in collusion with her husband and McGahan from the day of the sale on execution to the time of the filing of the bill. The bill further alleged that the causes of action upon which the judgment in favor of Stelling purported to have been recovered were a note and eight drafts of D. R. Smith & Company, payable to the order of Claussen & Company, and endorsed by the payees in blank; that the record in Stelling's action did not show who composed the firm of Claussen & Company or the citizen-

ship of the members of that firm, and that they were citizens of South Carolina; that the causes of action upon which the judgment in favor of M. Brown, Sons and Company purported to have been recovered were a certain note and drafts of D. R. Smith & Company payable to the order of E. Bates & Company, and by the latter endorsed, and that in that action the names of the members of Bates & Company and their citizenship were not shown of record, but that they were citizens of South Carolina; that McGahan was a member of the firm of Bates & Company, and, on information, that they were the real owners of said note and drafts. The bill charged that jurisdiction in the Circuit Court of the United States for the District of South Carolina in the two actions in which these judgments were recovered was attempted to be obtained by plaintiffs in said actions by suppressing the fact that the payees in the notes and drafts were citizens of the same State as the makers thereof, and that judgments by default were suffered by D. R. Smith in favor of these plaintiffs by collusion with them "and with a view to the protection of the property of said D. R. Smith against his other creditors and to defeat their just rights." The bill prayed that the judgments, the sales thereunder, and the deed or deeds of the United States marshal be set aside and declared null and void; that a receiver be appointed; an account decreed; the property be sold and the proceeds applied to the payment of liens thereon according to their priority, the unsecured creditors of D. R. Smith & Company out of the balance, and the creditors of the individual partners out of their individual property; and for general relief.

A copy of the deed of the marshal was annexed to the bill as an exhibit, which recited the levy of both executions, the sales thereunder of certain tracts of land, buildings, and improvements, ("except the steam saw mill, with engines, boilers, and all appurtenances belonging thereto, known as Smith's Mills,") and conveyed said lands, etc., to McGahan.

Answers were filed to the bill by M. Brown, Sons & Company, Thomas R. McGahan, D. R. Smith, and E. P. Smith, and replications thereto. Defendant Daniel C. Stelling filed a

general demurrer, which, having been heard, was sustained by the court, and complainant prayed an appeal to this court as set forth in the opinion. Citation was issued to all the defendants returnable on the first Monday of May, 1891, and service accepted for McGahan, Stelling, D. R. and E. P. Smith, but not on behalf of the members of the firm of M. Brown, Sons & Company, and they were not served.

Mr. Theodore G. Barker for appellant.

Mr. Henry A. M. Smith for appellee.

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

A decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance in this court, the court below will have nothing to do but execute the decree it has already entered. *Dainese* v. *Kendall*, 119 U. S. 53. In this case the record contains no decree disposing of the case as to all the parties. The orders were as follows: December 3, 1890: "This cause having come on to be heard at the November term, 1890, upon the demurrer of Daniel C. Stelling to the bill of complaint herein, and counsel on both sides having been heard: It is thereupon adjudged and decreed that the said demurrer be sustained." On the same day the following appears: "The complainant in the above-entitled cause having in open court, at the present term of this court, prayed that an appeal be allowed to it from the judgment of this court sustaining the demurrer of Daniel C. Stelling, defendant, and dismissing the bill: It is ordered that said appeal be allowed." On March 14, 1891, the appeal was perfected as to Stelling by giving a bond in the sum of $250 running to Stelling, and reciting that lately at a regular term of the Circuit Court "a decree was rendered against the said complainant on the demurrer of said Daniel C. Stelling, dismissing said bill against the said defendant, Daniel C. Stelling, and the said complainant having obtained leave to appeal to the Supreme Court of the United States from said decree," etc. The

errors assigned are to the action of the Circuit Court "in sustaining the demurrer of defendant Daniel C. Stelling, and in dismissing the bill as to said Daniel C. Stelling, defendant." And appellant's counsel designated among the parts of the record necessary for the consideration of the errors upon which he intended to rely: "The decree of the Circuit Court sustaining the demurrer and dismissing the bill of complaint as to Daniel C. Stelling."

So far as appears the case stands at issue below as to the defendants other than Stelling, and the whole cause has not been finally determined in the Circuit Court. It cannot be divided so as to bring up successively distinct parts of it, and the decree is not a final decree.

It may be that if the order of the Circuit Court were affirmed appellant would abandon further effort against the other defendants, while it is clear enough that if the order were reversed the case would be proceeded in against them all; but it is useless to speculate on the subject, as this appeal manifestly falls within the general rule.

In *Mendenhall* v. *Hall*, 134 U. S. 559, the suit was brought by Mendenhall against Clark N. Hall and Charles F. Hall. Charles F. Hall demurred and filed a special plea to the bill. Clark N. Hall also demurred. The demurrer and plea of Charles F. Hall were both sustained, and by a decree entered May 13, 1885, the bill was dismissed as to him. The demurrer of Clark N. Hall was overruled, and he answered, and the cause went to decree against him April 14, 1886. An appeal was taken to this court by the plaintiff, who executed an appeal bond which ran "to the defendants." Charles F. Hall was not served with notice of the appeal, and when the case was reached on our docket and that fact appeared, a citation was directed to be served upon him, or, if he was dead, upon his representative. The citation was executed upon his widow, who was also administratrix of his estate. On the argument here, it was suggested that no appeal had been taken as to Charles F. Hall, and that this court was without jurisdiction over the case as to him, but we held that the appeal brought before us not only the final decree of 1886, but also that of 1885, sustaining the

demurrer and plea of Charles F. Hall and dismissing the suit as to him, and that it was not necessary to take an appeal from the latter order until after the whole case was determined in the court below.

In *Hill* v. *Chicago & Evanston Railroad*, 140 U. S. 52, a decree had been rendered June 8, 1885, dismissing a bill as to certain parties for want of equity, and denying relief to complainant upon all matters and things in controversy except as to an amount of money paid by one of the defendants, and for the purpose of ascertaining that amount the case was retained as to some of the defendants, which finally resulted in a decree, July 14, 1887, as to that severable matter. It was held that, under these circumstances, the decree of June 8, 1885, was a final decree as to all matters determined by it, and that its finality was not affected by the fact that there was left to be determined a further severable matter, in respect of which the case was retained only as against the parties interested in that matter. An appeal had been prayed from the decree of June 8, 1885, but the transcript of the record not having been filed here at the next term after the appeal was taken, it was, on motion, dismissed. *Hill* v. *Chicago & Evanston Railroad*, 129 U. S. 170.

This decree cannot, however, be brought within the exception created by the peculiar circumstances of that case.

As the order upon the demurrer did not dispose of the whole case, the decree is not final, and we cannot entertain jurisdiction.

Appeal dismissed.

CONNELL *v.* SMILEY.

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

No. 14. Submitted January 22, 1895. — Decided March 4, 1895.

A party in a cause pending in a state court who petitions for its removal to a Federal court, or who consents to its removal, cannot after removal object to it as not asked for in time.

Statement of the Case.

It is the duty of this court, however, to consider objections to the removal of a cause from a state court which are apparent on the record.

In this case it does not appear from the record that the controversy was not a separable controversy, or that the case was improperly removed.

THIS was an action originally brought March 16, 1887, by John A. Smiley, a citizen of Nebraska, against William J. Connell, also a citizen of that State, in the District Court of Douglas County, Nebraska, to quiet title to eighty acres of land. The petition alleged that the plaintiff made a deed of the tract in which a proposed corporation was named as grantee, which was deposited in escrow to be delivered when the corporation was fully organized and certain stock issued to plaintiff; that the corporate enterprise was abandoned, but the deed, contrary to intention and without plaintiff's knowledge or consent, was placed on record; that one Frederick Lay recovered judgment against the corporation, and the land was sold on execution issued thereon, and bid in by Lay's attorneys, one of whom was Connell, and conveyed by the sheriff to them, and by Connell's associate to him; that plaintiff was in ignorance of this until long after; that the corporation had reconveyed and that Lay had assigned the judgment and quitclaimed any interest thereunder to him. The specific prayer was that the court might decree "that said Connell took no interest in said land by reason of said sale upon execution issued on said judgment; that the said sheriff's deeds be set aside and the title to said land be quieted in plaintiff." On the eighteenth of June, 1887, a motion was filed in the cause by W. J. Connell as attorney for Herbert M. Tenney, which read: "And now comes Herbert M. Tenney and hereby represents that he has and at the time of the commencement of this action did have an interest in the property in controversy herein, and he therefore asks to be made a party defendant, and so allowed to file an answer herein and defend his said interest." The record shows on the same day an order in these words: "On motion and for good cause shown, it is ordered that F. H. Lay be, and he hereby is, made a party defendant in this action and is allowed to file an answer herein within twenty days." The answer of defendant Connell was

filed July 7, 1887, setting forth among other things "that prior to commencement of this action a portion of said premises was conveyed by deed to Herbert M. Tenney and F. H. Lay, who now claim to be the owners of the premises so conveyed." On the same day Lay and Tenney, by their attorney, Connell, filed their petition and bond for removal to the Circuit Court of the United States for the District of Nebraska. The petition stated: "Your petitioners, Frederick H. Lay and Herbert M. Tenney, defendants in the above-entitled suit, respectfully show to the court that at this time and at the commencement of this action and for a long time prior thereto the said Frederick H. Lay was and is a citizen of the State of Colorado, and the said Herbert M. Tenney was and is a citizen of the State of Ohio. Your petitioners further show that the said John A. Smiley, plaintiff, is a citizen of the State of Nebraska, and at the time of the commencement of said suit was a citizen of the State of Nebraska, and further say that the amount in dispute in said action exceeds the sum of $2000.00, exclusive of costs, and in fact exceeds the sum of $10,000.00, exclusive of costs, and that each of said parties own and claim separate and distinct portions of said land." Attached was the affidavit of Connell "that he is the attorney for the above-named defendants, Frederick H. Lay and Herbert M. Tenney, and that the facts contained in the foregoing petition are true." The bond was signed by Lay and Tenney by their attorney, Connell. Thereupon, August 8, 1887, an order for removal was entered, which concluded: "And by consent of parties the said cause is removed as to said defendant Connell, as well as to the other defendants." The plaintiff thereupon filed in the Circuit Court his petition for leave to file an amended and supplemental bill, making Tenney and Lay defendants, which leave was granted, and an amended and supplemental bill filed accordingly against Connell, Tenney, and Lay. This bill averred that after the filing of the original bill, "the defendant Connell signed and acknowledged two deeds purporting to convey to each of said defendants Lay and Tenney a portion of your orator's said land, and caused the said deeds to be recorded in

the office of the county clerk of said county. Said deeds bear a date previous to the filing of your orator's said bill;" that thereafter the defendants Tenney and Lay by their attorney, the defendant Connell, applied to said District Court to be admitted as defendants in the suit, and on the 18th of June, 1887, of the May term were, by said court, so admitted. It was further alleged that on July 7, 1887, actions of ejectment had been commenced against plaintiff by Lay, Tenney, and Connell, severally, to obtain possession of portions of the land in dispute.

February 15, 1888, Tenney answered the amended bill of complaint, stating, among other things, that he "admits that said defendant Connell by deed to this defendant and to said defendant Lay conveyed the portions of said land in said bill of complaint described as having been so conveyed; but this defendant denies that said deeds were made after the filing of said bill, but, on the contrary, the defendant charges that said deeds were made, executed, and acknowledged the day on which they bear date." On the same day the answer of Connell to the amended bill was filed, and on February 22 the answer of Lay, containing similar allegations. Replications were filed to these answers, and the cause was subsequently heard and a decree rendered in favor of the complainant with costs, it being stated at the foot of the decree: "To the jurisdiction of the court to render a decree herein the said respondents object, and to which several findings and each thereof and to which said decree the said respondents except and pray an appeal, which is hereby allowed," etc. An appeal was subsequently prosecuted to this court.

Mr. William J. Connell in person for himself appellant.

Mr. William J. Bryan for appellee.

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

On behalf of appellants briefs are submitted for appellant Connell only, and his contention is that the decree should be

reversed and the cause remanded with a direction to remand it to the state court, because improperly removed to the Circuit Court.

The grounds urged are that Tenney and Lay were intervenors deriving title from Connell, the original defendant; that they were purchasers *pendente lite* because their deeds were not delivered or were not recorded prior to the commencement of the suit; that they therefore were not entitled to remove because Connell was not; that the application was made too late; and that there was no separable controversy as to petitioners capable of removal.

Whether the petition for removal was filed in time it is immaterial to consider, as neither Tenney nor Lay, who petitioned for removal, nor Connell, who consented as a party and participated as their attorney, can now raise the objection. *Ayers* v. *Watson*, 113 U. S. 594; *Martin* v. *Baltimore & Ohio Railroad*, 161 U. S. 673.

By the second section of the act of March 3, 1887, c. 373, as corrected by the act of Aug. 13, 1888, c. 866, it was provided: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district," 25 Stat. 433; and by the fifth section of the act of March 3, 1875, c. 137, "that if, in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require,

and shall make such order as to costs as shall be just." 18 Stat. 470, 472.

And since "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes, this question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Mansfield, Coldwater &c. Railway* v. *Swan*, 111 U. S. 379, 382.

If plaintiff had brought his suit in the state court against Tenney or Lay alone in respect of the particular parcel of land claimed by either, and, on proper petition, the defendant had removed the case to the Circuit Court, where it had thereupon gone to decree against him, he could not have procured a reversal on the ground of want of jurisdiction of the Circuit Court unless the record had disclosed that Connell was an indispensable party and Equity rule 47 inapplicable, in which case this court might have reversed the decree and directed a dismissal of the suit.

As remarked in *Louisville and Nashville Railroad* v. *Ide*, 114 U. S. 52, 56: "Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. *Smith* v. *Rines*, 2 Sumner, 348. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings." But where a plaintiff has brought suit against a sole defendant, and others, intervening, claim several interests in the subject-matter, involving separate defences as to such interests, separable controversies might be held to exist as to them, although the developments in the after progress of the case might show they were not such.

Plaintiff brought his suit seeking relief as against Connell

alone. Tenney and Lay intervened, claiming to be owners of distinct portions of the tract, and removed the suit on the ground that the controversy as to each of them was separable, and, according to *Barney* v. *Latham*, 103 U. S. 205; *Brooks* v. *Clark*, 119 U. S. 502, 512, the whole case was removed, the record here adding that the removal as to Connell was "by consent of parties." It is now said there was no separable controversy because the controversy indicated could not be fully determined as between Tenney and Lay, or either of them, and the plaintiff without the presence of Connell. This, however, if so, did not appear at the time of the removal, and whether it did afterwards in such wise that it became the duty of the Circuit Court to remand the cause because not really and substantially involving a dispute or controversy not properly within its jurisdiction, is determinable on other considerations.

Appellants do not deny that the petition for removal was presented in good faith, and, although it left much to be desired in the way of fulness and accuracy, it set up a separable controversy, which might have involved the defence of *bona fide* purchase for value without notice, and apparently could have been fully determined as between them and the plaintiff, even in respect of the proceedings on execution, in the absence of Connell, who cannot be allowed to say that his claim to the remaining portion of the land would have been legally affected by such determination. The question before us is, therefore, whether it appeared on the hearing that no such separable controversy really and substantially existed, and that the Circuit Court erred in not remanding the case. The cause was heard upon the merits. The record does not purport to contain all the evidence, and most of the depositions and the exhibits are omitted in printing by designation of appellant under rule 10. There is evidence tending to show that Connell conveyed some twenty acres to Lay at or about the time of a settlement between them, but the deeds to Lay and to Tenney do not appear. Whether as matter of fact Tenney and Lay were purchasers *pendente lite*, or the controversy as to them was not separable, is not so disclosed as to compel the

reversal of the decree at the instance of appellants, and in spite of the position they occupied to the contrary. It is suggested that the principles in relation to separable controversies were not so well understood in 1887 as at this date, and except for that appellants would not have attempted to remove the cause; but the petition, though imperfect, was sufficient to accomplish the result of forcing appellee into the Circuit Court, and we find ourselves at liberty to decline to deprive him of his decree on the ground that the cause was not rightfully transferred. *Decree affirmed.*

PALMER *v.* CORNING.

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

No. 137. Argued January 8, 9, 1895. — Decided March 4, 1895.

The improvement in sewer gratings patented to Henry W. Clapp by letters patent No. 134,978, dated January 21, 1873, involved no invention.

THE case is stated in the opinion.

Mr. Edwin H. Risley for appellant.

Mr. George T. Spencer for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The sole question in this case is whether the appliance to which the plaintiff in error claims the rights of a patentee under the grant of letters patent No. 134,978, bearing date January 21, 1873, issued to his assignor, involves invention, or is simply a manifestation of mechanical skill.

There is no doubt that in this, as in all similar cases, the letters patent are *prima facie* evidence that the device was patentable. Still, we are always required, with this presumption in mind, to examine the question of invention *vel non* upon its merits in each particular case. In the present instance the letters patent state the device to be an "improvement in gratings for sewer inlets," and describe it as follows:

Opinion of the Court.

"My improvement consists in the employment of a device to elevate the grating above the opening which it covers a short distance, so that it will not become obstructed by small sticks, straws, leaves, and other small rubbish not large enough to clog the sewer or drain with which it may be connected, and at the same time will stop all matter large enough to do injury in said drain.

"My improvement may be attached to any form of grating, round or square; and consists of a cast-iron ring made to fit the collar which surrounds the opening to hold the grate in place, marked *a* in the drawing, in which I set the cast or wrought-iron pins, marked *b* in the drawing, to which the grating is firmly attached, and by means of which the grating may be elevated one to two inches, more or less, as may be desirable. These pins may be of wrought iron fitted to holes drilled in the grate and ring; or the grate, ring, and pins for elevating the grate may be cast all in one piece; or wrought-iron pins may be cast into the ring and grate when they are cast.

"The whole grating and ring may be taken out as desired, as easily as if they were not furnished with the supporting ring; and my improvement may be used with a wood or iron collar, as may be desired.

"By thus elevating the grate a space is left, through which leaves, straws, small sticks will pass freely, and the grate will be kept clear for the passage of water.

"I claim —

"The grating for sewer openings herein described, consisting of the ring *a*, supporting-pins *b*, and elevated grating, substantially as specified."

It thus appears that the whole subject-matter which is covered consists of a grate elevated above the top of the catch-basin of a sewer and resting on a ring or support placed below the top of the basin by means of pins which thus lift up the grating, between which pins are left spaces allowing the water to pass through, under the grating, the result of so elevating the grate being, it is claimed, to keep the openings on the grating proper and the openings below free from the

debris which would otherwise accumulate thereon or against the same. There is no pretence that the claim covers a grate of any particular style of manufacture or any particular shape; in fact, it is expressly stated that the grate may be made either round or square, and that the pins may be of wrought iron, fitted to holes drilled in the grate or ring, or the grate, rings and pins for elevating the grate may be cast all in one piece, or wrought-iron pins may be cast into the ring and grate when they are cast. Viewed separately, the elements of this device certainly involve no invention. A grate over a sewer is one of the simplest of mechanical devices. The mere use of a ring of iron on which to rest such a grating is obviously nothing more than a mechanical arrangement, which involves no element of invention; and the same is the case with the use of pins or legs for the purpose of holding up a sewer grate. And it is equally clear that the leaving of open spaces between the pins and the elevating of the grate above the ring, thereby giving greater facility for the flow of water, is invention in no sense of the word. But although no one of these elements of the contrivance involves invention, it is insisted that, taken all together, they constitute a "combination," and that it is this combination which is covered by the letters patent. If a combination of unpatentable elements, as such, produces new and useful results, there can be no doubt that the combination is patentable. But there are certain conditions constituting the essential nature of a combination under the patent law, which we think are not met in this case. The law upon this subject this court has often stated:

"It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtapo-

sition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination." *Hailes* v. *Van Wormer*, 20 Wall. 353, 368.

"The combination to be patentable must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements." *Reckendorfer* v. *Faber*, 92 U. S. 347, 357.

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every part, *per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise it is only a mechanical juxtaposition, and not a vital union." *Pickering* v. *McCullough*, 104 U. S. 310, 318.

"It is true that such a fireplace heater, by reason of the fuel magazine, was a better heater than before, just as the outstanding stove with its similar fuel magazine was a better heater than a similar stove without such a fuel magazine. But the improvement in the fireplace heater was the result merely of the single change produced by the introduction of the fuel magazine, but one element in the combination. The new and improved result in the utility of a fireplace heater cannot be said to be due to anything in the combination of

the elements which compose it, in any other sense than that it arises from bringing together old and well-known separate elements, which, when thus brought together, operate separately, each in its own old way. There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements, considered in itself." *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 294.

Tested by these principles, we think it evident that there is no invention in the device now before us. It is claimed that its effect is to prevent the grate from being clogged. But this effect only comes from raising the grate and leaving openings beneath it; it is an effect produced solely by the openings beneath, and is not in any way due to the presence of the grate above. Thus, even if the appliance operates as claimed, its operation is the result of no combined action, but is due entirely to the openings below. If there were no grate above the pins but a solid piece of metal or other substance, so that no water could enter the sewer except through the openings left between the pins, the tendency of the flow of the water through those openings would not be affected, and the only result would be to diminish the flow of water into the sewer in a given time by the quantity which would enter above if the place were grated. It seems manifest, indeed, that the only practical operation of this device is to increase the utility of the sewer by elevating the grate, and so rendering it easier for the water to enter. An attempt was made to show by the testimony of a person who had observed the operation of one of these grates made in a circular form, that its use resulted in giving a circular motion to the water, and that the debris was carried to the periphery of the circulating fluid and thereby prevented from accumulating on the top of the grate. But if this be true, it is manifestly a result of leaving the open spaces between the pins and having the grate circular in form. Conceding that the water just before passing through openings thus arranged would acquire something of a circular motion, this would not be by any means

the result of any combination between the opening below and the grate above. And, moreover, it cannot be contended that the arrangement of a circular grate supported on pins with the open spaces between them constitutes the invention, for it is expressly stated that the grates may be of any form, round or square.

The judgment below, holding that no invention is involved in this arrangement, is, we think, obviously correct, and it is, therefore,

Affirmed.

MARICOPA AND PHŒNIX RAILROAD COMPANY *v.* ARIZONA TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 195. Submitted January 28, 1895. — Decided March 4, 1895.

When Congress grants to a railway company organized under the laws of a Territory a right of way over an Indian reservation within the Territory, and the road is constructed entirely within the Territory, that part of it within the reservation is subject to taxation by the territorial government.

The question whether it is so subject to taxation is one within the jurisdiction of this court, when properly brought here, irrespective of the amount involved.

After the organization of the Territory of Arizona certain land situated within its geographical limits was set apart as an Indian reservation for the use of the Pima and Maricopa Indians. Act of February 28, 1859, c. 66, § 3, 11 Stat. 401. The tract is known as the "Gila River Reservation." The Maricopa and Phœnix Railroad Company owns and operates within the Territory of Arizona 24.16 miles of railroad track, all of which lie within the geographical outlines of the Territory, as named in its organic act, but 6.24 miles are within the reservation just mentioned. This portion was constructed under the authority of the act of Congress of January 17,

1887, c. 26, 24 Stat. 361, which provided that the railroad should be "authorized, invested, and empowered with the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line through the Indian reservation situated in the Territory of Arizona known as the Gila River Reservation, occupied by the Pima and Maricopa Indians."

"SEC. 2. A right of way one hundred feet in width through said Indian reservation is hereby granted to the said Maricopa and Phœnix Railway Company, and a strip of land two hundred feet in width, with a length of three thousand feet, in addition to said right of way, is granted for stations for every ten miles of road, no portion of which shall be sold or leased by the company; with the right to use such additional ground, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; . . . *And provided, further*, that before any such lands shall be taken for the purposes aforesaid, the consent of the Indians thereto shall be obtained in a manner satisfactory to the President of the United States."

This act moreover contained a stipulation reserving the right to amend, alter, or repeal its provisions. The tax laws of the Territory of Arizona provide as follows:

"The president, vice-president, general superintendent, auditor or general officer of any corporation operating any railway in this Territory shall furnish said board, on or before the first Monday in June in each year, a statement signed and sworn to by one of such officers, showing in detail the whole number of miles of railroad in each county, also the whole number of miles owned, operated, or leased in the Territory by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value located in each county in the Territory; *second*, also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight, and other cars or property owned by such railway, and on

railways which are a part of lines extending beyond the limits of this Territory. The returns shall show the actual proportion of the amount and full cash value of the rolling stock in use on the corporation's line which is necessary for the transportation of the freight and passengers, and the operation of the railroad in this Territory, during the year for which the return is made. The return shall also show the amount and value of property hereinafter designated in this section, and such further information shall be furnished as the board may in writing require. If said officers fail to make such statement, said board shall proceed to assess the property of the corporation so failing, and shall add thirty per cent to the value thereof as ascertained and determined by the said board. The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this Territory, and shall include the franchise, right of way, roadbed, bridges, culverts, rolling stock, depots, station grounds, buildings, telegraph lines, and all other property, real and personal, exclusively used in the operation of such railway. In assessing said railway and its equipments, said board shall take into consideration all matters connected with said road necessary to enable them to make a just and equitable assessment of said railway property. On or before the third Monday in June in each year said board shall transmit to the board of supervisors of each county, through or into which any railway may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a *pro rata* distribution per mile of the assessed value of the whole property herein specified, with a description of the whole of said assessed property within the county by metes and bounds, or other description sufficient for identification. And the said assessment and *pro rata* shall be made with reference to the value of the property belonging to said railway other than the main track, situate in each county and municipality through or into which said railway extends. Where the railroad of a railroad corporation lies in several counties, its rolling stock must be apportioned between them so that a portion thereof may be assessed in

each county, and each county's portion must bear to the whole rolling stock the same ratio which the number of miles of the road in such county bears to the whole number of miles of such road lying in this Territory."

Under this territorial law all the franchises and rights, and the road-bed, track, rolling stock, etc., of the railroad company were assessed at a valuation of $7000 per mile for 24.16 miles of track. The corporation paid the tax on the mileage outside of the reservation, but refused to pay on the 6.24 miles situated within it. Statutory proceedings to compel the payment of the tax culminated in a decree against the company. From this an appeal was prosecuted to the Supreme Court of the Territory. There the decree below was substantially affirmed, and the corporation was ordered to pay $1212.39, with costs, this amount being recognized as a subsisting lien "upon all the property of said Maricopa and Phœnix Railroad Company, situated in said county of Maricopa, and described as follows, to wit: The 24.16 miles of main track, with franchises and right of way." In consequence of this recognition of lien, it was moreover ordered that a copy of the decree should authorize the tax collector to sell so much of the property as might be necessary to pay the taxes, penalties, and costs. The case was then brought here by appeal.

Mr. Harvey S. Brown for appellant.

No appearance for appellee.

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

We consider that many of the points which are here pressed upon our attention are not necessarily involved in the decision of the cause. The matter in dispute not being above $5000, exclusive of costs, our jurisdiction depends upon whether "there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." Act of March 3, 1885, c. 355, 23 Stat. 443. It is insisted that the Territory is without authority under its organic act to extend

its taxing power beyond its limits and over a reservation created by act of Congress, and that it has undertaken to do so, either directly, or by including the value of the property within the reservation in its general estimate of the amount for which the company ought to be assessed. This claim, we think, presents a question within our appellate jurisdiction. *Clayton* v. *Utah*, 132 U. S. 632. It is clear that such issues as involve the regularity of the tax, the sum of the penalties due, the extent of the lien given by the territorial law, etc., do not present any question of the exercise of authority under laws of the United States. *Linford* v. *Ellison*, 155 U. S. 503. It is conceded that there was no treaty with the Indians for whose benefit the reservation was established, limiting the power of Congress to grant to the railroad the rights conveyed. The consent of Congress to the railroad's entering on the land and using it, as therein provided, was, then, a valid exercise of power. Its necessary effect was, to the extent of the grant and for the purposes thereof, to withdraw the land from the operation of the prior act of reservation. And the immediate consequence of such withdrawal, so far as it affected the property and rights withdrawn, was to reëstablish the full sway and dominion of the territorial authority. *Utah & Northern Railway* v. *Fisher*, 116 U. S. 28; *Harkness* v. *Hyde*, 98 U. S. 476.

There is no force in the contention that, because the consent of the Indians, to be given in a manner satisfactory to the President, was a condition attached to the grant, and it does not appear by the record that such consent was given, therefore the rights admittedly enjoyed by the corporation are to be treated as if obtained without the Indians' consent.

In the first place, as the company has taken the rights granted by the statute, the legal presumption of duty performed (*omnia rite*, etc.) requires us to assume that the consent was given in accordance with law. And again, the company having assumed and exercised rights which it could possess only by virtue of such consent, cannot be permitted to aver its own wrongdoing, trespassing, and violation of the statute in order to escape its just share of the burden of taxation.

It is wholly immaterial whether the rights vested in the corporation by the act of Congress were rights of ownership or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant, and came, to the extent of their withdrawal, under the jurisdiction of the territorial authority. The fact that Congress reserved the power to alter, amend, or repeal the statute in no way affected the authority of the Territory over the rights granted, although the duration of that authority may depend on the exercise by Congress of the rights reserved. The method of assessing railroads provided for in the statute was to treat each road as a unit, embracing the sum of its franchises, property, and rights. The division of the total amount of the one assessment of the property of the road, into certain sums per mile was a mere method of stating the assessment, and did not change the real unit forming the basis of taxation, the railroad, in its entirety, comprising every element entering therein, which could be made assessable. This being the case, it was clearly lawful for the taxing authorities of the Territory to consider the rights granted by the act of Congress and enjoyed by the railroad in making up the sum of the assessment upon its total property.

The other errors alleged, which are four in number, may be briefly disposed of. Two are concluded by the foregoing views. The assessment being made as a unit, the description of the thing assessed as found in the assessment roll was adequate, and the tax being due as a unit was correctly held to be a lien upon all the property assessed. The territorial court, as such, had jurisdiction to enforce the territorial law on the subject of the collection of taxes. The complaint that a penalty on the delinquent tax was erroneously included in the judgment is, if correct, without merit here. It involves only an error of calculation for a small amount, and is hence controlled by the principle "*de minimis*," etc., and, apart from this, we do not enter into an analysis of the figures to ascertain whether error, in this regard, was committed, because, if it was, the fact should have been called to the attention of the

court below, so as to have afforded an opportunity there to make the requisite correction. Motions for rehearing are expressly allowed by the statute law of Arizona. (Revised Statutes 1887, § 954.) Instead of availing himself of such a motion, the appellant, on the day the decree was entered, gave notice in open court of his intention to appeal, declaring therein that he excepted "only to such portion of said decision and judgment as decided that railroad property within the boundaries of an Indian reservation, within the Territory, is subject to taxation by the Territories or counties, and that such reservation is under the jurisdiction of the territorial courts."

Affirmed.

UNITED STATES *ex rel.* SIEGEL *v.* THOMAN.

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

No. 125. Submitted December 18, 1894. — Decided March 4, 1895.

The provision in act No. 30 of the Louisiana Statutes of 1877 that the surplus of the revenues of parishes and municipal corporations for any year may be applied to the payment of the indebtedness of former years is not mandatory, but only permissory, and creates no contract right in a holder of such indebtedness of former years which can be enforced by mandamus.

THE legislature of the State of Louisiana in 1877 passed an act which may be epitomized as follows: That no police jury of any parish or municipal corporation in the State should make appropriations or expenditures of money in any year which should, separately or together, with any appropriations or expenditures of the same year, be in actual excess of the actual revenue of the parish or municipality for that year; and that all the revenues of the parishes and municipalities of each year should be devoted to the expenditures of that year, provided "that any surplus of said revenues may be applied

to the payment of the indebtedness of former years." Extra Session Acts of 1877, p. 47.

In 1879 (act No. 38 of that year) it was provided that it should be the duty of the board of administrators of the common council of the city of New Orleans, in December of each year, to propose a detailed statement exhibiting the amount of revenues for the ensuing year expected to be derived by the city from taxes and licenses, and that along with this estimate of receipts it should be likewise the duty of the city to prepare a detailed statement of the estimated expenditures, exhibiting the items of liability and expenses for the year, including the requisite amount for contingent expenses during that time. The act provided that the estimate of liabilities and expenses should not exceed four-fifths of the estimated amount of revenue. It made it the duty of the city to adopt a budget of revenues and liabilities, and to levy the taxes and collect the licenses provided in the estimate in order to pay the same. It directed that the detailed estimate of receipts and expenses should be considered as an appropriation of the amounts therein stated to the purpose therein set forth, and forbade the diversion of any of the receipts from the particular purposes to which they were then appropriated.

In 1882, in an act reincorporating the city of New Orleans, the foregoing provision as to the annual estimate and budget was practically reënacted, with the direction that the budget be published in the official journal. This law, in addition, provided as follows:

"The council in fixing the budget of revenue and expenses as herein provided for shall not consider and adopt as a revenue miscellaneous or contingent resources and affix thereto either an arbitrary or nominal value or amount; but whenever such resources are considered and adopted they shall be estimated on a real and substantial basis, giving the source whence to be derived, a specific sum to be received from each item thereof, and no more. The council is hereby prohibited from estimating for expenditures to be derived from any uncertain or indefinite source, cause or circumstance; but the council shall, by proper ordinances, provide for the receipt

and disbursements of any sums of money, interests, rights, or credits that may accrue to the corporation by bequest, grant, or any cause whatever, and all such sums, rights, interests, or credits so received shall be, and are hereby, appropriated for the purposes of public works and improvements, the manner and details of such appropriations to be ordered by the council.

"The council shall not under any pretext whatever appropriate any funds for the government of the corporation to the full extent of the estimated revenues, but shall reserve twenty-five per cent of said estimated revenues, which reserve and all sums, rights, interests, and credits received from miscellaneous or contingent sources shall be appropriated by the council for the purposes of public improvements as herein provided for." Sections 64, 65, and 66 of act No. 20, Acts of 1882, pp. 14, 35.

In 1886 the act just quoted was amended by providing that the council "shall not under any pretext whatever appropriate any funds for the government of the corporation to the full extent of the revenues, but shall reserve 20 per cent of said revenues; which reserve and all sums, rights, interests, and credits received from miscellaneous or contingent sources shall be appropriated by the council for the purposes of permanent public improvements, as herein provided for."

In March, 1883, the city of New Orleans sanctioned the issue of transferable certificates of ownership for unpaid appropriations, which certificates entitled the creditor to receive a cash warrant for the claim in the order of the promulgation of the ordinance by which the claim was authorized. The ordinance provided that the certificates thus issued should bear no interest.

Prior to May 21, 1890, the relator herein brought three suits against the city of New Orleans in the Circuit Court of the United States for the Eastern District of Louisiana upon transferable certificates of 1882, issued under the ordinance aforesaid. In one suit, No. 1900 on the docket, judgment was rendered in his favor on May 21, 1890, for $4960.40 and costs, but without interest. Its language is: "It is therefore

ordered, adjudged and decreed that the plaintiff, Henry Siegel, do have and recover of and from the defendant, the city of New Orleans, the sum of $4960.40 and costs, but without interest. The said judgment to be paid exclusively out of such revenues of the city of New Orleans for the year 1882 as may be collected by said city from revenues set apart by the amended budget of the said city for the year 1882, . . . legally and properly payable, and for which appropriation was made by said amended budget, provided that the surplus of revenue of any subsequent year may be applied to the payment of the debts of the year 1882, according to section 3 of act No. 30, 1877.". A like judgment was rendered in the two other cases, the only difference between them being in the amounts which they covered — both amounts, separately, however, being below $5000. At about that time, or subsequently thereto, the defendant also filed against the city of New Orleans fourteen suits, numbered on the docket, respectively, from 11,914 to 11,928, omitting 11,922. These suits covered transferable certificates of the city of New Orleans, like those already referred to, for various amounts and against the appropriations of the years 1879, 1880, 1881, and 1882. These fourteen cases were heard together before the District and Circuit Judge, resulting in separate judgments, entered on June 19, 1890, in each case, as follows: "It is therefore ordered, adjudged, and decreed that the plaintiff . . . do have and recover of and from the defendant, the city of New Orleans, the sum of ———, payable out of the revenues of the year ——, with full benefit of the provisions of section 3 of act No. 30, 1877." The proper blanks left above contained in the entry of each judgment a statement of the amount and the year against which the claim had been created. The sum of these seventeen judgments, payable out of the revenues of the respective years, was as follows: 1879, $21,008.36; 1880, $3391.87; 1881, $12,311.78; 1882, $35,366.17.

Shortly after the entering of the judgments, proceedings by mandamus were commenced in all of the suits to compel the comptroller of the city of New Orleans to pay the amounts upon the ground that there was a surplus of revenue for the

Counsel for Defendant in Error.

years 1888 and 1889 in the city treasury largely in excess of the judgments, and that the relator was entitled by contract to have them paid out of the surplus revenues of any year subsequent to that in which the indebtedness which he held was created. The seventeen mandamus proceedings were ordered consolidated into one cause, to be entitled *Henry Siegel* v. *The City of New Orleans*, under the number "11,500, consolidated." The comptroller, in this consolidated suit, made return denying that there was any surplus of revenues for the year 1888, and averring, on the contrary, "that the budget for the city of New Orleans for the year 1888 was $1,474,093.10 for the alimony of the city and the sum of $88,752.04 for the reserve fund, making the total budget for all purposes against the revenues for that year the sum of $1,562,855.14; that the total collection out of the revenues for that year, to date of return was the sum of $1,550,502.32; that out of said amount the sum of $1,474,093.10 has been paid on account of the alimony of the city, and $47,343.05 has gone to pay claims out of the reserve fund; that $29,066.17 was in cash to the credit of the reserve fund for that year, and is retained to pay claims payable out of the same; that if the said $29,066.17 were paid to the creditors holding claims against the reserve fund . . . there would still remain unpaid claims against the said reserve fund to the extent of $12,342.82; that until said amount was collected there could not be a payment of all the claims charged against the reserve fund," and hence no surplus existed. Facts substantially similar, the figures varying in amount, were stated in regard to the funds of 1889. The return denied the existence of any special contract right in favor of the judgment creditor as against the reserve fund of the respective years. A jury having been waived, the case was submitted to the court, and resulted in a decree refusing the mandamus, and the case was brought by error here.

Mr. J. R. Beckwith and *Mr. Henry L. Lazarus* for plaintiff in error.

Mr. E. A. O'Sullivan for defendant in error.

Opinion of the Court.

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

The right which the relator asserts rests upon the premise that the third section of the act of 1877 contractually dedicated the surplus fund of any year to the payment of creditors holding claims for years subsequent to 1877, which claims were made by law payable out of the revenues for such subsequent years. From this is deduced the conclusion that the city charter, (sections 65 and 66 of the act of 1882,) and the amendment thereof in 1886, (act 109 of 1886,) which authorize the surplus in any year to be applied to works of public improvement, are void so far as creditors subsequent to 1877 are concerned, because they impair the obligations of the contract made in favor of such creditors by the act of 1877. The premise is fallacious and the conclusion drawn from it unsound. The act of 1877, after dedicating the revenues of each year to the expenses of that year, took any surplus out of the imperative rule thus established by the proviso that "any surplus of said revenues may be applied to the indebtedness of former years." In other words, having fixed inflexibly the rule by which the revenues of the year were to be first used to pay the debts of the year, it made an exception by allowing the surplus of any year to be applied to the debts "of former years." The rule was imperative; the exception permissive or facultative. Both provisions taken together operated to deprive the city government of power to use the revenues of one year to pay the debts of another, and to confer on the city authority to employ, if it so chose, the surplus of one year to pay debts of previous years. Indeed, the law made no attempt to dedicate the surplus to any particular object or to control the legislative discretion of the municipal council in its regard. Having affirmatively directed that the revenues of each year should be applied to the year's expenses or debts, the surplus necessarily became subject to the appropriating power of the city. To prevent the general limitation dedicating each year's revenues to each year's debts, from operating to prevent the surplus from being applied to debts of previous years, should the city so desire, the law said the city "may" so use it.

It is familiar doctrine that where a statute confers a power to be exercised for the benefit of the public or of a private person, the word "may" is often treated as imposing a duty rather than conferring a discretion. *Mason* v. *Fearson*, 9 How. 248; *Washington* v. *Pratt*, 8 Wheat. 681; *Supervisors* v. *United States*, 4 Wall. 435. This rule of construction is, however, by no means invariable. Its application depends on the context of the statute, and on whether it is fairly to be presumed that it was the intention of the legislature to confer a discretionary power or to impose an imperative duty. *Minor* v. *Mechanics' Bank*, 1 Pet. 46; *Binney* v. *Chesapeake & Ohio Canal Co.*, 8 Pet. 201; *Thompson* v. *Carroll's Lessee*, 22 How. 422. In *Minor* v. *Mechanics' Bank*, Mr. Justice Story, delivering the opinion of the court, said (p. 63): "The argument of the defendants is that 'may' in this section means 'must;' and reliance is placed upon a well-known rule, in the construction of public statutes, where the word 'may' is often construed as imperative. Without question such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provisions."

In *Thompson* v. *Lessee of Carroll*, *supra*, this court, speaking through Mr. Justice Grier, observed (p. 434): "It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of the statute."

In the law to be construed here it is evident that the word "may" is used in special contradistinction to the word "shall," and hence there can be no reason for "taking such a liberty." The legislature first imposes an imperative duty, the application of the revenue of each year to the expenses thereof, and then makes provision for the case of an excess of revenue

over expenses. In the first the word "shall" and in the latter provision the word "may" is used, indicating command in the one and permission in the other. Indeed, the discretionary nature of the power lodged in the city by the act of 1877, in regard to the surplus revenue of any year, results inevitably from the entire context of the statute and its obvious purpose. Under the general rule which the statute created all the revenues of each year were to be applied exclusively to the expenditures of such year, hence they could not be used for any other purpose. If, after the expenses of any year had been paid out of its revenues, a balance remained on hand, the city would have been powerless to use it. She could not have applied it to the payment of a debt, because the statute said that it should be devoted to the expenditures of the year in which it was collected. She could not have applied it to the expenses of other years, for this, likewise, would have been a violation of the statute. She would simply have had in her possession a sum of money which she could not lawfully use for any purpose whatever. This condition of things rendered it necessary to give power to dispose of the surplus; hence the use of the word "may," which clearly expresses this legislative intent.

The surplus having been left by the act of 1877 under the control of the city council, it follows that that act gave to the relator no contract right to such surplus. The city having power to dispose of it, the acts of 1882 and 1886, directing the municipality to appropriate the surplus to works of public improvement, impaired the obligation of no contract right in favor of relator, since no right existed, and was therefore, *quoad* the questions presented by this record, a valid exercise of legislative authority.

Indeed, the necessary effect of granting the relief here sought would be to impair the contract rights of creditors who are not before us. The record shows that under the mandatory terms of the statutes of 1882 and 1886 the surplus for the years covered by relator's claim has been set apart to works of public improvement, and appropriations to that end have been made against the same. To make the mandamus peremp-

tory would therefore take the fund from the creditors, to the payment of whose claims it has been lawfully consecrated, and give it to the relator.

The judgments in favor of the relator in no way change the situation. The first three direct "said judgment to be paid exclusively out of such revenues . . . of the year 1882 . . . and for which appropriations are made in said amended budget, provided that any surplus of the revenues of any subsequent year may be applied to the payment of the debts of the year 1882, according to section 3 of act No. 30 of 1877." The last fourteen, after providing that they should be paid out of the funds of the respective years, add, "with the full benefit of the provisions of section 3 of act No. 30 of 1877." The proviso in all these judgments adds nothing to the rights conferred by the act of 1877, but in terms simply preserves them. What the position of the relator under that act is we have just stated. The manifest purpose of the saving clause in the judgments was to prevent the language, which directed that they should be paid out of the funds of the year, from being construed as preventing the city government from paying out of the surplus, if so determined by the municipal authorities.

Judgment affirmed.

WALDRON *v.* WALDRON.

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

No. 97. Submitted December 4, 1894. — Decided March 4, 1895.

A bill of exceptions may be signed after the expiration of the term at which the judgment was rendered, if done by agreement of parties made during that term.

If such bill is not delivered to counsel within the time fixed by the agreement, objection to the failure to do so must be taken when the bill is settled, and, if decided against the objector, the question should be reserved.

Statement of the Case.

If evidence legally inadmissible is admitted over objection, that fact is ground for reversal by the appellate court.

The assertion in argument by counsel of facts of which no evidence is properly before the jury in such a way as to seriously prejudice the opposing party is, when duly excepted to, ground for reversal.

Where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time, does not authorize its use for other purposes for which it was not, and could not have been, legally introduced.

It is the duty of the court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is duly made the cause of reversal is thereby removed.

The fact of a divorce being confessed by the pleadings, and being admitted by counsel for defendant in open court, it is unnecessary to prove it, and the divorce record is inadmissible.

Mary Russell Beauchamp was married in September, 1865, to E. H. Waldron. They lived in Lafayette, Indiana, from the date of their marriage until 1875, when they removed to St. Louis, the employment of the husband calling him there. In 1877 they left St. Louis and returned to Indiana, where they continued to live as husband and wife until June, 1886. At that date the husband abandoned his marital relations and fixed his permanent residence in Chicago. For twelve or fifteen years, prior to June, 1886, the husband, Waldron, had friendly relations with E. S. Alexander and wife, who lived in Chicago, Waldron dealing with Alexander in a business way, and also calling socially at his residence, and Alexander visiting Waldron when he came to Lafayette. In February, 1886, E. S. Alexander died, leaving a widow. Subsequently Mrs. Waldron filed in the Superior Court of Tippecanoe County, Indiana, a suit for divorce against her husband, which ripened, in June, 1887, into a decree granting the divorce and giving her $10,000 alimony. In October, 1887, E. H. Waldron married Mrs. Josephine P. Alexander, the widow of E. S. Alexander. In June, 1888, Mary Russell, the divorced wife of E. H. Waldron, sued Mrs. Josephine P. Waldron, the former Mrs. Alexander, in the Circuit Court of the United States for the Northern District of Illinois. The grounds of this action are stated in her complaint as follows:

1st. "Whereas the said defendant, contriving and wrong-

fully, wickedly, and unjustly intending to injure the said plaintiff and to deprive her of the comfort, fellowship, society, aid, and assistance of Edwin H. Waldron, the then husband of the said plaintiff, and to alienate and destroy his affection for said plaintiff, on, to wit, the 6th day of June, A.D. 1886, and on divers other days and times between said 6th day of June, A.D. 1886, to the 21st day of June, A.D. 1887, at, etc., wrongfully, wickedly, and unjustly debauched and carnally knew the said Edwin H. Waldron, then and there still being the husband of the said plaintiff, and thereby the affection of the said Edwin H. Waldron for the said plaintiff was then and there alienated and destroyed, and also by reason of the premises the said plaintiff from thence hitherto wholly lost and was deprived of the comfort, fellowship, society, and assistance of the said Edwin H. Waldron, her said husband, in her domestic affairs, which the said plaintiff during all that time ought to have had and otherwise might and would have had, etc., aforesaid."

2d. "Whereas the said defendant, contriving and wrongfully, wickedly, and unjustly intending to injure the said plaintiff and to deprive her of the comfort, fellowship, society, aid, and assistance of Edwin H. Waldron, the then husband of the said plaintiff, and to alienate and destroy his affection for the said plaintiff on, to wit, the 6th day of June, A.D. 1886, and on divers other days and times between said 6th day of June, A.D. 1886, and the 21st day of June, A.D. 1887, at, etc., wrongfully and unjustly sought and made the acquaintance of Edwin H. Waldron, the husband of the said plaintiff, and then and there, well knowing that said Edwin H. Waldron was the husband of said plaintiff, wrongfully, wickedly, and unjustly besought, persuaded, and allured the said Edwin H. Waldron to desert and abandon the said plaintiff, and thereby the affection of said Edwin H. Waldron for the plaintiff was alienated and destroyed, and also by reason of the premises the plaintiff has from thence hitherto been wholly deprived of the affection, society, aid, and assistance of her said husband in her domestic affairs, which the plaintiff during all that time ought to have had and otherwise might and would

have had, and also by reason of the premises the said plaintiff during all said time from thence hitherto suffered great mental anguish and loss of social reputation at, etc., aforesaid, to the damage of said plaintiff of one hundred thousand dollars, and therefore she brings her suit," etc.

The defendant pleaded that inasmuch as the relation of husband and wife, which formerly existed between the plaintiff and defendant's present husband, had been terminated by a decree of divorce, granted at plaintiff's own demand, the action was not maintainable. She further pleaded the general issue.

The case came to trial in January, 1890. In the opening statement, foreshadowing the case which it was proposed to prove, one of the counsel for plaintiff read to the jury extracts from the divorce proceedings, and commented thereon in a manner which clearly indicated that they were links in a chain of evidence, which plaintiff proposed to offer in order to establish the adultery of the defendant. Thereafter, during the progress of the trial, the record of the divorce suit was offered in evidence by the plaintiff, for the general purposes of the case, and its admission was objected to by the defence on the ground that it was *res inter alios*, and that the plaintiff could not make proof for herself by offering her own petition as evidence in her favor, and thus asperse the character of the defendant. The court admitted the record to prove the fact of the divorce alone, and, while thus admitting it, repeatedly declared that it could only be used for that one purpose, and that the averments in the petition and other matters reflecting on the defendant were not to be disclosed or read to the jury. The defendant excepted to the admission of the record for any purpose whatever.

The plaintiff then offered the statute of Indiana relative to divorce, and this was also admitted, in spite of objection, as evidence of the Indiana law on that subject. The testimony of the judge before whom the divorce proceeding was had was then admitted. Wilson, who appeared as attorney for Waldron in the divorce proceeding, was also allowed, over objection, to testify as to his connection therewith. Davie, the

witness on the strength of whose testimony the decree of divorce had been mainly based, was also allowed to testify. In the closing argument to the jury Mr. Aldrich, of counsel for the plaintiff, used the following language:

"The divorce law of Indiana provides that . . . a divorce may be decreed . . . for the following causes and no other: Adultery, except as hereinafter provided; impotency existing at the time of the marriage; abandonment for two years; cruel and inhuman treatment of either party by the other; habitual drunkenness of either party; the failure of the husband to make reasonable provision for his family for a period of two years; the conviction subsequent to the marriage, in any country, of either party, of an infamous crime. . . .

"The only two that are referred to in this bill for divorce — the record is not here, I shall state it, and if it is challenged I shall read it when it comes — are these: That he had abandoned her. Is there any conflict in the evidence in this case that that abandonment only extended from the 6th day of June up until the time this decree was entered the 21st day of June, 1887, a year? Is that a compliance with the statute calling for abandonment for two years? Nothing of the kind. Cruel and inhuman treatment. Hasn't Edward H. Waldron testified upon the stand in this case, and is there any dispute upon this subject, that there was no cruel and inhuman treatment upon his part in this case; that he had never been guilty of cruel and inhuman treatment, and has the statement been challenged that cruel and inhuman treatment under the laws of the State of Indiana only means acts of cruelty coupled with personal violence?

"There has been no cruelty or anything of the kind. They say there is no charge of adultery in this case. The record says that there was no cruel and inhuman treatment, and that he was enamoured of Josephine P. Alexander, in this case. . . . Mr. Davie was the only witness upon this subject, . . . and he has said . . . that he . . . did not know Edward H. Waldron until he came to Chicago, and Edward H. Waldron . . . has testified . . . that up to the time he

came to Chicago he had no acquaintance with Robert Davie. . . . He was the agent, the paid agent, of Edward H. Waldron. Edward H. Waldron is too able a man, he has too much brains, he is too cute, he is too slick, gentlemen of the jury, not to apply any other terms but those that are fitting to him, to suppose that a decree could be obtained in Indiana for abandonment or for cruelty or for inhuman treatment. Edward H. Waldron knew as well as you know that he could only get a divorce and it could only be procured on the ground of his adultery with somebody. . . . Robert Davie knew it. By reason of this non-acquaintance at that time Robert Davie could not have testified to any of the acts of cruelty. How did Robert Davie acquire his information? By these innumerable visits to Chicago. . . . In view of the testimony in this case; in view of the relations of the parties; in view of the fact, that Edward H. Waldron has testified that he had talked with the defendant on two occasions about these divorce matters, and the fact that he was living at this house at that time, with that fact before you, you cannot believe, that it was unpremeditated, that it was unknown, or anything of that kind." The record then continues:

"Mr. McCoy, for the defendant, excepted to the statement of counsel that Robert Davie had obtained the information to which he testified in the divorce proceeding in Chicago, or from Edward H. Waldron, on the ground that the court had excluded the evidence of Robert Davie on that subject.

"Mr. McCoy. 'I read a question here as to whether or not Mr. Davie obtained his information in Chicago, and he replied that he did not, and that extra question and answer was stricken out as being within the character of the evidence excluded by the court; therefore I do not think it is proper to comment upon to the jury.'

"Mr. Aldrich further stated to the jury: 'I submit to you, gentlemen, that any information upon that subject, whether it was cruelty or whether it was cruel and inhuman treatment, or whether it was abandonment, must have been acquired by Mr. Davie while he was in Chicago.'

"To which statement of counsel for the plaintiff Mr. McCoy,

counsel for the defendant, objected, and then and there duly excepted for the reasons above stated.

"Mr. McCoy further objected to the statements of the counsel for the plaintiff to the jury as to the laws of Indiana on the subject of divorce and the argument that it must have been granted on the grounds alleged in the complaint in the divorce proceeding reflecting upon the character of the defendant, Josephine P. Alexander, and then and there duly excepted to such statements.

"And thereupon, after further arguments to the jury, . . . Mr. Dexter addressed the jury in a closing argument on behalf of the plaintiff, in the course of which . . . he spoke as follows:

"*Mr. Dexter's Closing Argument.*

"Now, what was that divorce? Gentlemen, this subject of divorce was spoken of, you recollect, between Waldron and the defendant. It was a matter of conversation, he says, on one or two occasions, and you have heard read his language on that subject. Now, I assert that here was a wicked scheme against the established order of society and the rights of this woman, and that the defendant shall not escape here by throwing up false issues. Are there any grounds of divorce here except those which sustain this action?

"Mr. Walker, for defendant. I enter my objection to the statement of counsel.

"The court. All that was in the declaration the court excluded.

"Mr. Dexter. . . . The conclusion that it [the evidence] leads to counsel shrinks from; it hurts him. The jury cannot be fogged about it. There is something underneath here that is reached for, and you will lay hold of it, and you will not be deceived about it. There will be no effectual effort to keep your minds from coming to the conclusion that they ought to reach. I shall confine myself to the statements admitted by the court and read to the jury. . . .

"The plaintiff prays for a decree of divorce for misconduct of the defendant on account of his cruel and inhuman treatment

of this plaintiff — neither cruel nor inhuman treatment proven save in the language of the bill — 'in this, that he has become enamoured of one Josephine P. Alexander, a married woman.' "

In its final charge to the jury the court, among other things, said:

"The court has already adjudged that the decree of divorce obtained by the plaintiff from Mr. Waldron, June 21, 1887, is evidence conclusive in this case that the marriage relations between the plaintiff and Mr. Waldron were dissolved from the date of that decree. The decree of divorce acted on the status of the parties and dissolved the marriage relation theretofore existing between them and left each free to remarry; but the allegations contained in the bill of complaint in that case against Mrs. E. S. Alexander, the present defendant, are not evidence in this case and were excluded by the court.

"The evidence also taken on the trial of that case is not competent evidence against the defendant in this case, and was also excluded. She, not being a party thereto, is not permitted to appear and cross-examine the witnesses. Nor should the jury assume or infer from anything in evidence in this case that the judgment of divorce was granted upon the ground of adultery, as that is not one of the grounds alleged in the bill of complaint, nor upon any ground of — for any of the causes having reference to the conduct of the defendant in this case. Such an inference has been sought to be drawn by counsel from the proceedings in that case, but it is an inference not warranted by the record in evidence and unfair towards the defendant. The jury will try this case upon the evidence produced on this trial, and not assume or infer that other evidence might have been produced here or was produced in some other case to which the defendant was not a party."

In February there was a verdict in favor of the plaintiff for $17,500. In March an application for a new trial was heard, and taken under advisement. In June, the motion for a new trial having been overruled, the defendant moved in arrest. This motion was also overruled, and on the same day judgment

was rendered on the verdict. The record states that on motion for defendant the time to file a bill of exceptions was extended to the first day of November next. Thereafter a writ of error was sued out and a supersedeas bond fixed at $25,000. On October 6, 1890, a written stipulation was entered into between counsel, which, after mentioning the suing out of the writ of error, the giving of the supersedeas bond, and the issuance of citation returnable here in October, 1890, expressed the desire of the plaintiff in error to obtain an extension of time to prepare the bill of exceptions and file the record here, and set out that this extension was agreed to by the defendant in error, provided —

"First. That the above-named defendant (as plaintiff in error) shall file in the office of the clerk of the Supreme Court of the United States the said writ of error, the said citation and this stipulation, and shall have the said cause docketed in said Supreme Court in its regular order within the time regularly required by the rules of said court for the filing of the transcript of the record in said cause in said Supreme Court as if this stipulation had not been made.

"Second. That counsel for the above-named defendant shall have until November 15, A.D. 1890, to prepare the bill of exceptions in said cause and deliver it to counsel for the above-named plaintiff for examination and such correction as he may deem proper.

"Third. That counsel for the above-named plaintiff shall examine said bill of exceptions and return it to counsel for the above-named defendant within thirty days after it shall have been delivered to him with any proposed corrections or alterations which he may deem proper.

"Fourth. Thereafter, as soon as practicable, but within thirty days upon reasonable notice, said bill of exceptions shall be presented to the judge who conducted the trial of said cause for his approval after the settlement by him of any parts of said bill of exceptions as to which counsel may have been unable to agree.

"Fifth. That said bill of exceptions shall be approved by said judge and be by him sent to the clerk of said Circuit

Court with directions that it be filed as of the date of the entry of said judgment.

"Sixth. That within thirty days after said bill of exceptions shall have been so filed the transcript of said record shall be completed and filed in the Supreme Court of the United States in said cause as theretofore docketed.

"That, in the meantime, so long as counsel for said above-named defendant make no default in the performance of the conditions of this stipulation, counsel for the above-named plaintiff (defendant in error) will make no motion to dismiss said writ of error for failure to file said transcript of the record within the time regularly prescribed by the rules of said Supreme Court, and the said transcript, when so filed, shall be taken and considered as having been filed in apt time.

"This stipulation is executed in triplicate, one to be filed in the Supreme Court of the United States, and one to be retained by counsel for each of said parties.

"Dated at Chicago, Illinois, October 6, A.D. 1890."

Application was made here in due season to docket this agreement and writ of error in lieu of the record, and was refused. The settlement of the bill of exceptions by the court is thus stated in the record:

"The clerk of said court will file this bill of exceptions as of the date of July 10th, A.D. 1890. R. BUNN, *Judge.*

"To William H. Bradley, Esq., clerk.

"Upon the presentation of the bill of exceptions to the judge for settlement, on February 21st, 1891, counsel for plaintiff (defendant in error) moved that the judge do not sign the same, because the defendant (plaintiff in error) has waived her right thereto, since said defendant has not filed this bill of exceptions within the time prescribed by the judge at the time the appeal was prayed, and has failed to have said case docketed in the Supreme Court, as in and by a stipulation entered into on October 8th, 1890, between the attorneys of the respective parties prescribed.

"Which motion was denied by the judge.

"To which ruling counsel for plaintiff then and there duly excepted.

"Date, Madison, Feb'y 21, 1891."

The bill of exceptions in its caption recites:

"Be it remembered that on the trial of the above-entitled cause on the 21st, 22d, 23d, 24th, 27th, 28th, 29th, 30th, and 31st days of January, and the 1st, 3d, and 4th days of February, A.D. 1890, in the December term of said court A.D. 1889, the said cause having been reached and come on for trial in its regular order on the trial calendar of said court, the following proceedings were had, viz."

When it reaches the point where the evidence for plaintiff is recited there appears the heading "Plaintiff's Evidence." At the point where the opening evidence for the plaintiff ends, is the following entry: "Which was all the evidence here offered on the part of the plaintiff on the trial of the cause." This is immediately followed by the words, "Defendant's Evidence. Thereupon the defendant, to maintain the issues on his part in said cause, introduced the following evidence." At the close of the evidence which follows the foregoing is the entry, "Here counsel for defendant rested their case;" and following this, "Rebuttal. And thereupon the plaintiff, further to maintain the issues on her part, introduced the following evidence in rebuttal." At the conclusion of this evidence is the statement, "Which was all the testimony offered on the trial of said cause." The record was filed and docketed here February 28, 1891. In December, 1892, defendant in error moved to vacate the supersedeas because the surety on the bond had become insolvent. On December 12 it was ordered that a new bond be given within thirty days, and on the same day the new bond was filed.

Mr. William H. Barnum, *Mr. H. J. Caldwell* and *Mr. Louis J. Pierson* for plaintiff in error.

Mr. Charles H. Aldrich for defendant in error, to the points on which the case turned in this court, said:

I. The record shows that judgment was entered on the verdict in this case on July 10, 1890, and defendant given until

November 1, 1890, to file her bill of exceptions. The bill of exceptions was not tendered to the judge until February 21, 1891, at which date he signed and sealed it as of the date of July 10, 1890. It is confidently submitted that the court had no jurisdiction to sign the bill at the time it was signed, and that its order to the clerk to enter the same as of the earlier date was wholly nugatory and void.

The conditions upon which the extension was granted failed; the plaintiff in error presented the bill of exceptions to the counsel for defendant in error January 15, 1891, sixty days later than he was required to do by the stipulation; he was notified as soon as this court refused to docket the case that this point would be insisted upon, and when the bill was tendered the question was distinctly reserved as certified by the judge.

Assuming, for the purpose of argument only, that counsel were able by their mere stipulation and without an order of the court procured before the expiration of the time limited, to extend the jurisdiction of the court to settle the bill of exceptions, it is certain that they had power to prescribe the terms of their own agreement. It was therefore competent to make the stipulation subject to the proviso that the "cause shall be docketed in the Supreme Court of the United States, as early and in the same order as to priority, as it would be docketed if the transcript of the record were filed in said Supreme Court, or within the time regularly required by the rules of said court, so that the time when said cause shall be reached for hearing in said Supreme Court shall not be postponed by such extension."

The right of the judge to sign the bill of exceptions on February 21, 1891, must therefore be determined independently of the stipulation and as if it had never been entered into. Assuming this, what are the rights of the parties?

A judgment is entered July 10, 1890, and the defendant given until November 1, 1890, to file her exceptions. She fails to do so until February 21, 1891. The statutory terms of the Circuit Court of the United States for the Northern District of Illinois are required to be held on the first Monday

of July and the third Monday of December of each year. By rule 21 as prescribed by that court, adjourned terms are held on the first Mondays of March, May, and October of each year. By rule 23 of the same court, process may be made returnable to the first day of any regular, special, or adjourned term.

The verdict in this case was recorded at the December term, 1889, and judgment rendered at the July term, 1890. The time given by the court, November 1, 1890, was a time within the same term. The trial was had before the District Judge for the Western District of Wisconsin, who at the trial was sitting as a Circuit Judge in the Northern District of Illinois. The order overruling the motion for a new trial was entered by the Circuit Judge, as the record states, by the direction of said District Judge. If the latter in Wisconsin had no jurisdiction to enter the order, it would probably be considered valid as having been entered by the Circuit Judge, and hence his order; but what authority had the District Judge, in February, 1891, sitting at Madison, Wisconsin, as the record indicates, and as the fact was, to direct the clerk of the Circuit Court of the Northern District of Illinois to file any papers as of July 10, 1890, or any other date?

II. But assuming for the purpose of argument only, that he was still authorized to exercise the powers of a Circuit Judge in the Northern District of Illinois, it is confidently submitted that neither he nor any other judge in that district had any power to enter any orders in the case of *Waldron* v. *Waldron*. That case had passed beyond the jurisdiction of the Circuit court. This has been decided by this court in *Mueller* v. *Ehlers*, 91 U. S. 249.

The writ of error was dated July 15, 1890, and was returnable the second Monday of October, 1890; the citation was dated July 16, 1890, and was returnable at the same time. This brings the case squarely within the decision in *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, both upon the question of the want of power after the term and the want of jurisdiction after the entry of a writ of error in this court.

III. The bill of exceptions can afford the court little if any

assistance in any event. It does not purport to contain the evidence. The record states "which was all the *testimony* offered on the trial of said cause." Where a like statement was made in a bill of exceptions the Supreme Court of Indiana said: "As we have said, the evidence is not in the record. The bill of exceptions states that all the 'testimony' is in the record; but this is not equivalent to a statement that all the 'evidence' is in the record. Testimony is one species of evidence. But the word 'evidence' is a generic term which includes every species of it. And, in a bill of exceptions, the general term covering all species should be used in the statement as to its embracing the evidence, not the term 'testimony,' which is satisfied if the bill only contains all of that species of evidence. The statement that all the testimony is in the record may, with reference to judicial records, properly be termed an affirmative pregnant." *Gazette Printing Co.* v. *Morss*, 60 Indiana, 153, 157.

IV. There was no available error committed by the admission of the divorce record in evidence.

It is an elementary principle of law that objections to testimony *en masse* are unavailable. Thompson on Trials, § 696. The principle is that the court must be advised of the specific point urged by counsel in order that he may rule intelligently upon it, and not be forced to the impracticable course of scanning every question of law which might be raised on evidence submitted. As many of the cases state, it is not a technical rule, but one intended to mitigate the hardships of technicalities. It saves the necessity of retrials, puts the court upon notice of the exact point to be relied upon, and therefore tends to do away with the technical questions which might be raised in the appellate court. If this divorce record, or any part of it, was admissible for any purpose, then the objection and exception made by counsel for plaintiff does not avail, for their objection was to the admission of the record for any purpose.

The decree of divorce is a judgment *in rem*, binding upon all the world as showing the status of the parties. It is conclusive against all parties as to the fact that Mary A. Waldron

is no longer entitled to the love and affection, the *consortium* of her husband. It is not conclusive as to why she is no longer entitled to it. The loss of *consortium* is one of the material facts in issue. It bears a strict analogy to the rules of evidence in criminal cases where it is every-day practice to admit evidence to prove the *corpus delicti* before there is any proof connecting the defendant with the crime. The fact that the crime has been committed is the first issue to be established by the prosecution, and in many cases it would be utterly impossible to prove the commission of a crime if evidence were only admissible which showed upon its face some connection of the defendant with the state of facts sought to be proven.

Much more is this principle important where the case involves questions of conspiracy. Indeed, a great branch of the law has been established on these questions of conspiracy and the evidence which can be admitted to prove it. Necessarily the proof is circumstantial and more remote. The connection is more inferential than in other cases where the direct acts of the parties charged can be proven. The case at bar involves practically a question of conspiracy. The motives are found in the mind of Mrs. Josephine P. Alexander. The overt acts, most of them, following upon those motives and volitions, come through Edward H. Waldron. The consequences of these acts are evident by the necessary acts of Mrs. Mary A. Waldron following upon those consequences. The logical connection is close and irrefutable. This record is of itself admissible as tending to prove one of the issues in the case, namely, the actual loss of the *consortium*. We are not compelled to show any connection with the acts of the plaintiff in error.

Prior to the admission of the divorce record it was in evidence that the plaintiff was living apart from her husband. This might have contained an inference to the jury that she was living apart from him of her own choice; that she was still entitled to his love and affection, and by proper conduct might reëstablish herself and him in their marital relations, and explain and settle any temporary estrangement then existing.

The divorce record would then be admissible to conclusively rebut any such possible inference, if it would show that she was no longer entitled to his *consortium;* that she could not then lawfully live with him, could not lawfully claim his protection, or any of those rights which she had theretofore had in him.

And again, the instructions of the court make it clear that the defendant could not have been prejudiced either by the admission of the divorce record or the statutes of Indiana upon the subject of divorce, or any inferences sought to be drawn therefrom by counsel. *Castle* v. *Bullard*, 23 How. 172, 189.

The prevailing opinion is that the error of admitting incompetent evidence may be cured by an instruction admonishing the jury to disregard such evidence, even in a criminal case. *Hopt* v. *Utah*, 120 U. S. 430; *State* v. *May*, 4 Dev. (Law), 330; *Goodnow* v. *Hill*, 125 Mass. 587; *Smith* v. *Whitman*, 6 Allen, 562; *Hawes* v. *Gustin*, 2 Allen, 402; *Dillin* v. *People*, 8 Michigan, 357; *Specht* v. *Howard*, 16 Wall. 564.

V. As connected with the admission of the divorce record, counsel for plaintiff in error raise the point that Mr. Dexter of counsel for plaintiff below made remarks outside the evidence, which had a tendency to prejudice the jury. These remarks are set forth quite extensively in the brief. The record shows that defendant's counsel objected to Mr. Dexter's argument at the point where they allege he went outside the evidence, and also shows that the court, upon this objection, stated to Mr. Dexter that all that was in the declaration (petition for divorce) had been excluded by the court. There was no further attempt by the counsel for plaintiff in error to have Mr. Dexter confine his remarks to what they conceived was in evidence. There was no suggestion to the court that it should compel him to limit these remarks as they allege he should have limited them, and there was no exception taken. We contend that Mr. Dexter's remarks, being upon the allegations of the petition for divorce, were warranted because, in our view, the allegation as to Mrs. Josephine Waldron was, as we have heretofore shown, in evidence. But even granting

that he went outside of the evidence, we think the instructions of the court have cured whatever injury might have been done by these remarks. These instructions on the point of the divorce record seem to us to completely do away with the contention of plaintiff in error that she was injured by the introduction of that evidence. It is an undeniable rule of law that, even if improper evidence is admitted, the court may avoid the error by instructing the jury to disregard it. No instructions could be clearer to that effect than those in this case.

It would be utterly impossible to conduct without error a trial of any case presenting a great mass of evidence with many difficult points of ruling as to admissibility, if the court could not at a later stage of the proceedings, by its explicit admonitions, remove the effect of error which inadvertently crept in.

It is no misconduct to urge the widest inferences from the evidence. It is misconduct (not sufficient to warrant a new trial, if corrected by the court in his instructions) to comment upon matters not in evidence. I think no well-considered case can be found where the verdict of the jury was interfered with because the attorney urged inferences from proper evidence not warranted in the opinion of the court. To establish such a rule would be equivalent to saying that every argument of attorneys engaged in a contest must be sound, and as in every such trial there are at least two such, we would be reduced to the absurdity of holding that both must be right, a conclusion often sound in a qualified sense, not in the broad one in which it is sought to be here applied. The practice and traditions of our profession, as well as the rules of common sense, have established the right of each advocate to urge a jury to adopt the conclusion most favorable to his client from the evidential facts, and has delegated to the jury, and not to the court, the power to decide between them. Therefore I submit, that if any party had a right to complain, it was the plaintiff, when the court, both upon trial and in the instructions, so limited the effect of the divorce record.

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

The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by consent of parties given during that term. *Hunnicutt* v. *Peyton*, 102 U. S. 333; *Davis* v. *Patrick*, 122 U. S. 138; *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293.

The fact that the bill of exceptions was not handed to counsel for defendant on or before November 15, 1890, does not appear of record, and if it did, it would be rendered immaterial by the action of the judge below in settling the bill.

If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled. And if an objection then taken was overruled, the question of the correctness of such action should have been then reserved. The fact is, that the only reservation made in the settlement of the bill is thus stated in the record: "Counsel for plaintiff move that the judge do not sign the same, because the defendant has not filed this bill of exceptions within the time prescribed . . . at the time the appeal was prayed." This, of course, was not sound, in view of the agreement whereby the time which had been at first fixed was extended. The only question reserved in this connection is accordingly, also, without merit. As to the contention that the appeal was docketed too late, the defendant in error is precluded from relying thereon by reason of his motion here for a new bond, long after the entry of the case on the docket of this court, which was made at the return term.

Whether the concluding words in the bill of exceptions, "which was all the testimony offered on the trial of the cause," would be treated as meaning all the evidence, if unexplained by the context of the bill, need not be considered, as all the recitals in the bill, from the caption to the end thereof, taken together, we think, conclusively show that the

words, "all the testimony," were used as synonymous with "all the evidence." This conclusion is strengthened by the fact that the bill was settled contradictorily, and no reservation as to its incompleteness was made.

Coming then to consider the record, we find that the assignments of error here are of a threefold nature: (*a*) those which relate to the conclusions of law reached by the court upon the merits of the controversy; (*b*) those which complain of perversion and misuse by counsel of evidence admitted, which it is alleged were so serious that they must have affected the minds of the jury, to such an extent as to render the verdict and judgment necessarily reversible; and (*c*) those which rest upon the alleged rejection of legal and admission of illegal evidence.

We will first approach the investigation of the matters mentioned under the second heading, since if the complaint of perversion and misuse of evidence is justified, it is not necessary to consider whether the rulings on the admissibility of testimony or the final conclusions of law, upon the merits, were correct.

The complaint of the conduct of counsel in argument is substantially predicated upon the following analysis of the facts, which we find borne out by the record. In the opening statement of counsel for plaintiff, portions of the divorce proceedings were read to the jury, counsel saying, among other things: "Here was an allegation that she has enticed him from his home, and the divorce was granted upon that ground among others; that is, the decree finds that the facts in the complaint were proved and that the divorce was granted upon that ground." When the record of the divorce proceedings was offered by the plaintiff objection was made thereto, and thereupon the court admitted it to prove the fact of the divorce alone, expressly limiting it to such purpose, and forbidding the reading or stating to the jury any of the averments found in the petition which in any way reflected upon the defendant. When the statute of Indiana was admitted, over objection, its introduction was allowed solely for the purpose of showing the law under which the divorce was granted.

Having thus obtained the admission of the record and the statute for qualified and restricted purposes, plaintiff's counsel, in their closing argument to the jury, used these instruments of evidence for the general purposes of their case, repeated to the jury some of the averments in the petition which assailed the plaintiff's character, and put those allegations in juxtaposition with the statute of Indiana on the subject of divorce and the testimony of certain witnesses, in order to produce the impression upon the minds of the jury that the decree of divorce had been granted on the ground of adultery between the defendant and Waldron. Indeed, the fact is that the counsel after referring the jury to the evidence which was not in the record stated to them, in effect, that it established the fact, or authorized the fair inference that the decree of divorce had been rendered on the ground of adultery with Mrs. Alexander, and therefore conclusively established the right of the plaintiff to recover in the present case. It is unnecessary to say that all this is ground for reversal, unless its legal effect be in some way overcome. It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor. *Farman* v. *Lanman*, 73 Indiana, 568; *Brow* v. *State*, 103 Indiana, 133; *Bullock* v. *Smith et al.*, 15 Georgia, 395; *Dickerson* v. *Burke*, 25 Georgia, 225; *Lloyd* v. *H. & St. J. Railroad*, 53 Missouri, 509; *Wightman* v. *Providence*, 1 Cliff. 524; *Martin* v. *Orndorff*, 22 Iowa, 504; *Tucker* v. *Henniker*, 41 N. H. 317; *Jenkins* v. *N. C. Ore Dressing Co.*, 65 N. C. 563; *State* v. *Williams*, 65 N. C. 505; *Hoff* v. *Crafton*, 79 N. C. 592; *Yoe* v. *People*, 49 Illinois, 410; *Saunders* v. *Baxter*, 53 Tennessee, 369.

The foregoing conclusions are not disputed by the defendant here, but she seeks to avoid their application as follows: First, by denying the right of the plaintiff in error to raise the question, upon the ground that no exception was reserved to the misuse by counsel of the evidence which is complained of;

secondly, by asserting that the misuse did not take place, and that the assertion thereof in the bill of exceptions is erroneous and "inadvertent;" thirdly, by admitting that use was made of the various items of evidence mentioned in argument, and contending that this was not a misuse, because the evidence was legally admissible for all the purposes of the cause, and was therefore properly so used; and, finally, by insisting that, even if use was made of alleged facts, evidence whereof had been expressly excluded, and which were not, therefore, before the jury, the wrong thus committed by counsel was cured by the final charge of the court, and therefore does not give rise to reversible error. Without pausing to consider the palpable inconsistency of these various contentions, we pass to the consideration of their correctness.

The claim that no exception was reserved to the misuse of testimony is founded on the proposition that, as the objection, made by defendant, to the record and statute was to their admissibility in any form or for any purpose, and as they were admissible to show the fact of divorce, the objection, being general, was not well taken. To state this argument is to answer it. It is clear that where evidence is admitted for one certain purpose, and that only, the mere fact that its admission was not objected to at the time, does not authorize the use of it for other purposes for which it was not, nor could have been legally introduced. The right of the defendant below to object to the perversion and misuse of the evidence depends upon whether objection was duly reserved thereto and not upon whether exception was taken to the admissibility of the evidence which, it is asserted, was misused. That exception was here taken to the misuse of the evidence is plain. At the close of the case, when reference was made by one of the counsel for the plaintiff to the record and to the Indiana statute, and the other matters connected therewith, the following exception was reserved:

"Mr. McCoy, counsel for defendant, further objected to the statements of counsel for the plaintiff to the jury as to the laws of Indiana and the suit for divorce, and the argument that it must have been granted upon the grounds alleged in the com-

plaint in the divorce proceedings which reflected upon the character of the defendant Josephine P. Alexander, and then and there duly excepted to such statements."

It is true that when, in the closing argument for the plaintiff, made by other counsel, similar language was used and objected to, no exception was reserved. This, however, is immaterial, as exception was reserved to the language, first used, and this one exception, if well taken, must lead to reversal.

The contention that the prejudicial averments in the petition for divorce were not conveyed to the jury is thus argued: True, the bill of exceptions shows that they were so conveyed, but, because this statement is in direct conflict with the rulings of the court, therefore the statement, in the bill of exceptions, would seem to be an inadvertence. In other words, the argument is that the bill of exceptions must be disregarded on the theory that, if the facts stated in the bill be true, error results, and error is not to be presumed.

The remaining suggestions are quite as unsound as the specious one we have just considered. The divorce proceeding and statute, it is asserted, were admissible for all purposes, because there was evidence tending to show that the divorce was inspired by Waldron in connivance with the defendant below, and because such proceedings were part of the *res gestæ*, etc., etc. Whatever weight these propositions may intrinsically possess need not be considered, since the question we are examining is, not whether the divorce proceedings should have been admitted, for the general purposes of the cause, but whether, having been rejected by the court for such purposes, it was competent for the plaintiff to use them in direct violation of the restriction placed upon their use. If error was committed in restricting the use of the evidence, the plaintiff's remedy was to except thereto, and not to disregard the ruling of the court and use the evidence in violation of the conditions under which its admission was secured.

We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court,

therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. *State* v. *May*, 4 Dev. (Law) 330; *Goodnow* v. *Hill*, 125 Mass. 587, 589; *Smith* v. *Whitman*, 6 Allen, 562; *Hawes* v. *Gustin*, 2 Allen, 402, 406; *Dillin* v. *People*, 8 Michigan, 357, 369; *Specht* v. *Howard*, 16 Wall. 564. There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. The rule and its exception were considered in *Hopt* v. *Utah*, 120 U. S. 430, 438, where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice Field: "But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted its subsequent withdrawal from the case with its accompanying instruction cured the error. It is true that in some instances there may be such strong impressions made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error. But such instances are exceptional."

The case here, we think, comes within the exception. The charge made in the complaint was a very grave one, seriously affecting the character of the defendant below. The record which was admitted for a limited purpose had no tendency to establish her guilt of that charge, if used only for the object for which it was allowed to be introduced. This is also true of the Indiana statute, and of the other testimony relating to the divorce proceeding. The admission of the record and other testimony having been thus obtained, in the closing argument for plaintiff, all the restrictions imposed by the court were transgressed, and the evidence was used by counsel

in order to accomplish the very purpose for which its use had been forbidden at the time of its admission.

Indeed, when the statements made by plaintiff's counsel in opening are considered, it seems clear that the failure to obtain the admission of the divorce proceedings in full left the case in such a condition that much of the subsequent testimony introduced, while it proved nothing intrinsically, was well adapted to fortify unlawful statements which might thereafter be made in reference to those proceedings. Thus, the case in its entire aspect was seemingly conducted in such a manner as to render the illegal use of evidence possible and to cause the harmful consequences arising therefrom to permeate the whole record and render the verdict erroneous. Our conviction in this regard is fortified by the fact that although the unauthorized use of the evidence occurred in the final argument of the counsel for plaintiff, who first addressed the jury, and was then and there objected to and exception reserved, the same line of argument, in an aggravated form, was resorted to by the counsel who followed in closing the case. Indeed, the language of this counsel invited the jury to disregard the finding of the court, by looking beneath the facts which were lawfully in evidence.

As the fact of divorce was confessed by the pleadings, and, besides, was admitted by counsel for defendant in open court, we are of opinion that the divorce record was inadmissible, because of irrelevancy. We also consider that the statute of Indiana was not admissible for any purpose. We have not rested our decree upon the question of the admissibility of this evidence, because the mere illegal introduction of irrelevant evidence does not necessarily constitute reversible error, and hence we have been compelled to consider, not alone the admission of the irrelevant evidence, but also the illegal use which was made of it.

Judgment reversed, and cause remanded, with directions to set aside the verdict and grant a new trial.

WINTER v. MONTGOMERY.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 533. Submitted February 4, 1895. — Decided March 4, 1895.

Eustis v. *Bolles*, 150 U. S. 361, affirmed and followed.

Motion to dismiss, coupled with which was a motion to affirm. The grounds for the motion, as stated by the counsel for the defendant in error, were substantially as follows:

The plaintiff in error filed in the chancery court of Montgomery County, Alabama, an original and amended bill against the defendant in error. The defendant made no answer to these bills, but moved their dismissal on the ground that they were "without equity." This motion was sustained, and decrees rendered by the chancery court dismissing the bills. On appeal to the Supreme Court of Alabama the decrees were affirmed by the judgment.

It is alleged by the complainant in substance that the pavement adjacent to certain property in the city of Montgomery, Alabama, held by him as trustee of his wife, Mary E. Winter, had been taken up by him, the entire sidewalk excavated, apartments for business purposes constructed in the excavation so made, and a new pavement laid, and that this was done by permission of the city council of Montgomery (defendant in error) as evidenced by a report of a special committee, dated July, 1870. It is further set forth that after the complainant had been for many years in the use of the improvements so made, the city authorities removed the pavement and the structure underneath, filled in the excavation, put down a new and different kind of pavement, known as the "Schillinger pavement," and have since excluded the complainant from the use of the space underneath the pavement in connection with the building adjacent, and that great damage has resulted from these acts of the city authorities.

It appears, also, from the original bill that the city authorities committed the alleged wrongs complained of on the

ground, as they claimed, that the sidewalk was out of repair and dangerous for passengers, and that it could only be properly repaired in the way they had done; that complainant had several times during a period of more than a year attempted to make the suggested repairs, but that the authorities had prevented his doing so, and had insisted on replacing the old pavement by the Schillinger pavement.

Among the errors assigned on the appeal to the Supreme Court of Alabama from the decrees of the chancery court were the following:

"3. The court erred in not holding that the ordinance of the city council of Montgomery, as set out as Exhibit 'C' to the original bill, impaired the obligation of the contract set out as Exhibit 'B' to the bill.

"4. The court erred in not holding that the acts of the city council, respondent, as set out in said bill, deprived the complainant and Mary E. Winter, the owner of the corpus, of the interest and property described 'without due process of law.'"

Mr. Edward A. Graham and *Mr. L. A. Shaver* for the motions.

Mr. H. E. Paine and *Mr. J. S. Winter* opposing.

THE CHIEF JUSTICE: The writ of error is dismissed on the authority of *Eustis* v. *Bolles*, 150 U. S. 361, and cases cited.

Dismissed.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* BROWN.

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

No. 632. Submitted February 4, 1895. — Decided March 4, 1895.

McLish v. *Roff*, 141 U. S. 661, and *Chicago, St. Paul &c. Railway* v. *Roberts*, 141 U. S. 690, affirmed to the point that this Court has no jurisdiction to

review in error or on appeal, in advance of the final judgment in the cause on the merits, an order of the Circuit Court of the United States remanding the cause to the state court from which it had been removed to the Circuit Court.

MOTION to dismiss.

Mr. Josiah Patterson for the motion.

Mr. H. W. McCorry opposing.

THE CHIEF JUSTICE: The writ of error is dismissed upon the authority of *Railway Company* v. *Roberts*, 141 U. S. 690, and *McLish* v. *Roff*, 141 U. S. 661. *Dismissed.*

HAYS *v.* STEIGER.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 67. Submitted November 9, 1894. — Decided March 4, 1895.

The grant of the Agua Caliente to Lazaro Pina by Governor Alvarado in 1840 was a valid grant, and embraced the tract in controversy in this action.

THE case is stated in the opinion.

Mr. Frederic Hall and *Mr. James A. Waymire* for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This case comes before us on writ of error from the Supreme Court of California. It was an action originally brought by the plaintiff in the Superior Court of one of the counties of that State, claiming an equitable right to 110.80 acres of land which is part of 160 acres of public land for which a preëmp-

tion claim was filed by one John Mann, through whom the plaintiffs in error claim as heirs at law, charging the defendant as trustee of the legal title, and praying that he be compelled to transfer it to them as the true owners thereof.

The defendant demurred to the complaint and had judgment thereon. The plaintiffs stood upon the sufficiency of their complaint, and appealed from the judgment of the inferior court, which was, however, affirmed.

From the latter judgment the case is brought to this court on a writ of error.

Mann, through whom the plaintiffs in error claim as heirs, was a qualified preëmptor on one hundred and sixty (160) acres of unsurveyed public land in Sonoma County, California, which embraced the 110.80 acres in controversy here. He made improvements upon the land and resided upon it until his death, which took place in July, 1872. He died intestate.

The township in which the one hundred and sixty (160) acres were situated was afterwards surveyed, and an approved plat thereof was filed in the United States land office in San Francisco in August, 1880.

In October following one of the plaintiffs, on behalf of the heirs of Mann, filed with the register and receiver of the land office a declaratory statement claiming the right to preëmpt, for the benefit and use of the heirs, one hundred and sixty (160) acres of land.

In November, 1880, the defendant in error filed in the land office an application claiming, as a homestead, a certain portion of the land which included the 110.80 acres. The defendant had entered upon the land in dispute in 1870, without the consent of Mann or the plaintiffs.

No entry of any kind was made by the defendant prior to 1870 upon the premises. He claimed the right to purchase the land under the provisions of section seven of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California." The object of that section was to withdraw from the general operation of the preëmption laws lands continuously possessed and improved by a purchaser under a Mexican grant, which was subsequently rejected, or limited

to a less quantity than that embraced in the boundaries designated, and to give to him, to the exclusion of all other claimants, the right to obtain the title. The land applied for by both parties, to the extent of 110.80 acres, was within the exterior boundary of the Mexican grant known as Agua Caliente, but which was excluded by the final survey of the United States. The defendant was a purchaser of the land thus excluded, for a valuable consideration, from parties who purchased from the original grantee.

The record contains a description of the grant and sets forth the various proceedings for its recognition and confirmation and survey, which we follow in the history of the proceedings as substantially correct.

The grant was made to Lazaro Pina by Alvarado, as governor of California, in October, 1840, and was approved by the departmental assembly in October, 1845. The claim of title to the grant was confirmed by the United States District Court and by this court.

The description of the land in the decree of confirmation is as follows:

"The land of which confirmation is made is situated in the present county of Sonoma, and is of the extent of two leagues and a half in length by a quarter of a league in width, and known by the name of Agua Caliente, and is bounded on the southwest by the arroyo of the Rancho of Petaluma, on the southeast by the town of Sonoma, on the north by the hills and mountains which intervene and separate the rancho of Mr. John Wilson, being the same land which was granted to Lazaro Pina by Governor Alvarado."

The parties proved their respective claims to enter the land before the register and receiver, who decided in favor of the defendant in error.

An appeal was taken to the Commissioner of the General Land Office from the decision of the register and receiver. That officer reversed their decision and rendered one in favor of the plaintiffs.

A further appeal was taken to the Secretary of the Interior, who reversed the decision of the Commissioner and affirmed

that of the register and receiver. Subsequently a patent was regularly issued to the defendant by the United States for a tract of land embracing the 110.80 acres in dispute.

An official survey of the grant to Pina had been made in December, 1870, which was approved. By the survey adopted the arroyo mentioned in the grant was made a fixed boundary on the westerly side.

The survey embraced two and one-half leagues in length and nearly parallel to the general course of the arroyo, and one-quarter of a league in width on the easterly side of the arroyo. The easterly side was situated to the west of the so-called Napa Hills. Upon the publication of the survey objections were filed thereto by the defendant and others, claiming that the eastern boundary did not extend far enough to the east to protect them.

In February, 1878, the Commissioner of the General Land Office decided that the grant of Agua Caliente was a grant limited in quantity by the calls of the title papers and decree of the United States courts to two and one-half leagues in length by one-quarter of a league in width; that the arroyo was the westerly boundary; and that the survey contained the quantity; that the eastern line was the exterior boundary, according to the calls of the grant; that of the boundary described in the decrees the northern must be regarded as the eastern boundary, and that where hills or mountains are described as the location calls of a grant the boundary must follow the foot or base of the hills or mountains.

The Commissioner approved the survey, and on appeal to the Secretary of the Interior the decision was affirmed.

One of the questions involved was as to the construction of the eastern boundary of the Pina grant and whether the land in dispute was within the exterior boundaries. The grant was for a fixed quantity of land, with the arroyo for the westerly boundary and with the southeast boundary of the town of Sonoma.

It was contended that the land was not within the exterior boundary of the grant, and that the register and receiver and Secretary of the Interior erred in holding that it was,

and awarding it to the defendant, but this contention was not sustained.

Conceding that the hills or mountains mentioned in the decree of confirmation as the northern boundary are really upon the east and form the eastern boundary, and that where a grant is described as bounded by hills and mountains the line runs along the base and not the summit of the hills, it does not appear that the land in controversy was not within the boundaries of the grant as originally made and confirmed. It was held that it might be, and that it was in fact. It follows that the defendant should have received as his preëmptive right the whole of the 160 acres claimed by him, the whole amount being within the limits of the grant finally confirmed to the grantee from whom he purchased, and the judgment in his favor should be, therefore,

Affirmed.

MATHER *v.* RILLSTON.

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

No. 139. Argued January 22, 23, 1895. — Decided March 4, 1895.

Occupations which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted without taking all reasonable precautions against such danger afforded by science.

Neglect in such case to provide readily attainable appliances known to science for the prevention of accidents, is culpable negligence.

If an occupation attended with danger can be prosecuted by proper precaution without fatal results, such precaution must be taken, or liability for injuries will follow, if injuries happen; and if laborers, engaged in such occupation, are left by their employers in ignorance of the danger, and suffer in consequence, the employers are chargeable for their injuries.

This was an action to recover damages for injuries sustained by the plaintiff from an explosion in an iron mine at Ironwood, in Michigan, alleged to have been caused through the carelessness and negligence of the defendants. It was commenced

in the Circuit Court for one of the counties of that State, and on motion of the defendants was removed to the Circuit Court of the United States for the Western District of Michigan. The declaration sets forth that the defendants were, in May, 1888, and had been for some time previously, operating at Bessemer, in the county mentioned, an iron mine, called the "Colby Mine." It then describes the general nature and mode of their mining, the use by them of giant powder or dynamite, of great explosive power, in blasting rock, boulders, and ore, the manner of its use, and the dangers attending it from explosion, to which it is liable from great heat or concussion with hard substances in working the mine; and alleges carelessness and negligence in handling the same, causing the explosion, destroying the eyes of the plaintiff and grievously injuring him in different parts of his body, for which injuries damages are claimed in the present action. A more detailed account of the operation of the mine is given in the declaration, and the defendants demanded a trial of the matters set forth, which, under the laws of Michigan, is equivalent to a plea of the general issue in the cause.

The plaintiff was a young man of only twenty-four years of age, and he was not a miner by occupation, nor had he any experience as a miner. He was employed by the defendants chiefly in loading tram cars in their service, and knew little of the different explosives used in the mines. In further history of the operation of the mine, and of the condition of the engine-house at the time of the explosion complained of, and its probable cause, the declaration alleges that the mining was carried on by sinking shafts, driving drifts, stoping and excavating in the manner usual in the business of iron mining; that in performing that work, rock, boulders, iron ore, gravel, sand, and earth were encountered and removed; that in removing them and other hard substances it became necessary to blast the same away by employing giant powder or dynamite of great explosive force; that the powder or dynamite thus used was put up in what were called "sticks," each stick being circular or nearly so, of a diameter of about one and one-half inches and about eight inches long, wrapped in a paper

covering; that the sticks were packed in sawdust in wooden boxes, there being about fifty in each box; that giant powder or dynamite similar in kind or character to that thus used by the defendants, and also caps similar to those hereinafter mentioned, had been in general use in the mines of the upper peninsula of Michigan for twenty years previously; that the powder or dynamite during cold weather became frozen or hard, and in that condition would not explode readily, and it was therefore necessary or at least advisable before using it to soften or thaw it, which was usually done by means of warm water, that being the safest means for that purpose, and when thus thawed or softened it was exceedingly sensitive and liable to explosion from heat or concussion, a fact well known to the defendants; that the usual manner in which explosions were effected in blasting in the mine was by placing at the end of a stick or piece thereof a cap attached to a fuse, which was ignited, and then solid rock and ore could be blasted out by it; that the caps were shaped like ordinary percussion caps and partly filled with a fulminate, which were then exceedingly sensitive and more powerful and more explosive than the dynamite; that they were liable to explosion from heat or by concussion against each other or against any other resisting substance, and were put up in tin boxes, each containing about one hundred, lightly packed in sawdust, and were always ready for use, not requiring any thawing before affixing the fuse and powder.

And the declaration further set forth that on the day of the explosion, hereafter mentioned, there was situated on the surface of the mine a house about twenty feet long by eighteen feet wide and one story high, which was primarily intended for a dry or changing house for the captains and bosses of the mine, of which there were about thirteen; that there were in the house two drums, used mainly for lowering timber into the mine; that these drums were circular and about three and one-half and four feet in diameter, respectively, and were operated by steam power, the steam being supplied through a pipe or pipes from a boiler about fifty feet distant; that eighteen inches from one of the drums was a steam heater, consist-

ing of about sixty coils of pipe, receiving steam from the boiler, intended to heat the house and dry the clothes of the men who changed their clothing there when they had become wet from the waters of the mine; that about a foot away from the heater and against a wall of the house was a shelf, consisting of a board fastened to the wall; that the drums and machinery in the house were in constant motion day and night, the machinery being kept running even when the drums were not in use hoisting or lowering in the mine, in order to keep the exhaust pipe from freezing; that the action of the machinery produced a constant jar in the building; that there was standing near the shelf and heater a barrel partly filled with ordinary lime; and that on the day of the explosion there was in the engine-house, placed there by the direction of the defendants, for the purpose of storing and thawing or softening the same, twelve boxes of giant powder or dynamite, a box and a half lying loose on the shelf, a box about half filled on the floor and against the heater, and, scattered loosely on the floor, about twenty sticks or parts of sticks, some lying against or upon the iron pipe of the heater, a large quantity of powder lying between the heater and the nearest drum, occupying nearly the entire space between them, and about three sticks or parts of sticks resting on the lime, and a small quantity of the lime scattered on the floor and upon some of the powder, and on the shelf was a full box of caps, and in the engine-house and near the heater was a box partly filled with caps; that during the day of the explosion, and while the powder and caps were located as stated, the machinery was in full operation, pounding and jarring, and the atmosphere of the room in the immediate vicinity of the powder and caps was heated from the heater and steam pipes to about 300°Fahrenheit, and the steam pipes were heated to the same degree, and the room being hot the plaintiff was obliged to open the door of the house when the ground was covered with snow to a depth of about a foot lying immediately in front of it and on the walks leading to the house, and several individuals who came into the house on the day of the explosion brought more or less snow on their feet and

persons, which melted and left water therefrom on and about the floor of the house and on the lime.

And it was averred that the powder or dynamite, when thawed out or softened, was very sensitive, and liable to explosion from the jarring of the drums and machinery, and the constant jarring of the building, and that the powder was liable to explosion from the heat of the steam heater and steam pipes and by the slacking of the lime in the lime barrel or on the powder; that the caps were more sensitive than the powder or dynamite, and more apt than the powder or dynamite to be exploded by the jarring and by the heat from the steam pipes and steam heater, all of which particulars were well known to the defendants.

And the plaintiff further averred that he was hired by the defendants to run and operate the drums in the house, and that then the powder and caps were stored and kept in the powder house of the defendants, and that afterwards they were stored in the engine-house; and that he was at the time wholly ignorant that the powder or dynamite was liable to explosion from the jarring of the machinery, or by becoming overheated by the steam heater, or by the heat generated by the lime when slacking, or that the caps were also liable to explosion by such jarring of the machinery, or collision against any other resisting substance in the box, or by the heat from the steam pipes or steam heater; that he had never used the powder or the caps or any other powder or caps similar in kind or character, and was entirely ignorant of their very sensitive character, and that when they were placed in the house he was not, nor was he at any time thereafter and before the accident, informed by the defendants, or any other person, of their sensitive and dangerous character, or that they were liable to be exploded, and that he continued to work in the house entirely ignorant of the danger to which he was thereby subjected.

And the plaintiff further averred that on the day of the explosion, while he was engaged about his business in the house, and while the machinery and the steam heater and steam pipes were in operation, and while the powder and caps

and all the other articles and things were situated in the house as stated, and while he was conducting himself in a careful and prudent manner and not touching, handling, or in any manner whatsoever meddling or interfering with the powder and caps or either thereof, and when he was about two feet distant therefrom, a part of the powder and of the caps, *caused by being jarred as mentioned by the machinery and overheated by the steam and steam pipes and by the lime, suddenly, and without any warning whatsoever*, exploded with great force and violence, throwing pieces of tin and other hard substances into his eyes and into his body, and throwing him out through the open door about fifty feet distant therefrom, and that he was then and thereby grievously bruised, maimed, and injured, and his eyes were permanently injured and destroyed, and he thereby became totally and permanently blind, and his body in other respects was maimed, mutilated, and injured.

And the plaintiff further averred that the explosion and the blinding and maiming and injury of himself were caused through the carelessness and negligence of the defendants *in storing the powder and caps in the house without informing him of the increased risk and danger of his remaining in employment therein ;* in thawing and softening the powder by means of steam heat, instead of hot water; in thawing and storing the powder and caps in the house where the machinery was in operation, and where the steam heater and steam pipes were situated, and the lime was kept and used, as stated, and in placing, or permitting to be placed, the powder and the caps near or around the steam heater, as stated, for all of which the plaintiff claimed damages.

The substantial facts thus stated in the first count are set forth with more or less detail in the other counts of the complaint, of which there are several, and the allegations of negligence and carelessness on the part of the defendants are repeated, from which the explosion is alleged to have followed, and the dreadful injuries stated to have been caused to the plaintiff, and by which he was also deprived of all means of earning a livelihood. The jury found for the plaintiff and

assessed his damages in ten thousand dollars, upon which verdict judgment was entered in his favor, and the defendants brought the case to this court by writ of error.

Mr. A. C. Dustin and *Mr. George F. Edmunds* for plaintiff in error. *Mr. James H. Hoyt* and *Mr. George Hayden* were on Mr. Dustin's brief.

Mr. F. O. Clark, with whom was *Mr. R. C. Flannigan* on the brief, for defendant in error.

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

The testimony produced on the trial by the plaintiff and the defendants corroborated in all essential particulars the facts set forth in the declaration. It is not, however, as definite in its statement of the extent of the heat of the room on the day of the explosion. The declaration puts it at a very high degree Fahrenheit, and the plaintiff, who was examined on the subject, while he does not designate it by any thermometrical measurement, states that the heat from the heater and boiler was more than he could stand; and that the room was hotter than anything he had ever known before. He also testified that the machinery in the engine-house was in operation all the time in order to keep the steam in the pipes and prevent them from freezing on the outside, and that the building was always shaking, so much so that a man's hat would not stay hung up when the machinery was in motion. He also added that he was not a miner and did not know the first part of mining; that he had never handled any powder in blasting, or handled or worked with the caps used; that he did not know what dynamite or giant powder was made of, and never had any knowledge or experience in the use or handling of explosives, and he never was informed by the defendants or any one else of the danger he incurred in handling the powder and caps, or the danger of explosion of either from the great heat in the engine-house, or from the concussion of the caps caused by its constant jarring.

It is clear from the whole evidence in the case, that there

was constant danger of explosion from the great heat produced in the operation of the mine and from the concussion of the caps by collision between themselves and with other hard substances in the engine-house and the powder scattered on the floor. The heat and concussion were a continuing danger to the safety of the persons employed in the mine, and of the existence of that danger the defendants were fully aware.

Rillston, the plaintiff, who was sworn as a witness in the case, testified that at the time of the explosion there was in the engine-house a coil of pipe, five barrels of oil, fourteen boxes of powder, a box and a half on the shelf, about half a box on the floor, a barrel of lime, several sticks in the lime, two boxes of caps, nine rings of fuse, and that there was powder on the floor thrown around in all directions.

Mr. Sellwood, the general manager of the mine for the defendants, testified that the caps and powder were put in the engine-house by his orders, and admits that the usual place previously for keeping them was at the powder magazine.

Notwithstanding the continuing danger of explosion, both from the heat in the engine-house and its constant jarring, and the confused and disorderly position in which the powder and caps were placed in the engine-house, it does not appear that there was any effort made by the defendants, or others acting for them, to lessen either the heat or the jarring.

The court instructed the jury that it was a question for them whether there was negligence in the conduct of the defendants in reference to the use of the exploding caps, that is, in putting them in the engine-house and in failing to give the plaintiff due warning of their dangerous character; and the jury found against the defendants on the question thus presented to them.

All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them, but in such cases where the occupation is attended with danger to life, body, or limb it is incumbent on the promoters thereof and the employers of others thereon to take all reason-

able and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced.

Further than this, it is plain from what has already been stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and is not contradicted by any one. With that fact shown there was no ground for any charge of contributory negligence on his part; and with the defendants' negligence established, as stated, there could have been no serious objection to the damages awarded to the plaintiff for the dreadful injuries sustained. The sum recovered was a moderate compensation to be awarded to him.

Judgment affirmed.

CUNNINGHAM *v.* MACON & BRUNSWICK RAILROAD COMPANY.

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

No. 91. Argued November 22, 23, 1894. — Decided March 4, 1895.

In 1866 the legislature of Georgia enacted a law loaning the credit of the State to a railroad company by endorsing its bonds to the amount of $10,000 per mile, and further providing that the endorsement should operate as a mortgage on all the property of the company. These bonds were issued to the amount of $1,950,000, endorsed and sold. In 1868 the new constitution of the State then adopted provided that the State should not loan its credit to any company without a provision that the whole property of the company should be bound to the State as security prior to any other indebtedness. In 1870 the legislature passed an act "to amend" the act of 1866, authorizing the governor to endorse the company's bonds to a further extent of $3000 per mile "in addition to $10,000 as recited in the act of which this is amendatory." The new bonds were issued, varying in form from the former bonds, were endorsed by the State, and were sold. In 1873 the company defaulted in the payment of the bonds of 1866, and the governor took possession of the property. The legislature then by joint resolution declared the bonds of 1866 to be valid, and those of 1870 to be unconstitutional. In 1875 the governor ordered the property sold under the provisions of the act of 1866, and the sale took place that year, the State being the purchaser at

Statement of the Case.

$1,000,000 and taking the conveyance. The bonds issued under the act of 1866 were then taken up and retired. The holders of the bonds issued in 1870 filed a bill in equity to set aside the sale, but the bill was dismissed upon the ground that the State was a necessary party, and could not be brought in without its consent. Meanwhile, the State having sold the whole property, a supplemental bill was filed in that case by leave of court against the purchasers, attempting to charge the property in their hands with a trust in favor of the holders of the bonds of 1870, charging that the State had been their trustee to enforce their equitable rights, and had been guilty of a breach of its trust by selling the property at a price much below its real value. *Held*,

(1) That the plaintiffs were not entitled to be subrogated to the mortgage security taken by the State, and as such to maintain this suit, because the property had passed out of the possession of the State when this suit was brought, and because the State was a necessary party to the enforcement of such a claim;

(2) That the only bonds secured by the statutory mortgage were those issued in 1866, and that those issued in 1870 were not secured by it;

(3) That even if they had been secured by it these complainants were junior creditors to those holding the bonds of 1866, with rights subordinate to theirs, and it was their duty to attend the sale and protect themselves by raising the bid to an amount sufficient for that purpose;

(4) That they could not avoid the sale without tendering reimbursement to the first mortgage creditors, which they had not done.

The Macon and Brunswick Railroad Company was chartered by the legislature of Georgia in 1856. Acts of 1856, No. 119, p. 181. By the act of December 3, 1866, the legislature of the State authorized the governor to endorse the bonds of the road to the extent of $10,000 per mile. The act reads as follows:

"*An act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes.*

"*Whereas* the Macon and Brunswick railroad has been completed to the distance of fifty miles from the city of Macon, and is thoroughly equipped, and daily trains are running thereon, and seventy miles additional are graded and ready for the superstructure; *and whereas* its completion to Brunswick would greatly inure to the benefit of the State in developing its agricultural, commercial, and manufacturing interests; *and whereas*, by reason of the financial embarrass-

ments resulting from the late war, the stockholders of said railroad are unable to supply the capital necessary to the completion of this great work:

"SECTION 1. *Be it enacted, etc.*, That his Excellency, the Governor, be and he is hereby authorized to place the endorsement of the State on the bonds of the Macon and Brunswick Railroad Company which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to wit: Before any such endorsement shall be made the governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens, or mortgages, or other encumbrances, which may in any manner endanger the security of the State: and upon the further condition and express understanding that any endorsement of said bonds, when thus made, shall not only vest the title to all property of every kind which may be purchased with said bonds in the State, until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all of the property of the company, to be enforced as hereinafter provided for.

"SEC. 2. In the event of any bond or bonds endorsed by the State, as provided in the first section of this act, or the interest due thereon, shall not be paid by said railroad company at maturity, or when due, it shall be the duty of the governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company, and apply the earnings of said road to the extinguishment of said bond, or bonds, or coupons, and he shall sell the said road and its equipments, and other property belonging to said company in such manner and at such time as in his judgment may best subserve the interest of all concerned." Acts of 1866, No. 178, p. 127.

Under this authority the governor endorsed the bonds of

the company to the extent of $1,950,000. The bonds were thus entitled:

"State of Georgia.

"United States of America.

"Macon & Brunswick Railroad Company. First and Only Mortgage Bond."

They acknowledged that the Macon and Brunswick Railroad Company was indebted to Charles J. Jenkins, as governor of Georgia, and to his successors in office, or to the bearer thereof, and also recited the statutory mortgage, which was reserved by the State in the act of 1866. In June, 1870, the president of the railroad company executed an instrument in which he stated that these bonds had been issued in conformity with the statute, and that the company was desirous of confirming the lien held by the State to secure their payment, and that, therefore, he, as president, recognized, on behalf of the company, the validity of the statutory mortgage and of the lien created thereby. To this instrument the State was not a party. In October, 1870, the legislature of Georgia passed the following act:

"*An act to amend an act to extend the aid of the State to the completion of the Macon and Brunswick railroad, and for other purposes.*

"Whereas the Macon and Brunswick railroad has been completed to Brunswick, requiring a greater outlay of money than was originally contemplated, to place the same in complete running order, and to furnish the necessary cars, engines, and machinery; and whereas the State has, by recent legislation, endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile:

"Section 1. *The general assembly of the State of Georgia do enact*, That the above-recited act be so amended as to authorize the governor to place the endorsements of the State, to the extent of three thousand dollars per mile, upon the bonds of said Macon and Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory.

"SEC. 2. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are, hereby repealed."

Under this act bonds to the extent of $600,000 were issued by the railroad and endorsed by the State. These bonds differed in several particulars from those of the first issue. Thus, instead of acknowledging that the corporation was indebted to the governor of the State, they declared that it was indebted to Morris K. Jesup, of the city of New York, or bearer; they made no reference to the mortgage or lien held by the State under the act of 1866, nor did they purport to be secured by mortgage. Each of them contained this recital: "This is one of a series to the extent of $3000 per mile of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia in accordance with an act of legislature passed October 27, 1870." At the time this act was passed the constitution of Georgia contained the following provision:

"The general assembly shall pass no law making the State a stockholder in any corporate company; nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State prior to any other debt or lien, except to laborers; nor to any company in which there is not already an equal amount invested by private persons; nor for any other object than a work of public improvement." Constitution of 1868, Art. 3, § 5.

In August, 1872, the legislature of Georgia passed a resolution declaring that the State's guaranty placed on the bonds of the Macon and Brunswick Railroad Company was binding. In 1873 the company defaulted in the payment of interest on the bonds issued under the act of 1866, and which bore the State's endorsement. In July of that year the governor issued a proclamation reciting the passage of the act of 1866, the issue of the bonds thereunder, and the company's default. He announced also that, in pursuance of the power conferred upon him by that act, he had seized the company's property and had appointed an agent of the State to take possession and control of the same. In March, 1875, the legis-

lature passed a resolution declaring that the $1,950,000 issue of bonds which had been endorsed under the act of 1866 were valid and binding obligations of the State, but that the $600,000 issue under the act of 1870 was unconstitutional, null, and void; that it was the sense of the general assembly that the railroad, with its franchises, equipments, and appurtenances, should be sold by the governor at an early date, and, if considered practicable, as early as June 1, 1875, at public or private sale, and upon such terms and for such a price in money or first mortgage endorsed bonds of the Macon and Brunswick Railroad Company, or bonds of the State, as in his judgment might be consistent with the interests of the State, and that no commission or percentage should be authorized or allowed under such sale.

In April, 1875, the governor issued his executive order for the sale of the railroad property which had been under seizure since 1873. This order, after also reciting the act of 1866, and the endorsement by the State of the bonds issued thereunder, proceeded as follows:

"Whereas, among other provisions of said second section of said act, it is expressly provided that after the seizure of all the property of said company, as aforesaid, the governor 'shall sell the road and its equipments and other property belonging to said company, in such manner and at such times as, in his judgment, may best subserve the interest of all concerned;' and having become satisfied that it will be for the best interest of the State and all concerned that all the property of the company seized under said order be sold at an early day: it is therefore

"Ordered, that all the property seized, as aforesaid, now in the possession of Edward A. Flewellen, receiver of the property of the Macon and Brunswick Railroad Company, under said order, be sold to the highest bidder at public outcry at the depot of the Macon and Brunswick Railroad Company, in the city of Macon, between the hours of 10 o'clock A.M. and 4 o'clock P.M. on the first Tuesday in June next.

"The said sale will be made for cash, for bonds of this State, or the first mortgage bonds of the company, endorsed

in behalf of the State, under the authority of the act approved December 3, 1866. It is further

"Ordered, that the said Edward A. Flewellen, as receiver aforesaid, make out an advertisement under this order, setting forth with requisite particularity all the property to be sold as aforesaid, and publish the same in such public gazettes in this State and in the city of New York as, in his judgment, will give proper publication to said sale."

The sale thus directed took place on the date fixed, and the property was bought in by the governor, on behalf of the State, for $1,000,000, the purchase having been authorized by the legislature of the State. The governor executed a formal conveyance of the purchase to the State on June 3, 1875, and the State subsequently retired the $1,950,000 of bonds, which had been issued and endorsed under the act of 1866. In September, 1877, the complainants-appellants, alleging themselves to be holders and owners of bonds of the Macon and Brunswick Railroad Company, endorsed by the State under the act of 1870, which, they averred, they had acquired in open market after the State had acknowledged her liability thereon, and before the passage of the act declaring the endorsement invalid, filed their bill in the Circuit Court of the United States for the Southern District of Georgia against the company and certain persons named therein, "styling themselves directors of the Macon and Brunswick Railroad," and J. W. Renfroe, treasurer, and Alfred H. Colquitt, governor of Georgia. This bill, after setting out the facts substantially as here given, charged that the sale made by the governor was void for the following reasons:

"1st. Because neither the legislature nor the governor had the right to exclude the $600,000 series of endorsed bonds from being used as so much cash in the purchase of said road at their face value. Certainly they were entitled to be so used in the event of the exhaustion of the $1,950,000, which themselves should have — received as cash at par.

"2d. Because the governor was not authorized to bid on said property for the State, and the State had no constitutional power to make the purchase, or if said sale is not void

it is certainly voidable, because under the statutory and executed mortgages the State is the trustee of the property mortgaged for the benefit of the bondholders, and had no right to buy at her own sale as such trustee without incurring the risk of having such sale set aside at the instance of any beneficiary under the trust, and your orator as such beneficiary elects to set said sale aside."

The bill also alleged the taking up by the State of the $1,950,000 of bonds issued under the act of 1866, subsequent to her purchase of the property, and averred, in the alternative, that if the sale was not void, because of the fact that the mortgage was solely to indemnify the State, then the holders of the bonds issued under the act of 1870 were entitled to a ratable distribution of the proceeds with the holders of those endorsed under the act of 1866, and therefore should receive an equal *pro rata* share of all sums paid or to be paid by the State on the retired issue of $1,950,000 under the act of 1866. The bill was demurred to by Renfroe, treasurer, and Colquitt, governor, and after hearing was dismissed. The complainants thereupon prosecuted their appeal to this court, where the decree below was affirmed. *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446. Meanwhile, subsequent to the decree of dismissal below, the railroad and its appurtenances were sold by the State, under proper legislative authority, for $1,250,000, and through a series of transfers, some of them being the result of judicial foreclosure of mortgages, the road finally became the property of the East Tennessee, Virginia and Georgia Railroad Company. In 1886, after the filing of the mandate of this court, affirming the decree of dismissal, a motion was made below for a decree *pro confesso* against the Macon and Brunswick Railroad Company, and leave was given to file a supplemental bill making the East Tennessee, Virginia and Georgia Railroad Company a party defendant. The amended bill was duly filed. This bill, after substantially reiterating the averments of the original bill, and charging likewise that the sale at which the governor bought in the property on behalf of the State was null and void, alleged that the East Tennessee, Virginia and

Georgia Railroad Company was a purchaser with notice of the illegality, and then proceeded as follows:

"And your orator charges that the said State of Georgia held the said property after the seizure thereof as a trust for the payment of the obligations of the said the Macon and Brunswick Railroad Company to the extent of the avails of a sale of the said property to be made for the interest of all creditors of said company, with the privilege unto the said State of protection, first, out of said avails, of its own endorsement of the bonds of said company; that the said State, in and by the resolution aforesaid, declared its endorsement of the bonds held by your orator to be not binding on it, and in advance of demand upon it by your orator refused thereby to pay the said endorsement or to enforce its said privilege of protection of said endorsement from the avails of said property so in its hands; that your orator thereby became at least entitled to the advantage of the said mortgage lien of the said State for his protection; to have the said property sold with proper regard to his interests and the interests of his fellow-bondholders; to be allowed to participate freely with all other lienors of the said railroad at the sale of the said railroad property by his said trustee, in bidding upon said property and paying therefor in the bonds held by him, hereinbefore mentioned, with due regard to the protection of any and all prior liens and the costs and expenses of sale.

"And your orator shows that in and by the said resolutions under which said sale was made, and under color of which the said trustee for your orator became possessed of the said railroad property, the said State of Georgia gave notice of its intention to commit a breach of trust by excluding your orator from participation in said sale on equitable terms with the holders of the first mortgage bonds, by excluding your orator, by the provisions thereof, from participation in the avails of said sale or any benefit therefrom by announcing openly to the world its intention to sell the said road in its own interest rather than in the interest of the creditors of said company, and by divers other acts and announcements, all concurring to demonstrate positively to

the world that the said trustee had determined to exclude your orator from any benefit under the said trust, and that it would not regard or protect in any respect the interests of your orator and his fellow-bondholders in the said sale or distribution of avails.

"And your orator shows that in point of fact the said State of Georgia, at the said sale, did commit the said breach of trust according to its previously announced intention, did exclude your orator and his fellow-bondholders from their rights of equitable protection on sale by bidding and paying the bonds held by them, did sell the said road in a manner contrary to the interests of the creditors generally of the said road for a very small part of its real value, the price nominally bid therefor being one million dollars and the real value thereof being four million dollars, and did sell the road to itself for said price in its own interest and without regard to the interests of the beneficiaries of the trust, including your orator, and thereupon, in equity, held the said property as a trust for your orator and subject to his lien for the payment of his said bonds.

"And your orator avers that the said the East Tennessee, Virginia and Georgia Railroad Company and the East Tennessee, Virginia and Georgia Railway Company had full notice in the purchase of said property made by each of the said breach of trust by said trustee, and took the said property subject to the duties and liabilities of said trustee towards your orator — that is to say, with the lien of your orator unaffected and undischarged by the sale of said property made by said trustee in breach of his fiduciary duty, and that the said last-mentioned company now holds said property as trustee for your orator and subject to your orator's lien for the payment of the said indebtedness to him."

The East Tennessee Company answered the supplemental bill, stating the various conveyances through which the title had finally come to be vested in itself, and asserting the validity thereof. All the facts above stated appear on the face of the pleadings and exhibits. Before the sale was made by the State, John P. Branch, a holder of bonds of the same series

as those held by these complainants, had filed a bill in the Circuit Court of the Southern District of Georgia, asking for an injunction to prevent the sale, but the application was denied. *Branch* v. *Macon and Brunswick Railroad*, 2 Woods, 385. Branch had also taken a decree *pro confesso* against the Macon and Brunswick Railroad Company, and he was allowed to intervene below and become a party to the present suit, in which he claims the same rights as those asserted in the original and supplemental bill. The cause was submitted to the court on bill, answer, and exhibits, and resulted in a decree of dismissal. The case was then brought here by appeal.

Mr. Charles N. West for appellants. *Mr. W. W. Montgomery* and *Mr. Daniel H. Chamberlain*, each filed a brief for same.

Mr. George Hoadly for the East Tennessee, Virginia and Georgia Railway Company, appellee.

Mr. John Howard closed for appellants.

I. In respect to the construction of the act of December 4, 1866, there are two classes of cases to be considered:

(1) When the State assumes a liability for a corporation, and the corporation conveys its property in trust as an indemnity to the State against loss, and the bondholders of the corporation take nothing. *Chamberlain* v. *St. Paul & Sioux City Railroad*, 92 U. S. 299.

(2) When the State assumes a liability for a corporation, and the corporation conveys its property in trust as an indemnity to the State, and *also* in trust to secure its bondholders as its principal debtors. *Hand* v. *Savannah & Charleston Railroad*, 12 S. C. 314, cited and approved in *Tennessee Bond Cases*, 114 U. S. 688, and also *Railroads* v. *Schutte*, 103 U. S. 118.

In this last case, it was held that the endorsement by the State of Florida of the bonds of the railroad company was void, because unconstitutional; but it was also held that

such fact did not impair the validity of the statutory mortgage and trust in favor of the bondholders of the company. And that case was cited and approved in *Supervisors* v. *Stanley*, 105 U. S. 312.

Should it be held that the endorsement by the State of Georgia of the bonds of the Macon and Brunswick Railroad Company was unconstitutional and void, *Railroads* v. *Schutte* would directly apply in favor of the express statutory trust for the bondholders of this company, whose bonds were thus endorsed.

II. And now as to the legal effect and operation of the act of Georgia of October 27, 1870, as an amendment to the original act of December 3, 1866.

There appears to be nothing in the constitution of Georgia regulating the manner in which amendments to previous acts shall be made, as is provided in many of the States, and therefore the legal effect of this amendment must be governed by the general law and the unlimited power of the legislature of Georgia to amend its acts of assembly in any manner it may deem proper and efficient for the purpose. The act of 1866 had been in full operation, and its purpose, intendment and effect are presumed to have been fully understood as securing an indemnity to the State for its endorsement of the bonds of the railroad company, and as an express trust for the payment of those bonds, together with ample power and machinery provided for those purposes. In 1870, the construction of the whole road, from Macon to Brunswick, had been completed, but the road was a dead thing, unless it could be furnished with equipments for its operation. The amendatory act was passed to accomplish that object, as its title and its preamble show; and then the act proceeded to amend the original act by authorizing the issue of additional bonds, with the endorsement of the State thereon, and repealed all acts in conflict with that legislation. The two acts must be taken as one act, and as having all of the effect of the terms and provisions of the original act in respect to the protection of the State and the bondholders, as if they were literally incorporated in the amendatory act *in totidem verbis*. *Holbrook* v.

Nichol, 36 Illinois, 161, 167. And if the act were susceptible of two constructions, one of which would so emasculate it as to make it meaningless and useless, and the other would be reasonable, and would vitalize and give it full legal effect and operation, and especially if in harmony with, and in effectuation of, previous legislation and its object and policy, the last should be adopted. Sutherland on Statutory Construction, § 323.

The provision of the state constitution *in re nata* was of course impresssd upon the act, and the question then arises, whose duty was it to see that there was a fulfilment of the constitutional requirements before the endorsement of the State could be validly made upon the new bonds to be issued? And here, again, there are two classes of cases:

(*a*) One requiring the purchaser to ascertain and determine for himself, from public records, to which he is referred, some extrinsic fact or facts necessary to authorize the act to be done which is to create the liability. *Sutliff* v. *Lake County Commissioners*, 147 U. S. 230, 237, in which the two classes of cases are collated and distinguished in the opinion of the court delivered by Mr. Justice Gray.

(*b*) The other requires such facts to be ascertained and determined by some officer or officers whose certificate as to the fulfilment of the necessary requirements is in the nature of an adjudication, and is conclusive upon the subject. *Chaffee County* v. *Potter*, 142 U. S. 355. Of this class is this case.

(1) By the first section of the original act, the governor of the State was constituted the tribunal that was to be "*satisfied*" that the precedent conditions as to the State's endorsement had been complied with and fulfilled, and his endorsement of the bonds was at once a decision upon the subject, and an assurance and announcement to the public of the fact of such compliance and fulfilment, and whether right or wrong was binding upon all parties. And hence the State of Georgia has never made any question as to the validity of the endorsement of those bonds, but on the contrary has ever recognized it.

The governor was charged with the same duty and judicial function in respect to the bonds authorized to be issued and endorsed by the amendment of 1870, with the addition only of ascertaining and determining or being "satisfied" as to whether or not the constitutional requirements had been fulfilled and complied with, and his endorsement upon those bonds was equally an express decision, certificate, and announcement to the public as to the fulfilment of those requirements, and was equally the *imprimatur* of the State to that effect.

(2) But the legislature subsequently undertook to establish a tribunal with ample powers in the nature of an appellate jurisdiction for the investigation and review of the action of the governor in the premises, by providing for the constitution of a commission composed of three persons, one to be selected by the President of the Senate, and the other two by the Speaker of the House of Representatives, clothed with full authority and power, and with the ample time of sixty days, to inquire into the whole matter, and for that purpose with "full power and authority to examine witnesses under oath, to send for persons, books, and papers, and to exercise such other powers as might be necessary to carry into effect the provisions of the act." That judicial commission performed its duty and reported in favor of the validity of the action of the governor, and the legislature adopted that report, and by a joint resolution enacted "that the State's guarantee on the bonds of the Macon and Brunswick Railroad Company is binding on the State."

III. *Contract and estoppel, and violation of contractual obligation.* It was under these circumstances that the appellants purchased the bonds now in suit, for valuable consideration, in open market, not only without any notice of invalidity as to the State's endorsement or touching the express trust of which the State was trustee for the payment of the bonds, but, on the contrary, with the above solemn certificates and assurances of the State as to the regularity and binding effect of the whole proceedings in the premises. There was thus formed between the State and the company on the one hand

and the purchasers on the other, a valid contract, the obligation of which was inviolable by anything that either the State or the company could do, and which the State was estopped from attempting to undo. It was a contract on the part of the State, not only that it would be bound by its endorsement of the bonds, but that it would faithfully execute the express trust it had assumed for the payment of the bonds, interest and principal. Its subsequent repudiation of its contract did not affect its validity and binding obligation any more than did its repudiation of its contract in *Fletcher* v. *Peck*, 6 Cranch, 87, which was the prototype of this case.

IV. *Sale of the trust property a fraudulent breach of trust upon its face, and full notice of the fact to the successive alienees.* The sale of the trust property in disregard of the rights of these bondholders was a plain breach of trust, and its purchase by the State at its own sale as trustee was not only another plain breach of trust, but was fraudulent *per se*, and its conveyance to itself bore the fraud upon its face and that fraud followed the title wherever it went.

No proof of actual fraud need be adduced by the beneficiaries of the trust when following the trust property; for the purchase by the trustee was *inherently* a breach of trust, and the law conclusively presumes it to have been fraudulent, and if, in a court of equity, such a transaction can ever be permitted to stand, except with the consent of the beneficiaries of the trust, the burden of proof is upon the trustee and his alienees to show that the property sold for its fair value, and that *uberrima fides* was exercised in the sale, and to "vindicate the transaction from all suspicion." 1 Perry on Trusts, §§ 197, 195, 277; 2 Perry on Trusts, §§ 602 *o*, 602 *p*, 602 *w*; *Wormley* v. *Wormley*, 8 Wheat. 421; *Michoud* v. *Girod*, 4 How. 503.

In the absence of such affirmative proof, a fraudulent breach of trust is indelibly stamped upon the face of the transaction, and is notice to all the world tracing title through that transaction of its inherent vice, and of the unaffected rights of the beneficiaries in the property. For, though the purchase was thus a fraudulent breach of trust, *ex rei necessitate*, and apparent upon its face, the conveyance

of the trustee passed the legal title, which, indeed, was absolute at law, but subject in equity to its original trust, and the holder is himself a trustee for the beneficiaries. 1 Perry on Trusts, §§ 274, 374, 355; 2 Perry, § 602 *k*; *Taylor* v. *King*, 6 Munford, 358, 366; *S. C.* 8 Am. Dec. 746; *Pownal* v. *Taylor*, 10 Leigh, 172, 183; 34 Am. Dec. 725; *Underwod* v. *McVeigh*, 23 Grat. 409.

Such is the case here. The conveyance from the State of Georgia, the trustee, to itself of June 3, 1873, expressly recites the fraudulent breach of trust as the origin of its title. The conveyance of the 28th of February, 1880, from the State of Georgia to the Macon and Brunswick Railroad Company expressly recites the same thing, and reserves a lien on the property for the payment of the purchase money.

The next conveyance refers to that lien, and hence to the conveyance in which it was reserved. The next conveyance also refers to that lien and its reservation. So as to the next conveyance, and so as to the next and *last* conveyance — that by which the legal title, clothed with its original trust, passed to the defendant, the East Tennessee, Virginia & Georgia Railroad Company, which consequently holds it as trustee for the beneficiaries of that trust, the appellants and their associates.

It thus appears that, in addition to the notice given to the world by the officially published acts of the legislature and the proclamations and advertisements of the governor of Georgia, touching the manner in which and the purpose for which the sale of this trust property was to be conducted in breach of trust, and in addition to the notice given by the *lis pendens*, here is, in the chain of title leading up to the fraudulent breach of trust by the trustee in itself purchasing the trust property, actual and positive notice to all intermediate holders, and to the present holder, of that fraudulent breach of trust, as the origin and source of the only title conveyed to and now held by the defendant company. *Caveat emptor* applied from the first to the last sale and conveyance made.

V. *The appellants not in default.* The appellants did all they reasonably could and in good time, first, to prevent by injunction the contemplated violation of their rights, and

their bill for that purpose was filed on the 29th of September, 1867, while the trust property was still in the hands of their original trustee, the State of Georgia; and, besides the officers of the State, the bill made the Macon & Brunswick Railroad, their principal debtor and the equitable owner of the property, a party. It was, at least, doubtful whether or not the State of Georgia was a party to the suit, as is shown by the elaborate opinion of this court itself, dismissing the bill for the reason that she was a party, and the dissenting opinion of two of the learned justices to the contrary.

The suit was a pending suit against the officers of the State, as well as against the other defendants, until the bill was finally dismissed by the mandate of this court, which came down and was filed on the 21st of October, 1885, and was made the decree of the court below on the 16th of December, 1885. Meanwhile, all of the *mesne* conveyances of this trust property had taken place, and the present defendant company was then the holder and in possession. All of those transactions, made under such circumstances, were obviously made, upon the established doctrine of *lis pendens*, with legal notice of the pendency of the litigation and subject to its ultimate results, and to amended and supplemental proceedings, germane to the original bill and becoming a part of the original case by being prosecuted for the effectuation of its leading object — the subjection of the trust property to the trust rights of the complainants. After dismissal of their bill, as to the officers of the State, upon a difficult and doubtful point of law, the complainants were certainly entitled to a reasonable time within which to look about them, ascertain the complicated facts of intermediate occurrence since the original sale, obtain legal advice, and prepare their pleadings when a course of proceeding should be decided upon. Their supplemental bill, bringing in the present defendant company as a party and claiming to hold it as a trustee for their benefit, was filed by leave of court on December 30, 1886.

This was done under what was said by this court in its decision in this case, 109 U. S. 446; and as it is not pretended that the defendant company was induced to make its purchase

of the trust property by anything that the complainants had done, or had left undone, and as in addition to all other modes of notice of the infirmity of their title, they had, in its direct chain, actual and positive notice of its infirmity by reason of its origin in a breach of trust, fraudulent, *per se*, it is not perceived upon what ground of *laches*, or prescription, the just rights of the complainants, which were originally attached to the property, and have followed it to a present responsible holder, amenable to the jurisdiction of the court, can be defeated.

VI. *As to parties and the jurisdiction of this court.* Georgia is neither an indispensable, nor a necessary, nor a proper party.

(*a*) The present controversy is by and between the complainants and the defendant company, its trustee, in possession. The complainants have now no controversy with the State of Georgia, and neither need nor ask anything at its hands. All they need and ask is that their trust property, now in the hands and possession of a competent trustee, shall be applied and the trust executed for their benefit.

(*b*) If Georgia has any rights, or interests, which it wishes to assert or considers as worthy of assertion, or protection, she can become a party to this suit, if not inhibited from doing so by her constitutional prohibition of 1879, made just before the fraudulent sale of this trust property in 1880 to the new company got up for the purpose of the sale.

(*c*) But if she has chosen to encircle herself with an environment of impenetrable immunity from the judicial investigation of her questionable or fraudulent acts, first by causing the adoption of the Eleventh Amendment to the Constitution of the United States, (*Chisholm* v. *The State of Georgia*,) and then by her own constitutional amendment, why, of course, that is her own affair. But, notwithstanding, it would seem that the constitutional and legal rights of the citizens of other States of the Union still remain unimpaired, and are to be determined as they shall judicially appear in the courts of the United States, in the absence of any ostrich State, that should stick its head in the sand, or turtle-like enclose itself in its exclusive shell.

However, Georgia has now no interest in this controversy, except the alleged lien for the purchase money of the fraudulent sale, which is subordinate to the rights and lien of the complainants. *Railroad Co.* v. *Soutter*, 13 Wall. 517. She has repudiated her endorsement of the bonds in suit, and all of the prior bonds, upon which she acknowledged her liability as endorser, have been paid, as admitted by opposite counsel. And while it is true that the right of the complainants, as principal creditors to be substituted to all of the securities of Georgia would have been destroyed by a lawful transfer of the trust property, yet in the case of an unlawful and fraudulent transfer, the same rule could not in reason and justice hold.

(*d*) But the complainants do not stand alone upon that ground. On the contrary, they stand upon the higher and original ground of an *express* trust created by the statutory mortgage, of which Georgia was constituted the trustee, with the legal title, and a power of seizure and sale, to be executed for the payment of the principal and interest of the bonds in suit.

VII. *The court has full jurisdiction.* It has before it all of the necessary, or even proper parties, for the execution of the original and still continuing trust, to wit: (1) The legal title; (2) the legal title coupled and impregnated with its original trust; (3) the trust property, in the possession and charge, and subject to the jurisdiction of the court for the administration of the trust.

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

The case of the appellants rests upon two distinct legal propositions. The first one asserts their right to be subrogated to a mortgage security taken by the State of Georgia, and, by virtue of such subrogation, to enforce the mortgage against the property of the railway company. The other proposition is that they are direct mortgage creditors and have a specific mortgage lien upon the property of the company.

Opinion of the Court.

A right of subrogation, such as is here claimed by the appellants, does not involve any direct lien in favor of the creditor, resulting from his position as such. It only exists in consequence of his being, as a creditor, entitled to enjoy certain rights which are vested in the surety at the time the subrogation is claimed. This principle is fundamental, and its application is fatal to the complainants. As the creditors' right to subrogation depends on the existence, in the surety, of the rights to which subrogation is sought, it follows that after the surety has parted with the thing given him for his protection, the creditor can have no subrogation to such thing. In the present case, when the subrogation was claimed, the State had divested herself of all her rights, under the mortgage of indemnity, by selling the mortgaged premises, and had applied the proceeds of the sale to the payment of the debt which the mortgage was given to secure. She had no longer any rights of her own, therefore no subrogation could be derived through her. Aside from this consideration, in order to enforce equitable subrogation against a surety, he must be made a party to the cause. The State of Georgia is not, and cannot be, without her consent, impleaded. All the foregoing doctrine was applied and carefully stated in *Chamberlain* v. *St. Paul & Sioux City Railroad*, 92 U. S. 299, 306, where, speaking through Mr. Justice Field, the court said: "Whatever right the plaintiff had to compel the application of the lands received by the State to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the State being the surety here, it could not be enforced at all, and not being a specific lien upon the property, cannot be enforced against the State's grantees. Where property passes to the State, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the origi-

nal owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. *The Siren*, 7 Wall. 158, 159. But where the property is not affected by any specific lien or trust in the hands of the State, her transfer will pass an unencumbered estate."

The appellants must therefore rely for the maintenance of any rights they may possess upon their second proposition, which is to the effect that the bonds which they hold were secured by the statutory mortgage created by the act of 1866, and that the mortgage rights thus existing were not affected by the sale made by the State in 1875, but are yet subsisting, and may be enforced against the mortgaged property in the hands of the present defendant. It is obvious that if the statutory mortgage created by the act of 1866 was solely for the indemnification of the State and not for the security of the bondholders, the latter, whatever may be their indirect rights by subrogation, cannot directly avail themselves of the statutory mortgage. *Chamberlain* v. *St. Paul & Sioux City Railroad*, 92 U. S. 299; *Tennessee Bond Cases*, 114 U. S. 663. In order, therefore, to give them the relief which they seek, the statutory mortgage must be treated as having been given to secure the holders of the bonds. But if this view be taken, the claim here asserted is untenable. If there be a mortgage in favor of complainant's bonds, it must result from the terms of the act of 1866; but these bonds were not issued under that act, and owe their existence to the authority conferred by the act of 1870. This act reserved no mortgage, and the bonds of relator, having been issued under it, do not purport to be secured by mortgage. The claim that they are so secured is deduced from this contention: The act of 1870, it is asserted, purported to be an amendment to the act of 1866; therefore, the provisions as to mortgage found in the act of 1866 were incorporated into and became a part of the act of 1870. Between 1866 and 1870, however, the following amendment to the constitution of Georgia was adopted, and it was in force when the act of 1870 was passed:

"The general assembly shall pass no law making the State

a stockholder in any corporate company; nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State, prior to any other debt or lien, except to laborers; nor any company in which there is not already an equal amount invested by private persons, nor for any other object than a work of public improvement."

Under these provisions, if we were to construe the act of 1870 as desired, the result would be to make that act clearly violate the amendment to the constitution just cited; for, if the statutory mortgage secured the bondholders, then the bonds, issued under the act of 1866, were necessarily secured by a first mortgage, and those issued under the act of 1870 by a second. This conclusion can be avoided only in one or the other of two ways. First, by contending that the incorporation of the provisions of the act of 1866 into the act of 1870 made the bonds, issued under the latter act, equal in rank of mortgage with the bonds issued under the former; but to admit this contention would make the act of 1870 void, because it would, if thus construed, impair the obligations of the contract made with the holders of the bonds first issued. Or, second, by contending that, inasmuch as the mortgage created by the act of 1866 was in favor of the State and not in favor of the bondholders, the issuance of the bonds of the second series simply increased the aggregate amount of the State's liability, and that there was no difference between the two in rank of lien and mortgage, since the State held both the first and the second series, and the two were practically issued under one act. But this would be an assertion that the statutory mortgage created by the act of 1866 was solely for the benefit and indemnification of the State, and that the holders of the bonds were not directly interested therein. If this position be assumed, it defeats the complainants, as we have already seen.

However, it is claimed that even if the State's endorsement of the bonds, issued under the act of 1870, was in violation of the constitutional amendment, the only result is to render the endorsement void, and thus the bonds are left outstanding as

valid contracts of the railroad company, secured by the statutory mortgage reserved in the act of 1866. This contradicts the plain text of that act, since it only purported to reserve a mortgage in favor of bonds endorsed by the State. And, besides, if this argument were adopted, it would render efficacious a legislative violation of the constitutional amendment, since it presupposes that there was power in the general assembly to allow the mortgage security, which had been taken by the State solely in order to secure the bonds she had guaranteed, to be transferred to others as a means of securing bonds to which her guaranty could not be constitutionally affixed. In other words, that the State, having a first mortgage security, which she had taken to secure bonds, of which she was an endorser, could vitiate such security by allowing others to participate in the benefits thereof, and thus do by indirection what the constitution forbade her to do directly.

Nor does the case of *Railroad Companies* v. *Schutte*, 103 U. S. 118, sustain this argument of the appellants. There the State of Florida issued her bonds to aid the railroads, securing herself by a first mortgage on the roads, and taking in exchange bonds of the companies. It was certified on the state bonds that they were protected by a first mortgage "as security for the holders thereof." The bonds, thus drawn, were endorsed by the railroad companies and issued by them. The obligation of the State was found unconstitutional, but it was held that, inasmuch as the railroad companies had endorsed the bonds thus drawn, they had guaranteed the existence of the mortgage, and the holders of the bonds were therefore entitled, as against them, to insist upon the validity of the mortgage and to assert legal rights by virtue thereof. In the present case there is no mention of the existence of a mortgage on the face of the bonds declared on by the complainants; nor is there any statement of such mortgage in the act of 1870 under which they were issued. The claim here is merely that a mortgage resulted from the statute passed in 1866, which statute in express terms reserves a mortgage only for such bonds as are endorsed by the State. The case relied on involved no question of the existence of a mortgage, but

the point at issue was whether an admittedly existing mortgage could be enforced against the corporations. Here, on the contrary, the question is, whether the mortgage under the act of 1866 ever existed *quoad* the bonds issued under the act of 1870.

These conclusions are decisive of the cause, but other considerations, which affect the merits of the controversy, are equally fatal to the appellants. It cannot be doubted that, even if the bonds issued under the act of 1870 were secured by the statutory mortgage reserved by the act of 1866, they were second in rank, and therefore their holders were junior mortgage creditors. Nor can it be gainsaid that the statutory mortgage conferred upon the State a power to sell the mortgaged property. This power was exercised in 1875. The grounds upon which it is asserted that the sale was void are: First, that before the sale it was announced that only bonds of the issue of 1866 would be received in payment, and that at the sale it was declared that such bonds would only be received at their market value. There is no averment in the bill that the first mortgage creditors complained of these requirements, nor does it contain any allegation that the holders of the second series of bonds, who are now championing the rights of the first mortgage creditors, bid at the sale, or in any way manifested their willingness to free the property from the first mortgage debt. The rights of the second mortgage creditors were necessarily subordinate to the paramount rights of the creditors first in rank. The property of the company had been for nearly two years under seizure, the default having occurred in 1873. It was the plain duty of the second mortgage creditors, if they were interested in preventing the sale and wished to tender their bonds in payment, to bid a sufficient amount to lift the prior encumbrance. Not only is there no averment that they did this, but the bill contains an assertion that in the event the mortgage indemnified only the State, then equality of rank existed between the holders of the second and the holders of the first series of bonds, and upon this alleged equality the complainants, as holders of the second series, base their claim to participate

ratably in the distribution of the purchase money, and thus infringe upon the unquestioned rights of the bondholders under the act of 1866.

The other ground of attack upon the sale was the incapacity of the State to purchase at her own sale, which it is claimed resulted from the fact that the statutory mortgage reserved by the act of 1866 made the State a trustee for the bondholders. Conceding this, the State was both a trustee and a mortgagee, and she had a direct individual interest in the property, by reason of her endorsement on the bonds. The general assembly of the State of Georgia had expressly authorized the governor to bid in the property, on behalf of the State, in case there was no bid sufficient to protect the outstanding obligation which bore the State's endorsement. Even if this provision be considered inapplicable upon the ground that the State could not lawfully bid at the sale under a power conferred upon herself by herself, the complainants' position would be untenable. It is conceded that the settled doctrine in Georgia is that the purchase by a trustee is not absolutely void, but merely voidable at the option of the *cestui que trust*. *Worthy* v. *Johnson*, 8 Georgia, 236. Let us suppose, for the sake of argument, that the *cestuis que trustent* in this case were the holders of the bonds which were issued under the act of 1866 and of those which were issued under the act of 1870. The bill contains an averment that the holders of the first class surrendered their bonds to the State after her purchase of the property, and that she has discharged her liability under her endorsement upon their bonds. In retiring these bonds the State paid off the first mortgage debt, not only to the extent of her bid, but to nearly twice its amount. The action of the first mortgage creditors in accepting the extinguishment by the State of their securities and the mortgage by which they were secured was, in effect, a ratification of the sale, and established its legal validity so far as they were concerned.

Under these circumstances, conceding that the second series of bonds were secured by a second mortgage, their holders cannot equitably be allowed to avoid the sale without tender-

ing reimbursement of the amount of the first mortgage. Their claims were subordinate to those of the holders of the first series, and they have no recourse until the latter are paid, and it would be grossly inequitable to allow them to avoid a sale which has been ratified by those who were primarily interested in the price resulting therefrom without compelling them, as a prerequisite, to do equity by protecting the first encumbrancers. *Collins* v. *Riggs*, 14 Wall. 491; Jones on Mortgages, sec. 1669; Pomeroy's Equity, sec. 1220 *et seq.* Instead of doing this, although nearly two years had elapsed between the sale and the filing of the bill, the complainants assert that their bonds are, in the contingency last stated, equal in rank of mortgage lien with those of the holders of the first series, and hence that they are entitled to an equal participation in the proceeds of the mortgage property. Indeed, in the discussion at bar, the contention was advanced that the retirement of the first mortgage bonds, by the State, after her purchase, extinguished the prior mortgage by which they were secured, and that, the sale being voidable at the instance of complainants, — an option which their bill asserts, — the second mortgage, which was held by them, has thus become first. No offer to pay the amount of the first mortgage was made prior to the purchase of the property by the defendants, and their title cannot now be divested, even if such an offer were made. We think the complainants are not entitled to the relief which they claim, and that the property passed to the defendant free from any lien under the statutory mortgage arising from the act of 1866 or 1870, even if from the latter any such mortgage ever resulted.

Affirmed.

BATCHELOR *v.* UNITED STATES.

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

No. 775. Argued January 23, 1895. — Decided March 4, 1895.

The offence of wilfully misapplying by the president of the funds of a national bank, in violation of section 5209 of the Revised Statutes, is not sufficiently set forth by an indictment alleging that the defendant, as the president of a national bank, wilfully misapplied a certain sum, of the moneys, funds and credits of the bank, in the manner following, to wit, that the defendant, without the knowledge or consent of the bank, or of its board of directors, and knowing himself and another person named to be insolvent and worthless, procured of the latter divers promissory notes, some of them endorsed by the defendant, but all without other security; "with which said notes, by and through the device and pretence of discounting the same, and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him," knowing those notes "to be inadequate security for the moneys so obtained," he took up and satisfied his indebtedness to the bank; that "thereafter in turn, by substituting the notes of" the defendant, sometimes endorsed by the other person, and sometimes by some third person named, the defendant, knowing these notes to be inadequate security for the sums they represented, and they having with them no other security, took up and cancelled and pretended to pay to the bank the indebtedness created to it by him as aforesaid; and that the defendant "did from time to time, by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of" the defendant to the bank, upon the accounts of the bank, gradually increase the amount of his actual indebtedness to the bank; "all of which said sums were misapplied wilfully, and in the manner aforesaid, out of the moneys, funds and credits of" the bank, and were converted to the defendant's use, benefit and advantage, with the intention to injure and defraud the bank and its depositors and other persons doing business with it.

The defendant, Harry F. Batchelor, was indicted on section 5209 of the Revised Statutes, for wilfully misapplying the moneys, funds and credits of a national bank of which he was the president and a director and agent, and was found guilty by the jury upon the second count, which was as follows:

"And the grand jurors aforesaid, upon their oaths and

affirmations aforesaid, do further find and present that the said Harry F. Batchelor, on the first day of January, 1891, and at divers times and dates between January 1, 1891, and July 8, 1893, was then and there the president and a director and agent of a certain national banking association, to wit, the Stock Growers' National Bank of Miles City, theretofore duly organized and established and then existing and doing business in the city of Miles City, in the circuit and district aforesaid, under the laws of the United States of America, did then and there, at the time aforesaid, within the said district, as such president, director, and agent, by virtue of such employment and while so employed, wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents, of the moneys, funds and credits then and there belonging to and the property of said association, in the manner following, to wit: That the said Harry F. Batchelor, without the knowledge or consent of the said association or the board of directors thereof, he then and there and at all times well knowing both himself and the said John W. Batchelor, hereinafter named, to be insolvent and worthless, did then and there procure of the said John W. Batchelor divers promissory notes payable to said association, some of which were endorsed by him, the said Harry F. Batchelor, but all without other or further security; with which said notes, by and through the device and pretence of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time, during the period aforesaid, take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association; and thereafter in turn, by substituting the notes of him, the said Harry F. Batchelor, to said association, sometimes endorsed by John W. Batchelor, or by one William Harmon or by one George Newman or by one C. L. Merrill, he, the said Harry F. Batchelor, then and there well knowing the said notes to be inadequate security for the sums they represented, and the said notes never having with them

any other security, he did then and there take up and cancel and pretend to pay to the said association the indebtedness so created to said association by John W. Batchelor as aforesaid; and did from time to time, by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association; all of which said sums were misapplied wilfully, and in the manner aforesaid, out of the moneys, funds and credits of said association, and converted then and there to the use, benefit and advantage of said Harry F. Batchelor, with the intention then and there had and having in him, the said Harry A. Batchelor, to injure and defraud the said association, its depositors, and other persons, corporations and firms, then doing or who might thereafter do business with the said association; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendant moved in arrest of judgment, because this count did "not state a public offence against the laws of the United States." The court overruled the motion; and the defendant alleged exceptions, and sued out this writ of error.

Mr. John T. Morgan for plaintiff in error. *Mr. Joseph K. Toole* and *Mr. W. E. Cullen* were with him on the brief.

Mr. Assistant Attorney General Conrad for defendants in error.

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

By the statute on which the defendant was indicted and convicted, "every president, director, cashier, teller, clerk, or agent of any [national banking] association, who embezzles,

abstracts, or wilfully misapplies any of the moneys, funds or credits of the association," "shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten." Rev. Stat. § 5209.

By the settled rules of criminal pleading, and by the previous decisions of this court, the words "wilfully misapplies," having no settled technical meaning, (such as the word "embezzle" has in the statutes, or the words "steal, take and carry away" have at common law,) do not, of themselves, fully and clearly set forth every element necessary to constitute the offence intended to be punished; but they must be supplemented by further averments, showing how the misapplication was made, and that it was an unlawful one. Without such averments, there is no sufficient description of the exact offence with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause. *United States* v. *Britton*, 107 U. S. 655, 661, 669; *United States* v. *Northway*, 120 U. S. 327, 332, 334; *Evans* v. *United States*, 153 U. S. 584, 587, 588.

The general allegation, at the beginning of the count in question, that the defendant, on January 1, 1891, and at divers times between that date and July 8, 1893, being president, director and agent of a certain national banking association, did, as such president, director and agent, "wilfully misapply forty thousand four hundred and twenty-two dollars and seventy-nine cents, of the moneys, funds and credits then and there belonging to and the property of said association, in the manner following," is rightly admitted to be insufficient, unless the acts afterwards alleged amount to a wilful misapplication of funds of the association, within the meaning of the statute.

It is first alleged that the defendant, without the knowledge or consent of the association, or of its board of directors, and knowing himself and one John W. Batchelor to be insolvent and worthless, procured of the latter divers promissory notes payable to the association, some of them endorsed by the defendant, but all without other security. So far, it is not

shown in what manner, or for what consideration, the defendant procured these notes, or that he be paid for them any sum of money whatever, least of all that he procured them with moneys, funds or credits of the association.

The indictment then proceeds, "with which said notes, by and through the device and pretence of discounting the same and making loans thereon, and with the proceeds of said loans so made thereon and thereby obtained by him, the said Harry F. Batchelor, he then and there knowing the said promissory notes to be inadequate security for the moneys so obtained, he did from time to time, during the period aforesaid, take up and satisfy the individual indebtedness of him, the said Harry F. Batchelor, to the said association."

Here is no direct or distinct allegation who made the discounts of, or the loans upon, the notes. The allegation of "the device and pretence of discounting the same and making loans thereon" must either mean that the discounts, as well as the loans, were made upon all the notes, which would make the allegation inconsistent with itself, inasmuch as when a bank discounts a note, the note becomes its absolute property, but when a bank makes a loan of money upon a note, it holds the note as security only for the payment of the loan; or else it must mean that some of the notes were discounted, and that loans were made upon the other notes, and, upon that interpretation, does not show what part of the notes was discounted, and upon what part loans were made. Moreover, it does not allege that any sums whatever were paid by the association, or by any one else, for the discounts. As to the loans, it does allege that "with the proceeds of said loans so made thereon and thereby obtained by him," the defendant, knowing those notes to be inadequate security "for the moneys so obtained," did from time to time "take up and satisfy the individual indebtedness of" the defendant to the association; but it does not state, either directly or by reference, what indebtedness of the defendant is here intended. "The proceeds of said loans" is an ambiguous and uncertain description, signifying what was obtained by the lender for the loans, quite as aptly as the very money lent to the bor-

rower; and the further words, "and thereby obtained by him," may have as full force by restricting them to the last antecedent, the "said loans so made thereon," as by carrying them back to the words, "the proceeds of" said loans. While it is further alleged that the defendant knew those notes to be inadequate security "for the moneys so obtained," there is no statement whatever of the amount of said moneys, nor even, as has been seen, any definite and certain allegation that any money had been obtained at all. To call upon the accused, or upon the court, to pick out and put together, from such a confused and ambiguous sentence, enough to make out a sufficient charge of unlawfully misapplying funds of the association, would be inconsistent with the settled rules of criminal pleading.

The rest of the indictment is yet more defective. The next allegation is that "thereafter in turn, by substituting the notes of" the defendant to the association, sometimes endorsed by John W. Batchelor, or by some third person named, the defendant, knowing these notes to be inadequate security for the sums they represented, and they having with them no other security, took up and cancelled and pretended to pay to the association the indebtedness created to it by John W. Batchelor as aforesaid. This amounts only to the substitution of worthless notes for other notes equally worthless without, so far as the indictment shows, the payment of any money or other consideration whatever.

The remaining specific allegation is that the defendant "did from time to time, by the fraudulent device and means aforesaid, as well as by passing differences between the face of said various notes and the indebtedness aforesaid, which they were from time to time to satisfy, to the credit of him, the said Harry F. Batchelor, upon the accounts of said association, gradually increase the amount of the actual indebtedness of him, the said Harry F. Batchelor, to the said association." As admitted by the learned attorney for the United States, in answer to a question from the court, the clause about "passing differences" has no legal meaning; and the rest of the allegation does not show any use of funds of the association.

Syllabus.

Such being the nature and effect of the specific allegations in the indictment as to the manner in which the defendant acted, there are no sums clearly and sufficiently specified, to which can be referred the concluding averment, "all of which said sums were misapplied wilfully, and in the manner aforesaid, out of the moneys, funds and credits of said association," and were converted to the defendant's use, benefit and advantage, with the intention to injure and defraud the association and its depositors and other persons and corporations doing business with it.

Judgment reversed.

COFFIN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

No. 741. Argued December 6, 7, 1894. — Decided March 4, 1895.

The offence of aiding or abetting an officer of a national bank in committing one or more of the offences set forth in Rev. Stat. § 5209 may be committed by persons who are not officers or agents of the bank, and consequently it is not necessary to aver in an indictment against such an aider or abettor that he was an officer of the bank, or occupied any specific relation to it when committing the offence.

In an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in its commission, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance.

The plain and unmistakable statement of this indictment as a whole is, that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also knowingly done by assisting him in the official capacity in which alone it is charged that he misapplied the funds.

This indictment further examined and held to clearly state the misapplication and actual conversion of the money by the methods described, that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that owing to the insolvency of such person the money was lost to the bank.

Where there is an averment that a person or matter is unknown to a grand jury, and no evidence upon the subject is offered by either side, and noth-

ing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed.

A charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt does not so entirely embody the statement of presumption of innocence as to justify the court in refusing, when requested, to instruct the jury concerning such presumption, which is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty.

By section 5209 of the Revised Statutes, relating to National Banks, certain acts therein enumerated are made misdemeanors punishable by imprisonment for not less than five nor more than ten years. The section reads as follows:

"Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment in this case was found on the 21st December, 1893, against Theodore P. Haughey, who had been president of the Indianapolis National Bank, for violations of the foregoing section. F. A. Coffin and Percival B. Coffin, plaintiffs in error, and A. S. Reed were charged therein with having aided and abetted Haughey in his alleged misdemeanors. The indictment is prolix and redundant, and it is difficult to

analyze it so as to make a concise statement of its contents. It contains fifty counts, and alleges that the various offences enumerated in them were committed on different dates between January 1, 1891, and July 26, 1893. The counts embrace a number of acts made misdemeanors by the statute, and the charges are commingled in a very indefinite and confusing manner. All the counts, however, may be classified as follows:

(1) Those which aver wilful misapplication of the funds of the bank at a specified time, in a precise sum, and by enumerated and distinctly described acts.

(2) Those which, although definite as to date and amount, are indefinite in their statement of the precise means by which the alleged crimes were accomplished.

(3) Those which, whilst charging a wilful misapplication of the funds of the bank for a definite amount, are entirely indefinite as to the date or dates upon which the acts took place, and also fail to specify the particular acts by which the wrong was accomplished.

(4) Those which charge false entries in the books of the bank.

(5) Those which charge false entries in certain official statements of the condition of the bank made to the Comptroller of the Currency.

Under the first head — counts which are definite as to time, dates, amounts, and methods — are included Nos. 1, 2, 3, and 47. The first of these in order of date — for the counts are not arranged chronologically in the indictment — is the 47th, which reads as follows:

"The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey then and there being president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in the State of Indiana, which said association had been heretofore

created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, which were then and there under his control, with intent to convert the same to the use of the Indianapolis Cabinet Company, and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of six thousand three hundred and eighteen dollars, by then and there causing said sum to be paid out of the moneys, funds, and credits of said association, upon a check drawn upon said association by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to its credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control and care of the moneys, funds, credits, and assets of said association, and the general superintendence of its affairs.

"And the grand jurors aforesaid do further say that Francis A. Coffin, Percival B. Coffin, and Albert S. Reed did unlawfully, willfully, knowingly, and feloniously and with intent to injure and defraud said association, on, to wit, the twenty-first day of December, in the year of our Lord one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey as aforesaid to wrongfully, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association as aforesaid, to wit, the sum of six thousand three hundred and eighteen dollars."

The second and third counts are substantially like the foregoing, varying only in the statements of date, amount, and method. The first and remaining count under this head, after fixing the date of the offence and stating the amount at $5802.84, describes the method by which the misapplication was accomplished, as follows:

"The Indianapolis Cabinet Company of Indianapolis, Indiana, presented to said bank and to the said Theodore P. Haughey, as such president thereof, a certain bill of exchange, drawn by said Indianapolis Cabinet Company on the Indianapolis Desk Company of London, England, for the sum of one thousand one hundred and ninety-four pounds sterling, and due on June 1, 1893, which said bill of exchange was received by said Theodore P. Haughey, and placed to the credit of the said Indianapolis Cabinet Company upon the books of said bank, and the said Indianapolis Cabinet Company thereupon drew its check for said sum upon the said bank, which check was then and there paid by said bank, under the direction of said Theodore P. Haughey; that said Indianapolis Desk Company of London, England, did not owe said Indianapolis Cabinet Company any sum whatever; that said Theodore P. Haughey failed and refused to send said bill of exchange forward for collection whereby said sum was lost to said association; that said sum was so wilfully misapplied to the use and benefit of the Indianapolis Cabinet Company as aforesaid."

Under the second head — those definite as to date and amount but indefinite in the statement of the method by which the wrong was committed — are embraced counts 4, 5, 6, 7, 8, 9, 10, 11, and 12. Of these the 8th is the first in order of time and reads as follows:

"The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, the said Theodore P. Haughey, then and there being the president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in

the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the said association, without authority of the directors thereof, with intent to convert the same to the use of the Indianapolis Cabinet Company and to other persons, to the grand jurors unknown, in a large sum, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents, by then and there paying and causing said sum to be paid out of the moneys, funds, and credits of said association upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to its credit. That said Indianapolis Cabinet Company was then and there insolvent as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association, with the custody, control, and care of the moneys, funds, credits, and assets of said association, and the general superintendence of all its affairs.

"And the grand jurors aforesaid do further say that Francis A. Coffin and Percival B. Coffin and Albert S. Reed at the district and State of Indiana aforesaid did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association on, to wit, the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-two, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously,

and wilfully misapply the money, funds, and credits of said association, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents aforesaid."

The other counts under this classification substantially vary only as to date and amount.

Under the third head — those which, whilst charging a wilful misapplication of the funds of the bank for a definite amount, are indefinite as to the date or dates upon which the acts took place, and also fail to specify in any definite way the particular methods by which the wrong was accomplished —are embraced counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36. Of these counts the first in order of time is the 17th, which is as follows:

"The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, the said Theodore P. Haughey then and there being the president of a certain national banking association then and there known and designated as the Indianapolis National Bank of Indianapolis, in the State of Indiana, which said association had been heretofore created and organized under the laws of the United States of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, State of Indiana, did then and there, by virtue of his said office as president of said bank, and without authority of the board of directors, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, with intent to convert the same to the use of the Indianapolis Cabinet Company, a more particular description of said moneys, funds, and credits being to the grand jurors unknown, in a large amount, to wit, the sum of three hundred and seventy-five thousand dollars, by then and there cashing, discounting, and paying for the use and benefit of said Indianapolis Cabinet Company, out of the funds of said association, a large

number of worthless and insolvent notes, drafts, and bills of exchange being drawn upon and by divers persons, firms, and companies, and corporations, each and all of whom were then insolvent, as the said Theodore P. Haughey then and there well knew, whereby said sum was wholly lost to said association; with intent then and there and thereby to injure and defraud said association. That as such president aforesaid, the said Theodore P. Haughey was entrusted and charged by the board of directors of said national banking association with the custody, control, and care of the funds, credits, and assets of said association, and the general superintendence of its affairs, and agent of said association in the transaction of all its business.

"And the grand jurors aforesaid do further say that Francis A. Coffin, Percival B. Coffin, and Albert S. Reed, at the district and State of Indiana aforesaid, did unlawfully, wilfully, knowingly, and feloniously and with intent to injure and defraud said association, on, to wit, the first day of January, in the year of our Lord one thousand eight hundred and ninety-one, and on divers times between said date and the twenty-fifth day of July, in the year of our Lord one thousand eight hundred and ninety-three, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of said association, to wit, the sum of three hundred and seventy-five thousand dollars aforesaid."

The vagueness of the date as fixed in this charge is somewhat mitigated in four of the counts coming under this head — counts 13, 14, 15, and 16 — wherein the offence is stated to have been committed "on May 9, 1893, and at divers times between said date and June 18, 1893," "on June 19, 1893, and at divers times between said date and July 13, 1893," "on the 3d day of March, 1893, and on divers dates between said date and the 8th day of May, 1893;" and "on May 8, 1893, and at divers times between that date and June 18, 1893." In all the other counts the offence is said to have been committed between January 1, 1891, and July 25, 1893, except in one wherein the last date is averred to be July 26, 1893,

instead of July 25. The sum averred to have been misapplied in counts 13, 14, 15, and 16 is different from that charged in count 17, it being in the 14th, $9132.19; in the 15th, $12,732.51; in the 13th and 16th, $10,106.08. In the other counts, where the date of the offence is stated as being between 1891 and 1893, the amount of the alleged misapplication varies, being placed in some at $375,000, and in others at $350,000.

The method by which the misapplication is alleged to have been accomplished is not as indefinitely stated in all the other counts as in the 17th, which we have just quoted. In some, instead of charging that the checks or "insolvent" notes, drafts, and bills were drawn "by or upon divers persons, firms, companies, and corporations," it is specified that the checks or the notes discounted were drawn by the Indianapolis Cabinet Company. With this exception all the counts under this head are equally vague in regard to the specific methods of the misapplication. Some of them state that it was made by paying out the money of the bank on worthless checks of the Indianapolis Cabinet Company without giving the dates or the amounts of the checks. More allege that the misapplication was brought about by allowing overdrafts without giving the dates of such overdrafts or specifying the various checks through which the overdrafting was done. Others, again, allege that the misapplication was accomplished by loaning the money of the bank to the Indianapolis Cabinet Company in excess of ten per cent of the capital stock without giving the dates or the precise amounts of the loans. Again, it is charged that the misapplication was concealed by discounting and entering to the credit of the Indianapolis Cabinet Company a number of worthless notes and bills without stating who were the drawers of the notes, or giving the dates and amounts of the entries which it is charged were made for the purpose of concealing the misapplication. Indeed, whatever may be the difference between the counts under this head, there is, as has been stated, a uniformity in one respect—their failure to disclose the specific methods by which the alleged offences were committed by giving dates and amounts. The only partial exceptions to this are found in counts 35 and

37, wherein the general charge of payment of "a large number of worthless and insolvent drafts and bills of exchange in large amounts, a more particular description of which is to the grand jurors unknown, executed by and upon divers persons, firms, companies, and corporations in large amounts, to wit," is followed by an enumeration of certain persons or corporations, with a lump sum as against each person or corporation named. The intent with which the misapplication is charged to have been committed is not uniform in all the counts. In some it is averred that the misapplications were made to injure and defraud the bank and certain companies, bodies politic, bodies corporate, and individual persons, whose names are to the grand jurors unknown; in others, that it was made to defraud the bank alone; again, that entries of the worthless checks paid, or "insolvent" paper taken were made on the books of the bank with intent to conceal the misapplication and to deceive certain officers of the corporation, whose names are to the grand jurors unknown, or to deceive certain agents appointed or to be appointed by the Comptroller of the Currency, etc.

Under the 4th head — those which charge the making of false entries in the books of the bank — are embraced counts 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46. The counts under this head vary only as to the particular false entry complained of, the date when made, and the folio of the account book where entered. Each particular false entry specified, except one, covers two counts, one charging it to have been made with intent to injure and defraud the association (bank), the other averring it to have been made to deceive any agent appointed or who might be thereafter appointed to examine the affairs of the bank, "the names of said agent or agents being to the grand jurors unknown."

The remaining counts belong to the fifth class, that is, relate to false entries which it is alleged were made in statements of the condition of the bank furnished to the Comptroller of the Currency.

A trial was begun under the indictment on the 10th of April, 1894, and progressed until the 25th of that month, when

by consent of all parties the jury was discharged because of the corrupt misconduct of one of the jurors. The court thereupon set the cause down for trial on the 1st of May. The defendants applied for a continuance upon two grounds: (1) because of the accidental wounding of the leading counsel for the accused, and his consequent inability to take part in the defence; and (2) because the general nature of the charges involved hundreds of transactions, covering thousands of dollars and a long period of time, necessitating the examination of over two thousand entries in the books of the bank which were in the hands of the officers of the government, who denied access thereto. The court refused the motion for continuance, and exception was duly reserved. The trial commenced on May 4.

During the course of the trial many exceptions were reserved to the admission or rejection of testimony. They went not only to the admissibility of the proffered testimony under particular counts, but were also taken to the admission of any evidence whatever, upon the theory that the entire indictment charged no offence, therefore no proof could be made under it. Other objections were also reserved to comments made by the court upon the evidence as it was adduced, etc. On the close of the case for the prosecution, the defendants moved the court to oblige the government "to elect and specify the particular transactions, in each count of the general counts, of the indictment in this case, to wit, from the 17th to 36th, both inclusive, upon which it relies as a substantive charge, and upon which it will claim a conviction of the defendants, or either of them; said election to be made before the evidence on behalf of the defendants is commenced, to the end that they and each of them may know to what particular charge in each count their evidence is required to be addressed." To the refusal of the court to grant this motion exception was reserved. The reason for refusing the request is not stated, but in the charge of the court to the jury the following language was used, which indicates its opinion on the subject: "The particular acts of misapplication described in the several specific counts must be established by proof as therein respec-

tively charged. If, however, there are any wilful misapplications shown by the evidence which are not covered by special or specific counts, they may be included under the general counts, and a verdict thereon rendered accordingly."

Before the case went to the jury the prosecution abandoned the 47th, 48th, 49th, and 50th counts of the indictment, thus eliminating from it one of the specific counts and all those which referred to false entries in official statements as to the condition of the bank made to the Comptroller. On the close of the case the defendants proffered to the court forty-five written requests to charge, and upon the court's refusing them all, excepted to such refusal as to each, or rather as to forty-four thereof. To the charge of the court actually delivered to the jury, the defendants reserved twenty-six exceptions. A controversy exists as to whether one of the twenty-six exceptions was properly taken. The facts, as stated in the bill of exceptions, are as follows:

After the court had delivered its charge to the jury, and before it retired, the court said: "If it is the desire of counsel for defendant to reserve any exceptions to the charges given and refused, the practice in this court requires that that shall be done before the jury retires.

"Mr. Miller: It is, of course, if your honor please, the desire on behalf of defendants to reserve exceptions to the refusal of such instructions as were requested and refused and to parts of the instruction given. Without having a little time to examine these instructions, it is impossible for us now to designate the particular parts. We would like to have time to look at them for that purpose.

"The Court: What length of time would you desire?

"Mr. Miller: I do not know, if your honor please, how long it would take; it has taken an hour to read them.

"Mr. Duncan: They can be made when made, as of this time, with permission of the court.

"The Court: Except so far as any mere verbal changes are concerned, which, if the court's attention was drawn to, it would at once correct, I have no objection to that method of procedure.

"Mr. Miller: Of course, anything that is formal, of that character, that won't go to the substance of the matter, we should not expect to insist on. But, as your honor can see it, it is impossible for us from hearing the instructions read for an hour, to select the parts.

"The Court: There are the instructions you propose (indicating), and these instructions I do not care to have mislaid or lost (indicating).

"Mr. Miller: No, sir; of course not. For that matter, every syllable of them has been taken down by two stenographers here, all of your instructions as you read them, so there cannot be any possibility of any trouble about them. We take them and make —

"The Court: Where is the bailiff?

"Mr. Taylor: You may take these forms of the verdict and the indictment.

"Gentlemen of the jury, you may retire with your bailiff."

The bill of exceptions then states that at the time this colloquy took place the assistant attorney for the prosecution was present in the court-room, heard the conversation, and assented to the arrangement thus made.

It further states that a few minutes after three in the afternoon the jury retired to consider their verdict; that the defendants' counsel took the instructions given by the court, which were typewritten, and noted thereon, by enclosing the same in a parenthesis mark with pencil, the parts of such instructions so given by the court to which exceptions were taken, the parts thus marked being respectively numbered; that at nine o'clock that night the defendants' counsel returned to the court-room and handed the instructions which had been so marked and numbered by them to the judge in open court, saying that the parts marked in parentheses and numbered were those to which the defendants excepted, and to which they reserved their bill under the understanding previously had; that immediately thereafter the jury, which had not reached a conclusion, was brought into court and informed by the judge that he would be within call until eleven o'clock to receive a verdict, and if they did

not agree by that time, they might seal their verdict and bring it into court on Monday morning, it being then Saturday evening.

On May 28, the defendants, through their counsel, wrote out in full their exceptions to the various parts of the charge as marked and numbered and presented them to the court, which declined to sign them because of the 22d exception, which it considered not properly taken under the understanding between court and counsel above stated. However, the court signed the bill of exceptions, writing therein a narrative of the facts, and predicating its objection to the 22d exception on the ground that the matter covered by it was merely verbal, and at the time the parties were given the right to take their bill the court did not include any mere verbal error which would have been corrected if attention had been called to it in proper time. The language contained in the charge covered by the disputed exception is as follows:

"I do not wish to be understood as meaning that the intent to injure, deceive, or defraud is conclusively established by the simple proof of the doing of the prohibited act which results in injury. What I do mean is this: That when the prohibited acts are knowingly and intentionally done and their natural and legitimate consequence are to produce injury to the bank or to benefit the wrongdoer, the intent to injure, deceive, or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful and their acts legitimate."

On the 28th day of May the jury returned a verdict against the plaintiffs in error of guilty as charged on all the counts of the indictment. After an ineffectual motion for a new trial, which restated the various grounds of objection raised to the admissibility of evidence under the indictment, and which had also been urged in the charges which had been requested and refused, the defendants moved in arrest. After argument upon this motion the court sustained the same as to the 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, and 36th counts.

This reduced the indictment, first, to those counts which

were specific as to date, amount, and method; second, to those which, whilst specific in amount and date, were not specific as to method; third, to four counts, Nos. 13, 14, 15, and 16, which were not specific as to date or method, leaving in addition all the counts charging false entries in the books of the bank. The errors assigned here are seventy-eight in number, and cover all the objections which were made to the rulings of the court below during the trial, and the exceptions based on charges requested and refused, as well as charges given.

Mr. W. H. H. Miller and *Mr. Ferdinand Winter* (with whom was *Mr. John B. Elam* on the brief) for plaintiffs in error.

Mr. Assistant Attorney General Conrad for defendants in error.

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

Many of the exceptions taken during the trial and the requests to charge which were refused, as well as most of the exceptions to the charge as given, relate to the counts of the indictment which were quashed on the motion in arrest. All these questions are, therefore, eliminated. We shall hence only consider the matters which are pertinent to the remaining counts, and shall examine first the objections made to the indictment generally, based upon the contention that all the counts fail to charge an offence; second, the exceptions reserved to rulings of the court during the trial, the effect of which is to assail the verdict and judgment without reference to the validity of the indictment. In making this examination we shall concentrate the errors complained of in proper order, thus obviating repetition — for the matters to be considered are all reiterated by way of objection to the evidence, of exception to the refusal to charge as requested, and of complaints of the charges which the court actually gave.

1st. It is contended that no offence is stated against the aiders and abettors, because in none of the counts is it asserted that

they were officers of the bank or occupied any specific relation to the bank which made aiding and abetting possible. The language of the statute fully answers this contention. It provides that "every president, director, cashier, teller, clerk, or agent of any association, who," etc., and adds, after defining the acts which are made misdemeanors, "that every person who with like intent aids and abets," etc. The phrase, "every person," is manifestly broader than the enumeration made in the first portion of the statute. In other words, the unambiguous letter of the law is that every president, director, agent, etc., who commits the designated offences shall suffer the penalties provided; and that *every person* who aids or abets such officer, etc. The argument is that no one but an officer or an agent can be punished as an aider and abettor, and hence that every person who aids and abets, not being an officer, shall go unwhipped of justice. To adopt the construction contended for would destroy the letter and violate the spirit of the law. For the letter says, "every person who aids and abets," and the proposition is that we should make it say every officer or agent who aids and abets. The spirit and purpose of the statute is to punish the president, cashier, officer, or agent, etc., and likewise to punish every person who aids and abets. The assertion that one who is not an officer or who bears no official relation to the bank cannot, in the nature of things, aid or abet an official of the bank in the misapplication of its funds, is an argument which, if sound, should be addressed to the legislative and not the judicial department. We cannot destroy the law on the theory that the acts which it forbids cannot be committed. In other words, the construction which we are asked to give does not deal with the meaning of the statute, but simply involves the claim that it is impossible to prove the commission of the offence defined by the law. The question whether the proof shows the commission of an offence is one of fact and not of law. The citation made from *United States* v. *Northway*, 120 U. S. 327, 333, is not apposite. True, we there said: "The acts charged against Fuller could only be committed by him by virtue of his official relation to the bank; the acts charged against the

defendant likewise could only be committed by him in his official capacity." But in that case the indictment itself charged Northway, as president and agent, with aiding and abetting Fuller, the cashier of the bank, and the language quoted referred to the matter under consideration, and hence it was incidentally stated that the proof and averment must correspond.

Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in *United States* v. *Simmons*, 96 U. S. 360, 363, as follows: "Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement. It is laid down as a general rule that 'in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance.' 2 Wharton, § 1281; *United States* v. *Gooding*, 12 Wheat. 460." The form-books give the indictment substantially as it appears here. Bishop's Forms, § 114, p. 52. Nothing in *Evans* v. *United States*, 153 U. S. 584, conflicts with these views. In that case the question was whether the 8th count stated misapplication of the funds, and not whether the particular acts by which the aiding and abetting were done were necessary to be set out in the indictment. On the contrary, the counts there held good charged the aiding and abetting in the very language found in the indictment in hand, "and the said Evans did then and there knowingly and unlawfully aid and abet the said cashier in such wilful misapplication with intent in him, the said Evans, to injure and defraud," etc.

2d. It is said that all the counts in the indictment are bad, because it is not charged that the aiders and abettors knew that Haughey was president of the bank at the time it is averred the acts were committed. The argument is this, the statute says that every person who with like intent aids or abets any officer, etc., therefore the fact that the aider or abettor knew that the person who misapplied the funds was

an officer, etc., must be specifically charged. Without considering the legal correctness of this proposition, it may be observed that it has no application to this cause. Each and every count here specifically avers that "the said Theodore P. Haughey, then and there being president of the bank," and "then and there by virtue of his said office as such president as aforesaid," "misapplied the funds" and having thus fully averred the relation of Haughey to the bank, and the commission of the acts complained of in his official capacity with intent to defraud, etc., the counts go on to charge that the plaintiffs in error did unlawfully, wilfully, feloniously, knowingly, and with intent to defraud, aid, and abet the "said Haughey as aforesaid." The words "as aforesaid" clearly relate to Haughey in the capacity in which it is stated that he committed the offence charged against him in the body of the indictment. Without entering into any nice question of grammar, or undertaking to discuss whether the word "said" before Haughey's name and the words "as aforesaid" which follow it are adverbial, we think the plain and unmistakable statement of the indictment as a whole is, that the acts charged against Haughey were done by him as president of the bank, and that the aiding and abetting was also knowingly done by assisting him in the official capacity in which alone it is charged that he misapplied the funds.

3d. It is further contended that all the counts of the indictment except the first are insufficient, because they fail to aver the actual conversion of the sum misapplied to the use of any particular person. This proposition is based on the cases of *United States* v. *Britton*, 107 U. S. 655, 666, and *United States* v. *Northway*, 120 U. S. 327. In the Britton case we said, that "the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore to constitute the offence of wilful misapplication there must be a conversion to his own use or to the use of some one else of the moneys and funds of the association by the party charged. This essential element of the offence is not averred in the counts

under consideration, but is negatived by the averment that the shares purchased by the defendant were held by him in trust for the use of the association, and there is no averment of a conversion by the defendant to his own use or the use of any other person of the funds used in the purchase of the shares. The counts, therefore, charge maladministration of the affairs of the bank, rather than criminal misapplication of its funds." So in *Northway's case* we said, p. 332: "It is of the essence of the criminality of the misapplication that there should be a conversion of the funds to the use of the defendant or of some person other than the association." The various counts of the indictment here are all substantially alike in stating the conversion. We take the second as an example. That charges that Haughey, being president of the Indianapolis Bank, did then and there by virtue of his office as president of said bank unlawfully, feloniously, and wilfully misapply the moneys, funds, and credits of the bank, with intent to convert the same to the use of the Indianapolis Cabinet Company, by then and there causing said sum to be paid out of the moneys, funds, and credits of the bank, upon a check drawn upon the bank by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the funds and credit of the bank; which sum, and no part thereof, was the said Indianapolis Cabinet Company entitled to withdraw from the bank, because said company had no funds in the bank, and that the said company was then and there insolvent, which Haughey then and there well knew, whereby said sum became lost to the bank. This clearly states the misapplication and actual conversion of the money by the methods described, that is to say, by paying it out of the funds of the bank to a designated person when that person was not entitled to take the funds, and that owing to the insolvency of such person the money was lost to the bank. The fact that the count charges the intent to convert money to the use of the Indianapolis Cabinet Company does not obliterate the clear statement of the actual conversion. In this regard the count is clearer and

stronger than that held sufficient in *Evans* v. *United States*, *supra*.

4th. The following request was made and refused:

"Each of the forty-six counts of this indictment, except the 1st, the 40th, the 41st, and the 43d, alleges that certain facts therein referred to are unknown to the grand jury. Thus, the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th counts each aver a misapplication of the funds of said bank by said Haughey with intent to convert the same to the use of the Indianapolis Cabinet Company and to other persons to the grand jury unknown. The averment that the names of these persons were unknown to the grand jurors is a material averment, and is necessary to be proven by the government in order to make out its case in each of said counts, because in each of said counts the charge is of a misapplication of a single, definite, fixed sum with an intent to convert the same to the use, not merely of the cabinet company, but of other persons. If, as a matter of fact, no evidence has been placed before you showing or tending to show that the names of such persons were unknown to the grand jury, then, as to these counts, the government's case has failed."

In connection with this ruling the bill of exceptions states that there was no evidence whatever on the subject offered by either side, and nothing to indicate that there was knowledge in the grand jurors of the matter which the indictment declared to be to them unknown. The instruction was rightly refused. It presupposes that where there is an averment that a person or matter is unknown to a grand jury and no evidence upon the subject of such knowledge is offered by either side, acquittal must follow, while the true rule is that where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed. Thus it was said in *Commonwealth* v. *Thornton*, 14 Gray, 41, 42: "The fact that the name of the person was in fact known, must appear from the evidence in the case. It is immaterial whether it so appears from the evidence offered by the government or that offered by the defendant. But there being no evidence to the contrary, the objection that the party was not unknown does

not arise." And subsequently, in *Commonwealth* v. *Sherman*, 13 Allen, 248, 250, the court observed: "It is always open to the defendant to move the judge before whom the trial is had to order the prosecuting attorney to give a more particular description, in the nature of a specification or bill of particulars, of the acts on which he intends to rely, and to suspend the trial until this can be done; and such an order will be made whenever it appears to be necessary to enable the defendant to meet the charge against him, or to avoid danger of injustice. *Commonwealth* v. *Giles*, 1 Gray, 469; *The King* v. *Curwood*, 3 Ad. & El. 815; Rosc. Crim. Ev. (6th ed.) 178, 179, 420." It is to be observed that none of the counts as to which the prosecution was called upon to specify remain, all having been eliminated by the action of the court on the motion in arrest.

This concludes the examination of all the general objections to the indictment which we deem it necessary to consider, and brings us to the exceptions taken to the refusals to charge, as well as those reserved to the charges actually given.

The 44th charge asked and refused was as follows:

"The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt."

Although the court refused to give this charge, it yet instructed the jury as follows: "Before you can find any one of the defendants guilty you must be satisfied of his guilt as charged in some of the counts of the indictment beyond a reasonable doubt." And, again: "You may find the defendants guilty on all the counts of the indictment if you are satisfied that beyond a reasonable doubt the evidence justifies it." And, finally, stating the matter more fully, it said: "To justify you in returning a verdict of guilty, the evidence must be of such a character as to satisfy your judgment to the exclusion of every reasonable doubt. If, therefore, you can reconcile the evidence with any reasonable hypothesis consistent

with the defendants' innocence, it is your duty to do so, and in that case find the defendants not guilty. And if, after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief that the defendants may be innocent of the offences charged against them, they are entitled to the benefit of that doubt and you should acquit them. It is not meant by this that the proof should establish their guilt to an absolute certainty, but merely that you should not convict unless, from all the evidence, you believe the defendants are guilty beyond a reasonable doubt. Speculative notions or possibilities resting upon mere conjecture, not arising or deducible from the proof, or the want of it, should not be confounded with a reasonable doubt. A doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the evidence or the want of it, or one born of a merciful inclination to permit the defendants to escape the penalty of the law, or one prompted by sympathy for them or those connected with them, is not what is meant by a reasonable doubt. A reasonable doubt, as that term is employed in the administration of the criminal law, is an honest, substantial misgiving, generated by the proof or the want of it. It is such a state of the proof as fails to convince your judgment and conscience, and satisfy your reason of the guilt of the accused. If the whole evidence, when carefully examined, weighed, compared, and considered, produces in your minds a settled conviction or belief of the defendants' guilt — such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your own life — you may be said to be free from any reasonable doubt, and should find a verdict in accordance with that conviction or belief."

The fact, then, is that whilst the court refused to instruct as to the presumption of innocence, it instructed fully on the subject of reasonable doubt.

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States. See Taylor on Evidence, vol. 1, c. 5, 126, 127; Wills on Circumstantial Evidence, c. 5, 91; Best on Presumptions, part 2, c. 1, 63, 64; c. 3, 31–58; Greenleaf on Evidence, part 5, §§ 29, &c.; 11 Criminal Law Magazine, 3; Wharton on Evidence, § 1244; Phillips on Evidence, Cowen & Hill's Notes, vol. 2, p. 289; *Lilienthal* v. *United States*, 97 U. S. 237; *Hopt* v. *Utah*, 120 U. S. 430; *Commonwealth* v. *Webster*, 5 Cush. 295, 320; *State* v. *Bartlett*, 43 N. H. 224; *Alexander* v. *People*, 96 Illinois, 96; *People* v. *Fairchild*, 48 Michigan, 31; *People* v. *Millard*, 53 Michigan, 63; *Commonwealth* v. *Whittaker*, 131 Mass. 224; *Blake* v. *State*, 3 Tex. App. 581; *Wharton* v. *State*, 73 Alabama, 366; *State* v. *Tibbetts*, 35 Maine, 81; *Moorer* v. *State*, 44 Alabama, 15.

Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Greenl. Ev. part 5, section 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

"Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day." Code, L. IV, T. XX, 1, l. 25.

"The noble (*divus*) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent." Dig. L. XLVIII, Tit. 19, l. 5.

"In all cases of doubt, the most merciful construction of facts should be preferred." Dig. L. L, Tit. XVII, l. 56.

"In criminal cases the milder construction shall always be preserved." Dig. L. L, Tit. XVII, l. 155, s. 2.

"In cases of doubt it is no less just than it is safe to adopt the milder construction." Dig. L. L, Tit. XVII, l. 192, s. 1.

Opinion of the Court.

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Cæsar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?" Rerum Gestarum, L. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law. Decretum Gratiani de Presumptionibus, L. II, T. XXIII, c. 14, A.D. 1198; Corpus Juris Canonici Hispani et Indici, R. P. Murillo Velarde, Tom. 1, L. II, n. 140. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer of an able article in the North American Review, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's Evidence (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

Fortescue says: "Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally." De Laudibus Legum Angliæ, Amos' translation, Cambridge, 1825.

Lord Hale (1678) says: "In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die." 2 Hale P. C. 290. He further observes: "And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger, *quod dubitas, ne faceris.*" 1 Hale P. C. 24.

Blackstone (1753–1765) maintains that "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 2 Bl. Com. c. 27, margin page 358, *ad finem.*

How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in *McKinley's case* (1817), 33 St. Tr. 275, 506, where Lord Gillies says: "It is impossible to look at it [a treasonable oath which it was alleged that McKinley had taken] without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty."

It is well settled that there is no error in refusing to give a correct charge precisely as requested, provided the instruction actually given fairly covers and includes the instruction asked. *United States* v. *Tweed* (*Tweed's case*), 16 Wall. 504; *Chicago & North Western Railway* v. *Whitton*, 13 Wall. 270. The contention here is that, inasmuch as the charge given by the court

on the subject of reasonable doubt substantially embodied the statement of the presumption of innocence, therefore the court was justified in refusing in terms to mention the latter. This presents the question whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt, so entirely embodies the statement of presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter. The authorities upon this question are few and unsatisfactory. In Texas it has been held that it is the duty of the court to state the presumption of innocence along with the doctrine of reasonable doubt, even though no request be made to do so. *Black* v. *State*, 1 Tex. App. 368; *Priesmuth* v. *State*, 1 Tex. App. 480; *McMullen* v. *State*, 1 Tex. App. 577. It is doubtful, however, whether the rulings in these cases were not based upon the terms of a Texas statute, and not on the general law. In Indiana it has been held error to refuse, upon request, to charge the presumption of innocence, even although it be clearly stated to the jury that conviction should not be had unless guilt be proven beyond reasonable doubt. *Long* v. *State*, 46 Indiana, 489, 582; *Line* v. *State*, 51 Indiana, 172. But the law of Indiana contains a similar provision to that of Texas. In two Michigan cases, where the doctrine of reasonable doubt was fully and fairly stated, but no request to charge the presumption of innocence was made, it was held that the failure to mention the presumption of innocence could not be assigned for error, in the reviewing court. *People* v. *Potter*, 89 Michigan, 353; *People* v. *Graney*, 91 Michigan, 646. But in the same State, where a request to charge the presumption of innocence was made and refused, the refusal was held erroneous, although the doctrine of reasonable doubt had been fully given to the jury. *People* v. *Macard*, 73 Michigan, 15. On the other hand, in Ohio it has been held not error to refuse to charge the presumption of innocence where the charge actually given was, "that the law required that the State should prove the material elements of the crime beyond doubt." *Morehead* v. *State*, 34 Ohio St. 212. It may be that the paucity of authority upon this subject results from

the fact that the presumption of innocence is so elementary that instances of denial to charge it upon request have rarely occurred. Such is the view expressed in a careful article in the Criminal Law Magazine for January, 1889, vol. 11, p. 3: "The practice of stating this principle to juries is so nearly universal that very few cases are found where error has been assigned upon the failure or refusal of the judge so to do." But whatever be the cause, authorities directly apposite are few and conflicting, and hence furnish no decisive solution of the question, which is further embarrassed by the fact that in some few cases the presumption of innocence and the doctrine of reasonable doubt are seemingly treated as synonymous. *Ogletree* v. *State*, 28 Alabama, 693; *Moorer* v. *State*, 44 Alabama, 15; *People* v. *Lenon*, 79 California, 625, 631. In these cases, however, it does not appear that any direct question was made as to whether the presumption of innocence and reasonable doubt were legally equivalent, the language used simply implying that one was practically the same as the other, both having been stated to the jury.

Some of the text-books also in the same loose way imply the identity of the two. Stephen in his History of the Criminal Law tells us that: "The presumption of innocence is otherwise stated by saying the prisoner is entitled to the benefit of every reasonable doubt." Vol. 1, 437. So, although Best in his work on Presumptions has fully stated the presumption of innocence, yet in a note to Chamberlayne's edition of that author's work on Evidence (Boston, 1883, page 304, note *a*) it is asserted that no such presumption obtains, and that "apparently all that is meant by the statement thereof, as a principle of law, is this — if a man be accused of crime he must be proved guilty beyond reasonable doubt."

This confusion makes it necessary to consider the distinction between the presumption of innocence and reasonable doubt as if it were an original question. In order to determine whether the two are the equivalents of each other, we must first ascertain, with accuracy, in what each consists. Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial

upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

Greenleaf thus states the doctrine: "As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence, to the benefit of which the party is entitled.*" 1 Greenl. Ev. § 34.

Wills on Circumstantial Evidence says: "In the investigation and estimate of criminatory evidence there is an antecedent *prima facie* presumption in favor of the innocence of the party accused, grounded in reason and justice, not less than in humanity, and recognized in the judicial practice of all civilized nations; which presumption must prevail until it be destroyed by such an overpowering amount of legal evidence of guilt as is calculated to produce the opposite belief." Best on Presumptions declares the presumption of innocence to be a "*presumptio juris.*" The same view is taken in the article in the Criminal Law Magazine for January, 1889, to which we have already referred. It says: "This presumption is in the nature of evidence in his favor [*i.e.* in favor of the accused], and a knowledge of it should be communicated to the jury. Accordingly, it is the duty of the judge in all jurisdictions, when requested, and in some when not requested, to explain it to the jury in his charge. The usual formula in which this doctrine is expressed, is that every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt. The accused is entitled, if he so requests it . . . to have this rule of law expounded to the jury in this or in some equivalent form of expression."

The fact that the presumption of innocence is recognized as a presumption of law and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy.

Concluding, then, that the presumption of innocence is evidence in favor of the accused introduced by the law in his behalf, let us consider what is "reasonable doubt." It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediævalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime. The importance of the distinction between the two is peculiarly emphasized here, for, after having declined to

instruct the jury as to the presumption of innocence, the court said: "If after weighing all the proofs and looking only to the proofs, you impartially and honestly entertain the belief," etc. Whether thus confining them to "the proofs" and only to the proofs would have been error if the jury had been instructed that the presumption of innocence was a part of the legal proof, need not be considered, since it is clear that the failure to instruct them in regard to it excluded from their minds a portion of the proof created by law, and which they were bound to consider. "The proofs and the proofs only" confined them to those matters which were admitted to their consideration by the court, and among these elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him.

In addition, we think the 22d exception to the rulings of the court was well taken. The error contained in the charge, which said substantially that the burden of proof had shifted under the circumstances of the case, and that therefore it was incumbent on the accused to show the lawfulness of their acts was not merely verbal, but was fundamental, especially when considered in connection with the failure to state the presumption of innocence.

There are other objections specifically raised to certain particular counts in the indictment which we do not deem it necessary to elaborately examine, but to which the condition of the case compels us to briefly allude. Thus, the first count charges the receipt and placing to the credit of the Indianapolis Cabinet Company of a bill of exchange amounting to a certain number of pounds sterling, followed by the averment that the company thereupon drew its check for said amount. It is contended that the check offered to show the payment of this money was for dollars and not for pounds sterling, and, therefore, there was a variance between the indictment and the proof. This contention, we think, is without merit. The count charged the misapplication of the sum of $5802.84, and averred that the misapplication was

effected by taking the bill of exchange and paying out that amount; in other words, the whole context, we think, makes plain the charge that the sum which it avers to have been misapplied was credited as the result of taking the bill of exchange, and that it was this sum which was paid out upon the check of the cabinet company. Of course it is immaterial at what rate or by what rule the pounds sterling were converted into current money. The sum of the misapplication was the amount stated as credited in consequence of having taken the bill of sterling exchange.

On the subject of the counts covering the charge of false entries in the books of the bank the following requests were made and refused:

"No. 18. In considering the false entry charges in the indictment, it is necessary that you should know what constitutes a false entry. The books of account of a bank are kept for the purpose of accurately and truly recording the financial transactions of the bank. An entry upon the books of the bank of some alleged transactions which never occurred, or of a transaction which did occur, but which is falsely recorded, would be a false entry. But any entry in which that which has been done by the officers or agents of the bank is correctly set forth in detail is not a false entry. If, therefore, you find from the evidence, for instance, with reference to the alleged false entry in the 40th count, that the bank had actually given to the cabinet company the credit for $44,000 upon the paper presented by the cabinet company, and had authorized said cabinet company to make its checks against said credit, and that said entry was made upon the books simply as a truthful record of that which had been done, then the same was not a false entry but was and is a true entry, and the indictment, so far as based upon such entry, cannot be sustained.

"No. 19. If Mr. Haughey, as president of the bank, received from the cabinet company drafts, bills, or notes, which, by reason of the insolvency of the parties, or for any other reason ought not to have been received, and gave to said cabinet company credit therefor, and afterwards caused

an entry of such credit to be made upon the books of the bank, then whatever wrong was done in the matter by Mr. Haughey was not in causing such entry to be made, but was, further back, in receiving the paper and giving the credit. Not to have made the entry would have been to commit another wrong, since it was his duty as president of the bank to see that the books should speak the exact truth as to that which he had caused to be done, and, however wrongful may have been his previous acts, the making of an exact and truthful record of the same in the books of the bank was and could be no crime under this statute."

Whilst we consider the charges asked were in some respects unsound, yet the exception reserved to the charge actually given by the court was well taken, because therein the questions of misapplication and of false entries are interblended in such a way that it is difficult to understand exactly what was intended. We think the language used must have tended to confuse the jury and leave upon their minds the impression that if the transaction represented by the entry actually occurred, but amounted to a misapplication, then its entry exactly as it occurred constituted "a false entry;" in other words, that an entry would be false, though it faithfully described an actual occurrence, unless the transaction which it represented involved full and fair value for the bank. The thought thus conveyed implied that the truthful entry of a fraudulent transaction constitutes a false entry within the meaning of the statute. We think it is clear that the making of a false entry is a concrete offence which is not committed where the transaction entered actually took place, and is entered exactly as it occurred.

Judgment reversed and case remanded with directions to grant a new trial.

BANNON AND MULKEY *v.* UNITED STATES.

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

No. 807. Argued January 23, 1895. — Decided March 4, 1895.

A conspiracy to commit an offence against the United States is not a felony at common law; and if made a felony by statute, an indictment for so conspiring is not defective by reason of failing to aver that it was feloniously entered into.

In an indictment for a conspiracy under Rev. Stat. § 5440, the fact of conspiring must be charged against all the conspirators, but the doing of overt acts in furtherance of the conspiracy may be charged only against those who committed them.

It is unnecessary to consider in detail errors which do not appear in the bill of exceptions, or which do not appear to have been excepted to on the trial, or which seem to have been quite immaterial, so far as excepted to.

This was a writ of error to review a conviction of the plaintiffs in error, who were jointly indicted with twenty-five others, for a conspiracy "to commit an offence against the United States," in aiding and abetting the landing in the United States of Chinese laborers in violation of the exclusion act, by furnishing such laborers false, fraudulent, and pretended evidences of identification, and by counselling, advising, and directing said laborers, and furnishing them information and advice touching the questions liable to be asked them upon their application for permission to land, and by various other means to the grand jury unknown. The times, places, manner, and means of such conspiracy are set forth in the indictment.

Most of the defendants were arrested on the day the indictment was filed, and demurred to the same for failing to set forth facts sufficient to constitute an offence against the laws of the United States. The demurrer being overruled, the trial proceeded against twenty of the defendants, and was concluded by a verdict finding the plaintiffs in error, together with one Dunbar, guilty as charged in the indictment. The others were acquitted, except two, as to whom the jury were

unable to agree. The usual motions for a new trial having been made and overruled, plaintiff in error Mulkey was sentenced to pay a fine of $5000, and to be imprisoned for one year, and Bannon was also sentenced to imprisonment for six months. Whereupon they sued out this writ of error.

Mr. A. B. Browne (with whom was *Mr. A. T. Britton* on the brief) for plaintiff in error Mulkey.

Mr. B. F. Dowell for plaintiff in error Bannon.

Mr. Assistant Attorney General Conrad for defendants in error.

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

This case is before us upon certain assignments of error, the principal ones of which relate to the sufficiency of the indictment.

1. The indictment is claimed to be fatally defective, in that it fails to allege that the defendants *feloniously* conspired to commit the offence in question. The language of the indictment in this particular is as follows: That the defendant did, "with divers other evil-disposed persons, to the grand jury unknown, unlawfully, wilfully, knowingly, and maliciously conspire, combine, and confederate together and with each other to wilfully, knowingly, unlawfully, and maliciously commit an offence against the United States, to wit: the offence and misdemeanor of knowingly and unlawfully aiding and abetting the landing in the United States, and in the State of Oregon, and in the District of Oregon, and within the jurisdiction of this court, from a vessel, to wit: the steamship Wilmington and the steamship Haytian Republic, both steamships plying between the port of Portland, Oregon, and Vancouver, in the Province of British Columbia, Dominion of Canada, Chinese persons, to wit, Chinese laborers not lawfully entitled to enter the United States, by furnishing such Chinese laborers false, fraudulent, and pre-

tended evidences of identification, and by counselling, advising, and directing said Chinese laborers and furnishing them information and advice touching the questions liable to be asked them upon their application for permission to land from said vessels, and by various other means to the grand jury unknown." Following this is a specification of certain acts done by several of the conspirators, including Bannon, but not including Mulkey.

The statute alleged to have been violated is Rev. Stat. sec. 5440, as amended by the act of May 17, 1879, c. 8, 21 Stat. 4: "If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court." Defendants' argument in this connection is that, inasmuch as this court held in *Mackin* v. *United States*, 117 U. S. 348, that a crime punishable by imprisonment in the state prison or penitentiary, with or without hard labor, is an infamous crime as known to the Federal Constitution, it necessarily follows that such an offence is a felony, and hence, that the indictment is defective, in failing to aver that the conspiracy was *feloniously* entered into.

That a conspiracy "to commit *any* offence against the United States" is not a felony at common law, is too clear for argument; and even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done. This was the distinct ruling of this court in *United States* v. *Staats*, 8 How. 41, wherein, under an act of Congress declaring that if any person should transmit to any officer of the government, any writing in support of any claim, with intent to defraud the United States, knowing the same to be forged, such person should be adjudged guilty of felony, it was held to be sufficient that the indictment charged the act to have been

done "with intent to defraud the United States," without also charging that it was done feloniously, or with a felonious intent. In the opinion it was admitted that, in cases of felonies at common law, and some also by statute, the felonious intent was deemed an essential ingredient, and the indictment would be defective, even after verdict, unless such intent was averred; but it was held that, under the statute in question, the felonious intent was no part of the description, as the offence was complete without it, and that the felony was only a conclusion of law, from the acts done with the intent described, and hence was not necessary to be charged in the indictment. Where the offence is created by statute, and the statute does not use the word "feloniously," there is a difference of opinion among state courts whether the word must be put into the indictment. 1 Bish. Crim. Proc. § 535. But under the decision in the *Staats case*, we are clearly of the opinion that it need not be done.

Neither does it necessarily follow that because the punishment affixed to an offence is infamous, the offence itself is thereby raised to the grade of felony. The word "felony" was used at common law to denote offences which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded according to the degree of guilt. 4 Bl. Com. 94, 95; 1 Russell on Crimes, 42. Certainly there is no intimation to the contrary in *Mackin's case*, which was put wholly upon the ground that, at the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment were made the sole test of felonies, it would necessarily follow that a great many offences of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offences under the internal and customs revenue laws, would be treated as felonies, and the persons guilty of such offences stigmatized as felons. The cases of *Wilson* (114 U. S. 417) and *Mackin* (117 U. S. 348) prescribed no new definition for the word "felony," but secured persons accused of offences punishable by imprisonment in the penitentiary, against prosecution by information,

and without a preliminary investigation of their cases by a grand jury. By statute in some of the States, the word "felony" is defined to mean offences for which the offender, on conviction, may be punished by death or imprisonment in the state prison or penitentiary; but in the absence of such statute the word is used to designate such serious offences as were formerly punishable by death, or by forfeiture of the lands or goods of the offender. *Ex parte Wilson*, 114 U. S. 417, 423.

2. The indictment is also claimed to be defective as to Mulkey, in failing to aver that he committed any act which connected him with the alleged conspiracy. The indictment, after alleging the conspiracy, sets forth various acts performed by several of the defendants in furtherance thereof, such as executing false certificates of identification, procuring signatures of witnesses thereto, and delivering the same with intent that they be taken to China and used there; but there is no averment of any act done by Mulkey, either connected with or in pursuance of the general design. The objection is clearly untenable. By the express terms of section 5440, "If two or more persons conspire . . . and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable." Nothing can be plainer than this language.

At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy, and indictments therefor were of such general description that it was customary to require the prosecutor to furnish the defendant with a particular of his charges. *Rex* v. *Gill*, 2 B. & Ald. 204; *Rex* v. *Hamilton*, 7 Carr. & P. 448; *United States* v. *Walsh*, 5 Dillon, 58. But this general form of indictment has not met with the approval of the courts in this country, and in most of the States an overt act must be alleged. The statute in question changes the common law only in requiring an overt act to be alleged and proved. The gist of the offence is still the unlawful combination, which must be proven against all the members of the conspiracy, each one of whom is then held responsible for the acts of all. *American Fur Co.* v. *United States*, 2 Pet.

358; *Nudd* v. *Burrows*, 91 U. S. 426, 438. It was said by Mr. Justice Woods in *United States* v. *Britton*, 108 U. S. 199, 204, that "the provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus pœnitentiæ*, so that before the act done either one or all the parties may abandon their design, and thus avoid the penalty prescribed by the statute." If such were not the law, indictments for conspiracy would stand upon a different footing from any others, as it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps toward carrying it out. It has always been, however, and is still the law, that, after *prima facie* evidence of an unlawful combination has been introduced, the act of any one of the coconspirators in furtherance of such combination may be properly given in evidence against all. To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offence nugatory. It is never necessary to set forth matters of evidence in an indictment. *Evans* v. *United States*, 153 U. S. 584, 594.

Our attention is called, in the brief of Bannon's counsel, to certain alleged errors in the admission of testimony, as well as in the charge of the court; but as these errors either do not appear in the bill of exceptions at all, or do not appear to have been excepted to upon the trial, or seem to have been quite immaterial, so far as they were excepted to, it is unnecessary to consider them in detail.

The judgment of the court below is, therefore,

Affirmed.

BELL SILVER AND COPPER MINING COMPANY *v.* FIRST NATIONAL BANK OF BUTTE.

ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 154. Argued January 16, 17, 1895. — Decided March 4, 1895.

A provision, in a deed of real estate in trust to secure the payment of a debt, which authorizes the trustee to sell the property at auction on breach of condition, first giving thirty days' notice of the time and place of sale by advertising the same for three successive weeks in a newspaper, is complied with so far as respects notice, by publication of such notice for three successive weeks, the first publication being more than thirty days before the day of sale.

If such notice describes the property to be sold in the language of the mortgage, it is sufficient.

A trust deed in the nature of a mortgage may confer upon the trustee power to sell the premises on default in the payment of the debt secured by the deed, and a sale thereunder, conducted in accordance with the terms of the power in the deed, will pass the granted premises to the purchaser on its consummation by conveyance; and this rule obtains in Montana, notwithstanding the provisions in § 371 of its Revised Statutes.

THE case is stated in the opinion.

Mr. A. H. Garland, (with whom was *Mr. W. F. Sanders* on the brief,) for plaintiffs in error and appellants.

Mr. M. Kirkpatrick, (with whom was *Mr. William Scallon* and *Mr. W. W. Dixon* on the brief,) for defendants in error and appellees.

MR. JUSTICE FIELD delivered the opinion of the court.

This case is before us on appeal from a judgment of the Supreme Court of the Territory of Montana, affirming a judgment of one of its district courts.

The original action in the district court was ejectment commenced by the plaintiffs in Silver Bow County for the possession of two mining claims situated therein. It was

tried by the court without the intervention of a jury upon certain agreed facts in the nature of a special verdict.

It appears by them that on the twenty-fifth of April, 1882, the defendant, the Bell Silver and Copper Mining Company, a corporation organized under the laws of Montana, was the owner and in possession of the mining ground described in the complaint, the other defendants named being at the time upon the premises under contract with the company. On that day the defendant company executed and delivered to the grantees therein designated an indenture reciting that it was authorized by the laws of the Territory of Montana, by its articles of incorporation, and by a vote of its trustees, to execute trust mortgages of all its property, real, personal, and mixed, to secure the payment of bonds issued by it, and it was about to issue sixty bonds in the sum of one thousand dollars each to secure a loan of sixty thousand dollars to be made to it; and declared that in order to secure the payment of the bonds to be thus issued, and interest thereon, it had granted, bargained, sold, and conveyed, and by those presents did grant, bargain, sell, and convey, to Samuel Wells and Theodore H. Tyndale, as trustees, and the survivor of them, their successors in trust and assigns, the property described in the complaint, with all the buildings, privileges, franchises, and appurtenances — this last clause not to be construed so as to prevent the company from selling old materials in the ordinary course of business, to be replaced by new, nor to prevent it from mining, reducing, or selling ore from the mine in the ordinary course of business, meaning and intending thereby to mortgage all the property, real, personal, and mixed, of whatever nature or name, owned by the party of the first part, but upon the following express trusts, that is to say, that in case the Bell Silver and Copper Mining Company should fail to pay the principal or any part thereof which might fall due on the bonds secured thereby, at any time and place when and where the same might become due and payable according to the tenor and effect thereof and for thirty days thereafter, then and in that case, upon the written request of the holders of one-fourth part of the bonds which might at

the time be outstanding and unpaid, it should be the duty of the parties of the second part, their survivors or assigns, to enter upon and take possession of the premises of the party of the first part, their successors in trust and assigns, or they might at their discretion, upon the written request of the holders of one-fourth of the bonds then unpaid, cause the premises and property to be sold at public auction in Butte City, Montana, or in the city of Boston, Massachusetts, as the parties of the second part, their successors or assigns, might deem best, first giving thirty days' notice of the time and place and terms of sale by publishing the same once a week for three weeks successively in one of the principal newspapers for the time being in Boston, Massachusetts, and Butte City, Montana, and upon such sale to execute to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in fee simple for the same which should be a bar against the said Bell Silver and Copper Mining Company, party of the first part, its successors and assigns, and all other persons claiming under it or them, of all right, interest, or claim in and to the premises and property and all parts thereof.

And it was expressly agreed by the indenture in question that the parties of the second part, their successors and assigns, or any persons in their behalf, might purchase at any sale thus made or made by order of the court, under the laws of Montana, and that no other person should be answerable for the application of the purchase money, and that the trustees should, after deducting from the proceeds of such sale the costs and expenses thereof, and of managing the property, and enough to indemnify and save themselves harmless from and against all liability arising from the trust and for their own compensation, apply so much of the proceeds of the premises and property as might be necessary for the payment of the principal and interest of the bonds unpaid, whether matured or not, and restore the residue to the party of the first part, it being expressly understood and agreed that in no case should any claim or advantage be taken of any valuation or appraisement, redemption or extension, by the party of the

first part, its successors or assigns, nor any process be obtained or applied for by it or them to prevent such entry or sale and conveyance.

The agreed statement of facts further showed, aside from other things, that thereafter, on the twenty-fourth day of June, 1885, one Harriet M. Pitman, being then the owner of thirty-five of the bonds mentioned therein, which had been due more than thirty days, wrote to Wells and Tyndale a letter directing them in their discretion to proceed and sell the premises upon the terms described in the instrument, and thereafter, on the fourteenth day of July, 1885, the bonds being past due and unpaid, Samuel Wells and Theodore H. Tyndale prepared and published a notice of sale, the substance of which, as to time, was published in the Boston Traveller and the Butte Miner, papers of general circulation in the cities and vicinities respectively where they were published.

And in pursuance of such notice on September 2, 1885, Wells and Tyndale offered for sale to the highest bidder the property described in the notice, when the same was struck off to the holders of the bonds in the mortgages mentioned for the sum of forty-five thousand dollars, they being then and there the highest and best bidders, and thereafter on the twelfth of October, 1885, Wells and Tyndale made and delivered to the plaintiffs, the purchasers at the sale, a deed of the premises described.

This deed is the source of the title of the plaintiff and the ground upon which their present action rests for recovery.

When the case was pending in the Supreme Court of the Territory it was objected that the deed was void upon several grounds; one, that the notice of sale was not in conformity with the requirements of the contract; second, that the description of the property was insufficient in law; and, third, that the power and authority under which the mortgagees and trustees executed the deed was void under section 371 of the Revised Statutes of Montana. These several objections were considered at length by the Supreme Court of the Territory and held to be untenable.

By the first objection was meant, though not happily ex-

pressed, that the notice of sale was not sufficient in the length of time for which it was given. The instrument provides for "thirty days' notice of the time and place and terms of such sale, by publishing the same once a week for three weeks successively, in one of the principal newspapers for the time being in Boston, Massachusetts, and Butte City, Montana." The notice of sale, in fact, was published on the 15th, 22d, and 29th of July, 1885, in the Boston Traveller, and in the Butte Daily Miner on the 21st of July, and each succeeding day, including the 11th of August, 1885, and the sale took place on the 2d day of the following September. Between the 15th of July, the date of the first publication in the Boston Traveller, and the 2d of September more than thirty days elapsed, and between the 21st of July, the date of the first publication in the Butte Daily Miner, and the 2d day of September was also more than thirty days, and the publication in each paper was once a week for three weeks successively. It is contended that unless the last notice in each of the papers preceded the sale by thirty days it was insufficient. This position was held untenable by the Supreme Court of the Territory, and, we think, correctly. It is sufficient that the notice of sale was published in each of the papers for three weeks, and that the notice preceded the sale thirty days. The first publication was notice, as the Supreme Court of the Territory observed, as much as the second or last. *Leffler* v. *Armstrong*, 4 Iowa, 482, 485. The second objection is sufficiently answered by the fact that the description in the notice of sale is a transcript of that contained in the mortgage, and if it is defective in any respect in the description of the personalty it is sufficient that it is complete in the description of the real property, for the recovery of which the action is brought. The third objection was that the power under which the trustees executed the deed was void under section 371 of the Revised Statutes of Montana. This objection requires further consideration. The statute declares that a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

It was taken from a similar statute in the laws of California. It constitutes section 260 of its practice act and has frequently been the subject of construction by its courts.

In *Koch* v. *Briggs*, 14 California, 256, which was a case in which Briggs was indebted to Koch on a promissory note and to secure its payment executed to one Swift, as trustee, a deed of a parcel of real property containing a provision for its sale upon default in the payment of the note and interest, or any part thereof, and that upon application of the holder he should sell the premises at public auction at a designated place in the county to the highest bidder for cash, after fifteen days' previous publication of notice in one of the newspapers of the county of the time and place of sale, and execute to the purchaser a good and sufficient deed of the same, and out of the proceeds, after satisfying the expenses of the advertisement and sale and of the trust generally, pay the principal and interest due upon the note, and render the surplus, if any, to the grantor, or his representatives, and the court held the instrument to be a deed of trust and distinguishable in some features from a mortgage, though executed as security for the debt of the grantor. By the common law a mortgage was a conveyance of a conditional estate, which became absolute upon breach of its condition. The instrument being intended as security for a debt, it became operative as a conveyance if the condition — that is, the payment of the debt — was not complied with.

A court of equity, however, considering that the instrument was intended principally as security, gave to the mortgagor a right to redeem the premises from forfeiture, after a breach of its conditions, that is, after the grantor's failure to pay the debt secured, which constituted the mortgagor's equity of redemption. Many attempts were made at different times by special provisions to lessen and deprive the mortgagor of this right and to treat the instrument as an absolute conveyance.

The object of the provision of the three hundred and seventy-first section of the statute of Montana and of the similar law of California, from which it was taken, was to preclude any arrangement between the mortgagor and the

mortgagee by which the former's right to the property could be cut off without a sale of the same. It therefore held that the mortgage should not operate as a conveyance, whatever its terms, until a foreclosure and sale. The foreclosure might be by judicial proceedings in equity or by any other regular proceedings which resulted in extinguishing the mortgagor's right of property by sale.

In deciding *Koch* v. *Briggs*, (p. 262,) and in distinguishing it from a mortgage in its strict form, the court said: "Where there is a mortgage there is a right, after condition broken, to a foreclosure on the part of the mortgagee, and a right of a redemption on the part of the mortgagor. It matters not whether we consider the instrument a conveyance of a conditional estate in the land, as at common law, or as creating a mere lien or encumbrance for the purpose of security, as by our law. The right to foreclose, whether resulting in vesting an absolute title to the property in the mortgagee, as formerly in England, or in a judicial sale of the premises, as in this State, exists in all cases of mortgage, after breach of condition, as does also the right to redeem the property from forfeiture, or from the encumbrance of the lien. These two rights are mutual and reciprocal."

In the case of *Fogarty* v. *Sawyer*, 17 California, 589, 592, the instrument under which the property conveyed was intended as security and to be sold by the trustees named upon breach of its condition for payment. It was similar in form to the indenture under consideration in this case, and the court said:

"Under the section" (260 of the Practice Act of California referred to) "the mortgage creates a mere lien for the purposes of security, and, as in other cases of lien upon real property, can only be enforced by judicial proceedings, except by the authority of the owner of the property. By virtue of the mortgage alone the mortgagee can neither acquire the possession nor dispose of the premises, but the existence of the mortgage does not prevent the owner from making an independent contract for the possession, or from authorizing a sale of the premises, the mortgagee consenting thereto, to pay off

the debt. Nor is it perceived that there is any legal obstacle to making such contract with the mortgagee or to clothing him with the power of sale. If the owner of the property sees fit to enter into such an arrangement with him, or to confer such power upon him, it would be going a great way for the court, for that reason alone, to invalidate the proceedings. The right to dispose both of the possession and estate follows necessarily from the ownership of the property, and, this being so, no valid objection can be urged against incorporating the contract and power in the same instrument with the mortgage. They do not become in that way any part of the mortgage, but are as much independent of it as though contained in separate instruments. Some stress is placed by the respondent upon the use of the words 'whatever its terms' in the statute. This language is supposed to prohibit separate stipulations between the parties for the possession and for the sale of the premises upon default. We do not thus construe the language, but, on the contrary, are clear that it was only intended to control the terms of grant, bargain, and sale generally employed in mortgages."

We agree to what is stated by the court in that case. There is nothing in the law of mortgages, nor in the law that covers what are sometimes designated as trust deeds in the nature of mortgages, which prevents the conferring by the grantor or mortgagor in such instrument of the power to sell the premises described therein upon default in payment of the debt secured by it, and if the sale is conducted in accordance with the terms of the power, the title to the premises granted by way of security passes to the purchaser upon its consummation by a conveyance. *Grant* v. *Burr*, 54 California, 298; *Bateman* v. *Burr*, 57 California, 480.

The power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the prop-

erty, to obtain payment of the indebtedness. The insertion of a power of sale does not affect the mortgagor's right to redeem so long as the power remains unexecuted and the mortgage is not, as it may be, foreclosed in the ordinary manner, but when a sale is made of the interest of the mortgagor, his right is wholly divested, embracing his equity of redemption.

Mr. Jones, in his careful treatise on Mortgages, observes that "the delay and expense incident to a foreclosure and sale in equity have brought power of sale mortgages and trust deeds into general favor both in England and America, and although their general use is now confined to a part only of our States, the same influences which have already led to their partial adoption and use are likely to lead to their general use everywhere at an early day. . . . A power of sale, whether vested in the creditor himself or in a trustee, affords a prompt and effectual security."

The sale made by the trustees in the case under consideration complied in all essential particulars with the conditions contained in the deed of trust or mortgage, whichever it may be called, and the deed executed by the trustees passed to the purchasers a good title to the premises covered by the indenture. *Judgment affirmed.*

ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY *v.* MISSOURI *ex rel.* MERRIAM.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 751. Submitted January 14, 1895. — Decided March 4, 1895.

The granting by the Supreme Court of a State of a writ of prohibition directed to an inferior court directing it to abstain from further proceedings in an action pending in it, and to a receiver of a railroad appointed by that court, directing him to turn over the property to a receiver appointed by another court of the State, presents no Federal question for the decision of this court.

Statement of the Case.

MOTION to dismiss. On the 20th day of July, 1893, in the Supreme Court of the State of Missouri, Edwin G. Merriam filed a petition for a writ of prohibition. In said petition the relator set forth that the St. Louis, Cape Girardeau and Fort Smith Railway Company was a corporation organized under the laws of the State of Missouri; that it had made on September 1, 1881, a mortgage on part of its railroad to one Leo Doyle, as trustee, to secure an issue of bonds amounting to $100,000; that on July 18, 1881, the same company had made to Leo Doyle, as trustee, a mortgage on another part of its road to secure an issue of $170,000 of its bonds. The petition also alleged that the relator was the holder of $27,000 of the bonds secured by the mortgage of September 1, 1881, and $49,200 of the bonds secured by the mortgage of July 18, 1881.

The petition further stated that default had been made in the payment of interest on said bonds, and that, after such default, the relator on the 3d day of March, 1893, filed in the circuit court of Stoddard County a bill of complaint in behalf of himself and all others similarly situated, against the said railway company, said Leo Doyle, trustee, and certain junior incumbrancers, and asked for the appointment of a receiver, and for a decree of sequestration and foreclosure, and other relief. The petition further alleged that, on the presentation of said bill of foreclosure on the 3d day of March, 1893, the circuit court of Stoddard County appointed one Eli Klotz as receiver, and authorized him to take possession of the railroad and property of the said railway company and manage and operate the same.

The petition further stated that on March 4, 1893, a pretended suit was instituted in the name of the said St. Louis, Cape Girardeau and Fort Smith Railway Company in another court, the Cape Girardeau court of common pleas; that such court appointed Louis Houck, the president of the railway company, and the owner of a majority of its stock, receiver of the said company's road and property; and that at the time of the filing of the petition he held possession as such receiver.

The petition further alleged that in the suit so instituted in the circuit court of Stoddard County process had been duly issued and served upon the defendant railway company on the

8th day of March, 1893, and upon Leo Doyle on or about the 9th day of March, 1893. The petition then set forth certain proceedings in the said circuit court of Stoddard County, in which George Houck, a brother of Louis Houck, was, on March 6, 1893, temporarily appointed judge in place of John G. Wear, who was prevented by sickness from attending court, and that said George Houck, as said judge, made an order early on the 13th day of March, 1893, discharging said Eli Klotz as receiver; and that afterwards on the same day the said John G. Wear reconvened said court and reappointed and confirmed the said Klotz as receiver, and that subsequently, on the 24th day of July, 1893, the said Judge John G. Wear again reappointed and confirmed the said Eli Klotz as receiver. The petition further stated that the said Leo Doyle, in disregard of his duties as trustee in the said mortgages, acted with the said railway company and with the said Louis Houck, and was represented in said suits by counsel employed at the instance of said Houck.

The petition further averred that the Cape Girardeau court of common pleas was about to issue receiver's certificates to the amount of $250,000, and to make them a lien on the property of the company prior to the lien of the mortgages securing the bonds held by the relator.

As relief the petition asked that a writ of prohibition should issue, directed to Alexander Ross, judge of the Cape Girardeau court of common pleas, and the other respondents, prohibiting him and them from pursuing and holding the pleas aforesaid, and from taking any further cognizance of the said suit before them touching the premises, and directing said court of common pleas to surrender to the proper jurisdiction of the circuit court of Stoddard County the said property of the said railway company. The record discloses that the said judge of the Cape Girardeau court of common pleas, the railway company, Louis Houck, Edward Hiddon, the Mercantile Trust Company, and Leo Doyle filed answers or returns to said petition, and that there was filed a stipulation that certain facts might be considered as proved and so treated by the court.

On December 4, 1893, the Supreme Court, after hearing,

Counsel for the Motion.

granted the writ of prohibition, and the writ was accordingly issued commanding the Cape Girardeau court of common pleas to cease from entertaining any further pleas or taking any further action in said so-called suit, entitled the "St. Louis, Cape Girardeau and Ft. Smith Railway Company against Leo Doyle and others," in said court, and that the said railway company and the said Houck, as president thereof, as well as receiver thereof, and the other respondents, cease from further prosecuting pleas therein. Said writ also directed the said Louis Houck to turn over all the property of said railway company that had come into his hands as receiver *de facto* thereof, under the orders of the Cape Girardeau court of common pleas, to the receiver *de jure* thereof, who had been or might be appointed by the circuit court of Stoddard County, in which the suit of the said relator was pending, and that he account therefor as such receiver, under the supervision of the said circuit court of Stoddard County.

The respondents filed a petition for rehearing, in which they set forth, among other things, that part of the writ of prohibition which commanded Houck to turn over the property of the railway company which had come into his hands as receiver under the appointment by the Cape Girardeau court of common pleas to the receiver appointed by the circuit court of Stoddard County, and averred, in respect to the same, that "that part of the order above quoted is in violation of article five of the amendments of the Constitution of the United States, which provides that no person shall 'be deprived of life, liberty, or property, without due process of law,' and of the provisions of the first section of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty, or property without the due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" The motion for rehearing was denied, and to the judgment granting the writ of prohibition a writ of error was allowed.

Mr. John F. Dillon, *Mr. W. S. Pierce*, and *Mr. H. Hubbard* for the motion.

Mr. John W. Noble and *Mr. M. R. Smith* opposing.

Mr. Justice Shiras delivered the opinion of the court.

This case was submitted on a motion to dismiss the writ of error herein, on the ground that no Federal question was raised in the Supreme Court of Missouri, and that, therefore, we have no jurisdiction to review the judgment of that court.

It is claimed that none of the pleadings in the Supreme Court of Missouri, nor the agreed statement of facts, raised any Federal question. It is admitted that, in the answer of the railway company to the petition for the writ of prohibition, it was averred "that any action by said judge of the circuit court of Stoddard County, or by said court itself attempting to seize out of the possession of this respondent under either of said divisional mortgages, all of said railroads, or any other part thereof, than that expressly named in said divisional mortgages, was and is and must be against the express provisions of both the constitution of Missouri and the Constitution of the United States, providing that no person shall be deprived of property without due process of law, and it is against the express law of the land;" and that, in the answer of Louis Houck, it was averred, "that the relator has no lien upon any part of the railroad beyond or west of Lakeville, and that his efforts to cause and compel this court or the circuit court of Stoddard County to take possession of any part of it beyond Lakeville is in violation of the Constitution of this State and of the United States, and of the law of the land, all of which guarantee that no property shall be taken except by due process of law." But it is said that, so far as Louis Houck is concerned, his answer is immaterial, because he does not appear as a plaintiff in error in this court, and that such part of the answer of the railway company as avers that the action of the judge of the circuit court will be against the Constitution of the United States was stricken out by the court; and as no objection was made or exception taken thereto the answer of the railway company does not raise any Federal question on the record.

On the other side, it is contended that it does clearly appear from the record that the provisions of the Constitution of the United States were relied on by the respondents, and that the questions thus raised were decided against them. It is argued that, even if this court will not take notice of the contents of the petition for a rehearing, in which the protection of the Constitution of the United States was in terms invoked, yet, that, as well by the recitals in the opinion as by the said averments in the answers of the railway company and of Houck, it affirmatively appears that the Federal questions were raised, and that no formal objection or exception to the action of the court in striking out those averments was necessary.

We do not think it necessary to narrowly inquire whether the record formally discloses that the respondents relied upon and pleaded rights under the Constitution of the United States, because we are of opinion that even if it be conceded that the respondents did, in form, invoke the provisions of the Federal Constitution, yet that no Federal question was really raised. The bare averment in the answers of supposed infringements in the proceedings of rights possessed by the respondents under the Constitution of the United States will not alone suffice. As was said in *New Orleans* v. *New Orleans Waterworks*, 142 U. S. 79: "While there is in the . . . answer of the city a formal averment that the ordinance impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free from charge, the bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." And in *Hamblin* v. *Western Land Company*, 147 U. S. 531, 532, where the foregoing opinion was quoted with approval, it was said: "A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of state courts."

We think that the Supreme Court of Missouri, in granting the writ of prohibition as prayed for, passed upon and decided

no question arising under the laws or Constitution of the United States.

Whether, under the state constitution and laws, the Supreme Court of Missouri possessed the power to grant a writ of prohibition directed to one of the subordinate courts of that State, and what were the legal scope and effect of the writ when granted, were questions for that court to decide, and its judgment in those particulars is not subject to our revision.

The mandatory portion of the writ as granted, commanding the receiver appointed by one state court to turn over the property in his hands belonging to the defendant corporation to the receiver appointed by another did not operate to take away from the defendant its property and bestow it upon a third person. The title to its property continued in the company as before, and that title was no more disturbed or impaired by the judicial order establishing the right of custody to belong to one of two contending receivers, than it was by the original order appointing a receiver. That, in a foreclosure suit, to appoint a receiver is to deprive the defendant of its property within the meaning of the Constitution of the United States, is a novel proposition, and does not, in our view, raise a real, as distinguished from a fictitious, Federal question.

If it be questionable, which we do not admit, whether a receiver can be validly appointed for an entire railroad at the suit of a creditor holding bonds secured by a mortgage whose lien is restricted to part only of the road, that also, in the present case, was a question for the state court to decide, and we cannot be called upon to answer it.

We cannot agree with the contention so earnestly made on behalf of the plaintiff in error, that the Supreme Court of Missouri, by the judgment complained of, adjudicated or passed upon any substantial right of property or dictated in advance to the circuit court of Stoddard County how that court should deal with the rights and claims of the parties before it. As we understand the action of the Supreme Court, it only decided that, as between the conflicting claims of two inferior courts to exercise jurisdiction over the railroad and

property of an insolvent railroad company, the court whose jurisdiction first attached was the proper one in which the litigation should proceed. Such a decision would seem to comport with well-settled and orderly principles of procedure.

At all events, we are unable to descry, in the record before us, any denial by the Supreme Court of Missouri of any rights of the plaintiff in error under the Constitution or laws of the United States, and the writ of error is accordingly

Dismissed.

LINDSAY *v.* FIRST NATIONAL BANK OF SHREVEPORT.

APPEAL FROM AND ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 132. Argued and submitted December 19, 1894. — Decided March 4, 1895.

A national bank commenced an action in a Circuit Court of the United States to have an assessment of the shares of its capital stock made by state officers declared invalid. The defendants demurred upon the ground that the remedy was in equity. The demurrer was overruled, the case went to trial before a jury, and the plaintiff obtained judgment. *Held*, That, although the proceedings might have been in accordance with practice in the courts of the State, the plaintiff's remedy was in equity according to practice in the Federal courts, and that the demurrer should have been sustained.

This was an action brought in the Circuit Court of the United States for the Western District of Louisiana by the First National Bank of Shreveport, a corporation created under the laws of the United States, against Robert H. Lindsay, assessor of the parish of Caddo, the police jury of said parish of Caddo, and the city of Shreveport, Louisiana. The declaration or petition sets forth that the capital stock of said bank consists of 2000 shares of one hundred dollars each, held and owned by about twenty persons, who are named in the petition; that Robert H. Lindsay, as assessor of the parish of Caddo, had assessed the shares of stock of said corporation against the said stockholders on the tax roll of the current

year 1889 at the rate of eighty dollars per share, aggregating the sum of $160,000; that such assessment was unlawful, unjust, and excessive, and that the bank and said stockholders, in due time and form, applied to the police jury of said parish, sitting as a board of reviewers, under the provisions of the revenue laws of said State, for the cancellation of said assessment, or to have the same corrected, but that said board of reviewers failed and refused to cancel or correct such assessment, which accordingly appeared on the tax roll for the year 1889 of said parish; that under the existing laws, on all property subject to taxation the State levies a tax of six mills on the dollar of valuation; that the parish of Caddo, through its police jury, levies a tax of eight mills on the dollar of valuation, and the city of Shreveport levies a tax of twenty-three and three-fourths mills on the dollar of valuation, making a total tax of thirty-seven and three-fourths mills on the dollar of valuation; that under said illegal assessment the State of Louisiana, the parish of Caddo, and the city of Shreveport are about to collect such taxes, aggregating six thousand and forty dollars, from the petitioner "unless prevented by the decree of this honorable court;" that the State of Louisiana has no power or right to tax in any manner the capital stock of any national bank, except so far as such power and right have been granted by the Congress of the United States; that under existing laws of the United States, the State may determine and direct the manner of taxing all shares of national banks having their domicil in the State, provided such taxation shall not be at a greater rate than is assessed upon the moneyed capital in the hands of individual citizens of the State, and that the true intent and meaning of such proviso is that the tax assessed on the shares of national banks shall be equal and uniform with the tax assessed and levied on other property in said State and on the individual owners thereof; that by the statute of the United States authorizing the State to tax, under certain limitations, shares of national banks, by the "law of the land," and by the constitution and laws of the State of Louisiana, it is expressly provided that taxation shall be equal and uniform; that the

assessment so as aforesaid made violates the principle of equality and uniformity in this, that the said Lindsay, assessor, has assessed said shares of stock at a much higher value proportionately than that at which he assessed the property of other citizens subject to taxation, the assessment of said shares being twice as high as that placed on other property; that the said assessor Lindsay has wilfully failed and neglected to assess and place on said tax roll moneys in the possession of citizens of the State, and moneys by such citizens loaned out, bonds, judgments, notes, accounts, and other verdicts held by and due to citizens of the State, and property of other kinds owned by citzens of the State and by persons not citizens of the State, all of which was and is subject to taxation, and should have been assessed and placed on said tax roll, and that the value of said property so omitted from said tax roll exceeded, at the time when said assessment should have been made, the sum of one million dollars; that the acts of the said assessor Lindsay, relating to said tax roll, destroy the uniformity of the rule fixed by the constitution and laws of the State, and are subversive of the act of Congress allowing shares in national banks to be taxed, which act intended to protect the owners of such shares from greater burthens than are imposed on other moneyed capital in the State where such banks are located; that in arriving at the assessment of said shares in said bank the said assessor Lindsay, and the said police jury, sitting as a board of reviewers, took the capital stock of said bank, viz., $200,000, and added thereto $40,000, the earnings of the bank, which did not and does not in any manner constitute any portion of the capital stock of said bank, and which the bank held and now holds in United States bonds, by law exempted from taxation; that section 29 of act No. 85 of the general assembly of Louisiana, session 1888, the existing revenue act of said State, provides that the actual shares of stock of every national bank shall be assessed to the stockholders, and the taxes so assessed shall be paid by the bank, and that all property owned by the bank taxable under section 1 of said act shall be assessed directly to the bank, and the *pro rata* share of such direct taxes and of all

exempt property proportioned to each share of capital stock shall be deducted from the amount of taxes assessed to that share under said section 29; that the said earnings, having been invested in property exempted from taxation, the said assessor and the said police jury should have deducted the same proportionately from the amount of taxes assessed to each share in said bank; that by the provisions of the twenty-ninth section of said act No. 85 of the general assembly of Louisiana, session of 1888, the said bank is required to pay the taxes assessed to its stockholders; that the corporation known as the First National Bank of Shreveport is a juridical person, separate and distinct from each and every person holding stock therein, and is not and cannot be bound to discharge the obligations of such other persons, and that said provisions of said section of said act violate the Constitution of the United States, etc.; that this is a case arising under the Constitution and laws of the United States, and presents Federal questions, and that this honorable court has jurisdiction to hear and determine the same; that therefore the petitioner prays that the said Lindsay, assessor, said police jury of Caddo parish, and the city of Shreveport be cited to answer hereto; that after all legal notices and delays there be judgment in favor of petitioner declaring said assessment null and void, and prohibiting the collection of any tax from petitioner or its stockholders; or in the event the court should not hold said assessment absolutely void, petitioner prays for a judgment reducing said assessment, so as to make it equal and uniform with other assessments, and striking therefrom the amount of property held by the bank exempted from taxation; and prays for all orders and decrees necessary in the premises for costs, and for general relief.

The defendants appeared and filed the following exception:

"Now come defendants in above-entitled suit and except to plaintiff's suit, which is in the law side of the court, on the ground and for the reason that the allegations of plaintiff's bill or petition show that his remedy is not by an action at law, but by injunction and bill in equity, and this court is without jurisdiction to entertain this suit as an action at law.

Whereupon defendants pray that this exception be sustained and plaintiff's suit be dismissed with costs."

After argument this exception was overruled, and thereupon the plaintiff filed an amended or supplemental petition averring, that the bank holds the amount of one hundred and eighty-three thousand dollars in bonds of the United States, constituting a portion of its capital, and so held the same at the time of the unequal and illegal assessment set forth in the original petition, and that in assessing said capital stock in which said amount of bonds was included there was and is an unjust discrimination against said bank and its stockholders, and the shares of the stockholders in said company are assessed at a greater rate than was assessed upon moneyed capital in the bonds of the individual citizens of the State; that United States bonds in the hands of individual citizens of the State were not and are not assessed or taxed; that the statute of the State of Louisiana, under which the assessment was made, discriminates unjustly against petitioner and its stockholders, and violates the principles of equality and uniformity in taxation by exempting such United States bonds from taxation when held by individual citizens of the State and taxes the same when held by the bank and its stockholders; and that said assessment and the statute under which it was made are null and void.

Subsequently the defendants filed the following exception to the amended petition:

"Now come defendants in the above-entitled suit and except to the amended and supplemental petition filed by the plaintiff, on the ground and for the reason that the allegations therein contained disclose no cause of action against these defendants; wherefore they pray that this exception be sustained, and that said petition be dismissed at plaintiff's costs."

On motion and after argument this exception was overruled, and the defendants filed an answer denying generally the allegations of the original and amended petitions, admitting that the shares of stock of plaintiff's bank were assessed in the assessment roll of 1889 to the respective stockholders

named in the petition at a valuation of eighty dollars on each share of the face value of one hundred dollars, and averring that said assessment was at the rate of two-thirds of the actual cash value of such shares, which were, at the rate of said assessment, worth in the market the sum of one hundred and twenty dollars in cash per share, if not more; denying that the assessor or the board of reviewers in and for the parish of Caddo have wilfully or intentionally omitted any property from assessment or taxation for the year 1889, and stating that if there was "surveyed capital in the hands of individuals" in said parish not assessed for the year 1889, the same belonged largely to the shareholders of plaintiff's bank, and was not returned by them for assessment according to law; denying that defendants have discriminated or attempted to discriminate in any manner against the shareholders of plaintiff's bank, and that said bank or its stockholders have any just cause of complaint.

The record further declares that on March 4, 1891, the case came on to be heard, that a jury was empanelled and sworn to try the same, and that, after evidence was put in, the jury rendered the following verdict:

"We, the jury, find the assessable value of each share of stock in the plaintiff's bank is twenty-three dollars and a half, after deducting from the assessment in controversy the amount of United States and state bonds held by the bank as portion of its capital stock."

On March 14, 1891, there was entered a judgment in the following terms:

"In this case, by reason of the law and the evidence, and the verdict of the jury being in favor of the plaintiff, the First National Bank of Shreveport, it is ordered, adjudged, and decreed that there be judgment in favor of said bank against the State of Louisiana reducing the assessment on each share of the capital stock of said bank, made against its several stockholders, as set forth in petition, for the year 1889, from eighty dollars a share to twenty-three $\frac{50}{100}$ dollars a share, said amount of twenty-three $\frac{50}{100}$ dollars being (according to the rate of assessing all property at two-thirds of its

cash value adopted by and governing the assessing officers of the parish of Caddo, for and during the year 1889, in making the assessment of said year) equal to two-thirds of the amount found by the jury to be the full assessable value of each share and reducing the aggregate assessment of the entire 2000 shares of the capital stock of said bank on the assessment roll or tax roll of 1889 from one hundred and sixty thousand to forty-seven thousand dollars; and it is further ordered and decreed that there be judgment to the same effect against the parish of Caddo and against the police jury of said parish; and it is further ordered and decreed that there be judgment to the same effect in favor of said bank and against the city of Shreveport; and it is further ordered and decreed that there be judgment against the defendant, R. H. Lindsay, to the same effect; and it is further ordered and decreed that plaintiffs have and recover from the defendants *in solido* costs, to be taxed."

Mr. William Wirt Howe for plaintiffs in error and appellants.

Mr. A. H. Leonard for defendant in error and appellee.

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

This was a proceeding instituted in the Circuit Court of the United States for the Western District of Louisiana by the First National Bank of Shreveport, to have declared invalid an assessment of the shares of its capital stock, made by the assessing officers of the State of Louisiana for the parish of Caddo, in the year 1889.

It is provided by the twenty-seventh section of the act of 1886 of the State of Louisiana that "all taxpayers shall have the right of testing the correctness of their assessments before the courts of justice in any procedure which the constitution and laws may permit;" and, by the thirty-sixth section of the act of 1888, that "all suits relating to taxes and licenses shall be preference suits in all courts where pending, and shall

be tried without a jury as speedily as possible, and in chambers if court is not in session."

The bank filed a declaration or petition on the law side of the court, alleging that the assessment in question was unjust and unequal, and in disregard of the constitution and laws of the State of Louisiana and of the statute of the United States authorizing the State to tax, under certain limitations, shares of the capital stock in national banks, and asking that there be judgment in favor of the petitioner declaring said assessment null and void, and prohibiting the collection of any tax from petitioner or its stockholders; or, in the event the court should not hold said assessment absolutely null, petitioner prayed for a judgment reducing said assessment so as to make it equal and uniform with other assessments and striking therefrom the amount of property held by the bank exempted from taxation, and for general relief.

The defendants appeared, and to this petition filed what is styled an "exception," equivalent to a demurrer, alleging that the suit was an action at law, but that the allegations of plaintiff's petition disclosed that the remedy was not by an action at law, but by injunction and bill in equity, and that the court was without jurisdiction to entertain the suit as an action at law, and therefore prayed that this exception be sustained and plaintiff's suit be dismissed with costs.

This exception was overruled, and, after other proceedings which it is not necessary here to notice, the case was put at issue by an answer traversing the allegations of the petition; a jury was sworn; evidence was adduced by both parties; the judge instructed the jury; a verdict was rendered; and a judgment, in pursuance of the allegations of the petition and of the findings of the verdict, was entered in favor of the bank.

It may be presumed that these proceedings were in due conformity with the practice in the courts of the State, in which no distinction is made between the legal and equitable side. But it is quite evident, from the nature and history of the case, as disclosed by the record, that the case was one in equity, and which, in the Circuit Court of the United States,

ought to have been prosecuted in regular chancery form, as prescribed by the rules in equity.

The suit was not brought to recover excessive taxes that had been paid under protest, nor for damages, nor to recover specific property, real or personal. Its object was to cancel or modify an assessment made by official persons. The relief prayed for was in the nature of a decree enjoining the collection of taxes. The verdict did not call for the payment of damages, or the surrender of the possession of land or chattels, but consisted of a finding that the assessment complained of should be reduced, in manner as prayed for in one part of the petition. The judgment was essentially a decree modifying the assessment and enjoining the officers from collecting the taxes as imposed.

The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles, and that although the forms of proceedings and practice in the state courts shall have been adopted in the Circuit Courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Bennett* v. *Butterworth*, 11 How. 669, 674; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Broderick will case*, 21 Wall. 503, 520.

It is true that the cases in which such strictures have been expressed have been usually those in which resort has been had to equitable forms of relief instead of legal remedies, and when defendants have thus been deprived of the constitutional right of trial by jury; but, so long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury and the law prescribed by the judge for the usual and legitimate prac-

tice of a court of chancery. How inadequate and incongruous the legal remedy is in a case like the present is shown by the so-called judgment. It does not adjudge a sum of money as due by the defendants to the plaintiff whose payment could be enforced by appropriate writs of execution, but it awards a judgment in favor of the plaintiff and against the defendants by decreeing a reduction or abatement of the legal assessments, there existing no legal writ by which the defendants can be compelled to respect or obey the decree.

It is, therefore, clear that the court below should have sustained the defendants' demurrer or exception, and dismissed the suit.

This view of the case takes from our cognizance the several errors assigned to the admission and rejection of evidence and to the charge of the court; nor are we called upon, with the record in its present shape, to decide whether questions were really presented which gave the Circuit Court of the United States jurisdiction, whether at law or in equity, at the suit of a national bank organized and doing business in the district in which the suit was begun.

The judgment of the court below is reversed and the cause remanded with directions to sustain the exception and dismiss the suit.

CARR *v.* FIFE.

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

No. 215. Submitted January 30, 1895. — Decided March 4, 1895.

It is too late to urge in this court stipulations between parties not brought to the attention of the court below.

The value of the matter in dispute, if not stated in the record, may, for the purpose of jurisdiction, be shown by affidavits.

The fact that a Circuit Judge, prior to his appointment, had been counsel for one of the parties in matters not connected with the case on trial, does not disqualify him from trying the cause.

Statement of the Case.

An objection that the receiver took part with the register on the hearing and decision of a case in the land office cannot be taken for the first time in this court.

Taking all the facts together, it is quite clear that the receiver and the register affirmatively found the fact of abandonment.

The decision of the land office upon the questions involved in this case was conclusive, unless the charges of fraud and conspiracy were sustained, and it is evident that the court below carefully considered the evidence on these points.

When a plaintiff seeks to invalidate a patent of land by averring misconduct on the part of officials in a contest case, a complete record of the proceedings is relevant and important.

In the absence of fraud and imposition the findings and decisions of the land office cannot be reviewed as to the facts involved.

In the District Court of the Second Judicial District of Washington Territory, in April, 1887, Anthony P. Carr filed a bill of complaint against W. H. Fife and others, including the executors of Edward S. Smith, deceased, seeking to set aside a patent of the United States to one Robert E. Sproul, issued on December 13, 1875, granting certain lands of the United States lying in the county of Pierce, and to have the defendants, who derived their titles to parts and parcels of said lands from the said Sproul, declared to hold the same in trust for the said plaintiff, and that they be required to execute conveyances thereof to the said plaintiff.

The defendants appeared and put in an answer and a cross-bill, to which the plaintiff demurred. On August 7, 1888, the demurrer to the answer was overruled and that to the cross-bill was sustained. An examiner was appointed and evidence was put in, and, on November 25, 1888, the cause was put down for hearing in the said District Court of the Second Judicial District of Washington Territory, and was submitted for decision on December 17, 1888. But before any decision was rendered, the Territory was admitted into the Union as a State. It was thereupon stipulated that the cause should be submitted to the Superior Court of Pierce County, State of Washington, on the pleadings, evidence, and briefs of counsel. Before the said Superior Court of Pierce County took any action the cause was, on May 26, 1890, at the instance of the defendants, under the provisions of section 23 of the act

approved February 22, 1889, 25 Stat. c. 180, pp. 676, 683, transferred to the Circuit Court of the United States for the District of Washington. On July 28, 1890, the plaintiff in the action moved the Circuit Court to remand the cause to the Superior Court of Pierce County, which motion was overruled, as was likewise a subsequent motion or petition to have the cause tried by the Circuit Judge, or, if he were unable to sit, by the District Judge for the District of Oregon. On January 28, 1891, a final decree was entered, dismissing the bill. A motion was made February 10, 1891, to vacate the decree and remand the cause to the Superior Court of Pierce County, upon the alleged grounds that the same had been improperly removed, and that the Circuit Court had not acquired jurisdiction thereof, because it had not been made to appear at the time of such removal that the matter in dispute exceeded, exclusive of interest and costs, the sum of two thousand dollars. The Circuit Court permitted affidavits to be filed on behalf of the defendants, averring that the matter in dispute largely exceeded the amount necessary to give the court jurisdiction, and then overruled the motion to vacate the decree and remand the cause. An appeal was then allowed to this court.

Mr. John Arthur, *Mr. Thomas Carroll*, and *Mr. Heber J. May* for appellant.

Mr. Galusha Parsons for appellees.

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

The ninth specification of error complains of the refusal of the court below to remand the cause to the Superior Court of Pierce County upon the showing that, after the admission of the State of Washington, it had been stipulated by the counsel of the respective parties that said cause might be tried in said Superior Court. But the record shows that the reasons assigned in the court below for the motion to remand did not

mention such a stipulation, and it is out of time and place to urge it in this court.

The tenth assignment asserts want of jurisdiction in the Circuit Court, at the time of entering the final decree, because the record did not contain a specific allegation that the matter in dispute exceeded the sum of two thousand dollars. If the record were defective in the particular mentioned, we think that the amendment by affidavits, disclosing that the value of the matter in dispute largely exceeded the jurisdictional amount, cured the defect. The procedure would have been more formal if the decree had been set aside, and renewed after the amendment had been made; but the term at which the decree was entered had not ended, so that the court still had power to permit an amendment of the record, and we do not feel compelled to reverse the decree because of the manner in which the court below exercised its power of amendment. Besides, it is not clear that the record was defective in the respect claimed. The suit was not one to recover a sum of money, but to decide a question of title to a considerable tract of land, and the plaintiff put in evidence in support of his claim, and of course before the decree was entered, tending to show that the land was worth more than ten thousand dollars; and if it be competent, as has always been held, to show by *ex parte* affidavits the amount of the value of the matter in dispute, it would seem that evidence to the same effect, deliberately put in by the very party now suggesting the defect, should be regarded as sufficient. It is also observable that the plaintiff, in his petition for an appeal, averred that the value of the property in dispute exceeded the sum of ten thousand dollars, and while, doubtless, that allegation, made for the purpose of showing that this court has jurisdiction on appeal, would not, of itself, supply the defect in the record of the Circuit Court, it is convincing that, in point of fact, the land in dispute was worth more than two thousand dollars, and that the plaintiff was not injured by the action of the court in permitting the record to be amended by affidavits supplying the formal averments of value.

Another error assigned is to the refusal of the court to

direct that the cause should be tried by the Honorable Lorenzo Sawyer, Circuit Judge, or in the event that it be found inconvenient for the Circuit Judge to try the cause, that the same be certified to the adjacent circuit of Oregon. The basis of this motion was an affidavit made by the plaintiff, alleging that the District Judge of the District of Washington, before whom the cause was about to come on for argument, had been, prior to his appointment as such judge, of counsel for some of the defendants.

The learned judge, in refusing the motion, stated that the motion was put upon the statement that he had been employed as an attorney by some of the defendants before his appointment to the office in matters not connected with the case, and that, as he was the only judge then present and able to try the cause, he was of opinion that it was his duty to do so.

Understanding then, as we do, that the ground of objection was that the judge had been, prior to his appointment, attorney for some of the defendants on matters not connected with the present case, we do not perceive that he was disqualified from trying the cause. In such a state of facts, the judge must be permitted to decide for himself whether it was improper for him to sit in the trial of the suit.

This was a proceeding in equity whereby Anthony P. Carr sought to have the defendants, who derived their titles to certain lands from Robert E. Sproul, to whom had been granted in 1875 a patent for said lands, declared trustees for his benefit on the ground that the patent had been improperly issued, and the substantial question in the case is as to what effect ought to be given to the proceedings and decision of the land office.

Appellant's first contention is that the tribunal that tried the case between Carr and Sproul was illegal in respect that instead of the register acting alone, the receiver took part in the hearing and decision. It is provided, in section 2297, Revised Statutes, that proof of abandonment is to be made out to the satisfaction of the register of the land office, and the record discloses that the evidence in the present case, on the question of abandonment, was put in before the register and the re-

ceiver, and that the finding was signed by both officers. No objection, however, seems to have been made while the hearing was in progress before them, nor was the participation of the receiver made a ground of exception in the appeal to the Commissioner of the General Land Office, or in the further appeal to the Secretary of the Interior. Nor was such participation complained of by the plaintiff in his bill of complaint, or called to the attention of the court below. We do not consider it necessary to decide whether in such an inquiry in the land office the receiver may validly take part, because we think an objection on that ground is made too late in this court.

The next position taken by the appellant is that the register and receiver went outside of their jurisdiction, which it is claimed was restricted to the question of abandonment, and recommended the cancellation of Carr's entry on other grounds than that of abandonment.

An examination of the proceedings in the land office does not sustain this position. They began with Sproul's application for a contest, in which Carr's abandonment of the tract is alleged. This was followed by the notice from the register and receiver to Carr that such a contest had been initiated, and fixing a time and place for him to attend and "furnish testimony concerning said alleged abandonment," and the record discloses that a large amount of evidence was put in on that issue.

It is true that the register and receiver, in their written decision, made August 18, 1873, wherein they decided in favor of the contestant, Sproul, used the following language: "From these occasional visits to the claim we can but draw the conclusion that said A. P. Carr did not wholly abandon his said claim, but we are more strongly of the opinion that the utter disregard of the spirit of this beneficent law, which gives to the poor man upon easy and reasonable terms what he could not otherwise obtain, would in equity be sufficient ground for cancellation of the homestead entry No. 1368, of A. P. Carr." Standing alone, this language would seem to give some color to the contention that the officers had failed to find the fact

of abandonment, and had placed their decision on merely equitable grounds. But when the statement quoted is read in connection with the entire report or decision, it is quite plain that the fact of abandonment was affirmatively found. The language criticised was elicited by evidence adduced by Carr, by which it was sought to show continuous possession, but which the officers regarded and found to rather show a want of good faith on the claimant's part — a mere pretended compliance with the law; and hence the expressions used were really the very opposite, in their actual meaning, to that now attributed to them. In effect it was said that, even if, instead of exacting strict legal proof by Carr of his compliance with the law, the case were to be equitably considered, the conclusion must still be that his entry should be cancelled.

This finding by the register and the receiver was approved by the Commissioner of the General Land Office, and subsequently by the Acting Secretary of the Interior.

Finally, it is contended that the court below erred in not going behind the decision of the Land Department, and in not giving effect to complainant's evidence as if the controversy were wholly independent of that decision.

An inspection of the opinion of the court below, however, discloses that the judge, while properly holding that the decision of the land office was conclusive unless the charges of conspiracy and fraud contained in the appellant's bill were sustained, yet considered the evidence with evident care.

Objection was made in the court below to the admission in evidence of the record in the case of *Anthony P. Carr* v. *The Tacoma Land Company*, as incompetent and irrelevant. As the contest in that case was about a different piece of land, it is not easy to see what purpose was served by putting the record in evidence — apparently to base thereon a cross-examination of the appellant, going to show that his place of residence was not consistent with his claim in this case. But it does not appear that the court deemed this evidence as having the least importance. It is not even referred to in the opinion, and its admission cannot, in any point of view, be deemed ground for a reversal of the decree below.

So, too, we are unable to see that there was error in admitting the record of the proceedings in the contest in the land office. The effort is made to sustain this objection by citing *Smelting Co.* v. *Kemp*, 104 U. S. 636, 640. But in that case the offer was to show, in an action at law, a record of the proceedings in the land office in order to impeach the patent, and the ruling was that, as against a patent regular upon its face, and in an action at law, such an offer was inadmissible. But here, when the plaintiff was endeavoring, by a bill in equity, to invalidate a patent by averring misconduct on the part of the officials in the contest case, a complete record of their proceedings was not only relevant, but of the utmost importance, if the incidents attending the contest in the land office were to be at all a subject of inquiry.

We cannot undertake to review the evidence in detail, but we have read it in the light afforded by an able brief filed on behalf of the appellant, and have been unable to find any satisfactory proof of fraud and imposition, but for which the appellant would have been entitled to himself receive the patent.

Nor can we accede to the argument that the Land Department fell into errors of law, by disregarding the appellant's evidence of the nature of his entry and of his character as a soldier applicant. The question really was whether or not he had abandoned the tract of land and had failed to comply with the directions of the law, and that question was found against the appellant.

Of course, in the absence of fraud and imposition, the findings and decision of the land office cannot be reviewed as to the facts involved, and the court below would not have been warranted in interfering with the title of the patentee and his vendees. *Lee* v. *Johnson*, 116 U. S. 48.

These views lead to the conclusion reached by the court below, and render it unnecessary to consider the defence of the statute of limitations discussed in the appellee's brief.

The decree of the Circuit Court is

Affirmed.

NATIONAL CASH REGISTER COMPANY *v.* BOSTON CASH INDICATOR AND RECORDER COMPANY.

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

No. 155. Argued January 17, 1895. — Decided March 4, 1895.

Letters patent No. 271,363, issued January 30, 1883, to James Ritty and John Birch for a cash register and indicator, are valid, and are infringed by the defendant's machine.

This was a bill in equity for the infringement of letters patent No. 271,363, issued January 30, 1883, to James Ritty and John Birch for a "cash register and indicator."

The invention, as stated in the specification —

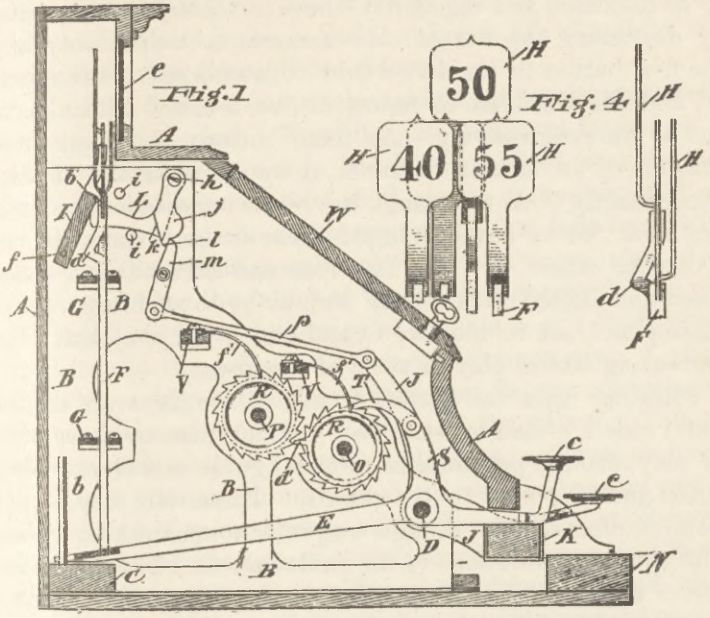
"Relates to an improvement in cash registers and indicators designed for the use of storekeepers and others as a means of accurately registering the total cash receipts for any given period of time — as a day, for instance — and for indicating to the customers that the amount paid has been registered by disclosing to their view such amounts upon figured tablets.

"The arrangements of the parts and operation of the machine are such that no tablet can be exhibited without its value being counted upon the registering mechanism, and whenever any tablet is disclosed it remains so until the machine is operated to disclose a second tablet.

"The novelty of our invention consists in the construction, combinations, and arrangements of the various parts, as will be herewith set forth and specifically claimed."

The following drawing exhibits such particulars of the patent as are pertinent to this suit:

Statement of the Case.



The material parts of the specification are as follows:

"We provide any suitable box or case, A, ornamented as desired, and of the general shape indicated, though its shape and ornamentation may be varied infinitely. In this outer case is fitted a metal framework, consisting chiefly of two upright sides, B, united by a cross-bar, C, and by the shafts and bars which support the operating mechanism.

"In the lower portion of the frame, and extending horizontally across it, is a rod or shaft, D, supported by and aiding to connect the sides B of the frame. Upon this shaft are hung a series of parallel keys, E, of metal, made heavier in the rear, so as to remain in and return to the position indicated in Fig. 1 by their gravity alone, without the use of springs or other devices. In the present instance twenty of these keys are shown, though any number may be employed. Each key has upon its front end, which extends through and projects from an opening in the front of the case or frame, a button, *c*, having marked upon it a figure to correspond with the value intended

to be indicated and registered whenever that key is operated by depressing the button. In a machine with twenty keys the first button to the left would be numbered 5, the second 10, and the third 15, to represent five, ten, and fifteen cents, and so on progressively. As these buttons are about three-quarters of an inch in diameter, it would make the machine unnecessarily wide to arrange the whole series side by side in one bank; so we have arranged them in two banks, the one above the other. . . . The rear end of each key is flattened and slotted at its outer end, so as to embrace vertical guide-pins *b*, set in the bar C, and which aid the shaft D in preventing lateral play or twist of the keys.

"Resting upon the flattened ends of the keys are vertical metal rods F — one for each key — which pass and have vertical play through perforations in metal guide-bars G, extending across and supported by the sides B. These rods may be any shape in cross-section, though we prefer to make them square, with square perforations in the guide-bars G. The upper portion of each rod, just above the upper bar G, is bent to form a knuckle or shoulder, *d*, upon its rear side, which has bevelled or inclined operating faces, for a purpose to be presently explained.

"Suitably secured to the top of each rod is a tablet, H, of thin flat metal, and upon the face of each tablet is a number corresponding with the number upon the key over whose rear end the rod of that tablet rests.

"Thus the tablet of the rod resting upon the key whose button is marked 5 is likewise marked 5, and so on through the series. In order to get the tablets into as narrow a space as possible, and thus not make the machine wider than necessary, their stems are bent so that the tablets can overlap each other as shown in Fig. 4, and yet each can be operated without interfering with another.

"In the upper portion of the case is a large horizontal opening extending across the front of the case and covered with transparent glass *e*, Fig. 1, and when the keys are in their normal position of rest, with the rods F resting upon their rear ends, all of the tablets are hidden from view below the lower

edge of the opening *e*; but when any key is pressed down by means of its button the rod of that key is raised and its tablet exposed to view through the glass *e*.

"In Figs. 1 and 4 one of the tablets is thus shown raised up and exposed to view. Now, it is an important feature of our machine that after a key has been operated and its tablet exposed to view such tablet shall remain up and exposed until another key is operated, whereupon the first falls back out of view and the second remains exposed, and so on, thus always keeping in view the tablet of the key last operated. To effect this result we pivot, by means of trunnions or a shaft extending between the sides B, a forwardly-inclined wing, I, pivoted at its lower edge, as at *f*, and resting at its upper edge against the rear sides of the upper portions of the rods F. This wing extends back of all of the rods, and is free to vibrate on its pivotal axis *f*. It is yieldingly held against the rods by any suitable spring, a spiral spring being shown for that purpose in Fig. 2, secured at one end of the wing and to the side B of the frame. Just on the inner sides of the frames B, and pivoted upon the shaft D, are flat arms J, extending upward and rearward and downward and forward of their pivotal points. The front ends of these arms extend into the opening made for the keys in the front of the case A, and are connected by a bar K, extending entirely across this opening and resting up against the under sides of all the keys. Of course when any one of the keys is depressed the bar K is likewise carried down, and the upper portions of the arms J are vibrated forward. . . . To return the bar J when the key is released, and to assist the key itself to return, any suitable spring may be employed.

"Pivoted at *h* upon the right-hand side of the frame B, Fig. 1, is a bell-crank tripping-arm, L, with the rear end rounded and resting against the upper portion of the front side of the wing I. Its vibration is limited by two pins or detents, *i*, as shown, and upon the same pivot, *h*, is hung a follower, *j*, whose lower end extends below the elbow of the bell-crank, and whose rear edge rests against a shoulder, *k*, upon the bell-crank. The lower end of this follower has a bevelled en-

gaging-nose, *l*, against which the upper end of a trigger, *m*, pivoted at or near its middle, as at *o*, to the side B rests. The lower end of this trigger is connected to the upper end of the arm J on that side of the machine by a link, *p*. The opposite arm . . . is connected by a similar link to similar tripping mechanism for operating the hammer of a bell or gong, which is secured in any suitable manner to the side of the frame.

"Now, the operation of thus much of the machine is as follows: When any key is pressed down its rod and tablet are raised, and the elbow *d* of the rod, in rising, aids in pressing back the wing I; but to aid the elbow the arm J on the right, which, as before explained, is drawn forward whenever a key is pressed, imparts motion to the link *p* and trigger *m*, whose upper end, acting on the nose *l* of the follower *j*, presses it back, and with it the bell-crank L, which is thus forced against the wing and presses it back. Now, the parts are so arranged that when the lower side of the elbow *d* is just above the top edge of the wing the key has completed its downward stroke, and is arrested by the front bar N of the case, the trigger *m* has passed beyond the nose *l* of the bell-crank, so that the latter swings back out of the way, and the spring *a'* draws the wing forward under the elbow *d*, so that the latter rests upon the upper edge, as seen at *b'*, Figs. 1 and 2, and there remains, thus retaining the tablet and rod of the operated key elevated. Now, upon releasing the key it falls backward to its normal position by gravity, and is aided by the spring *g*, Fig. 2, which returns the bar K and arms J. The follower *j*, being free to swing forward without moving the bell-crank, permits the trigger *m* to flip it up and pass under its nose to its normal position. During this operation the opposite arm . . . has in like manner actuated the hammer of the gong, which is sounded every time a key is depressed to its farthest limit, and only then, and thus gives notice to the customer that the machine has been properly operated. Whenever the same key is successively operated its rod and the tablet remain up and exposed to view; but when a different key is operated the tablet of the pre-

vious one is released and falls back out of sight, and the tablet of the operated key remains up and exposed."

The remainder of the specification relates to the registering or recording mechanism which is not in issue here. The only claim alleged to have been infringed is the first, which reads as follows:

"1. In a registering and indicating machine, the combination, with a series of indicating-tablets operated by a series of keys, of a series of rods, each provided with a detent or shoulder and carrying one of the aforesaid tablets, and a supporting-wing with connecting mechanism, whereby upon operating any one of the keys the wing is so moved as to permit the passage of the rod, and whereby upon the release of the keys the wing engages with and holds up the tablet-rod and tablet, substantially as described."

The answer put in issue principally the question of infringement, and, upon a hearing upon pleadings and proofs, the Circuit Court found this issue in favor of the defendant, and dismissed the bill. Plaintiff thereupon appealed to this court.

Mr. Edward Rector and *Mr. Lysander Hill* for appellant.

Mr. Frederick P. Fish, (with whom was *Mr. W. K. Richardson* on the brief,) for appellees.

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

In the past fifteen years, cash registers have become extensively used in retail shops, where each sale is small in amount, such as drug stores, cigar stands, restaurants, and other small establishments, for the purpose of affording a convenient deposit for the cash received, and of preserving a record of every sale made during each day, and of the amount received therefor. The correspondence between the amount indicated by the register and the amount in the drawer shows whether each sale has been properly accounted for. It thus enables the

proprietor to ascertain at the close of each day's business the amount of sales, and also operates as a check upon the dishonesty of clerks who are held accountable for the amount of money indicated by the register.

To fulfil all its requirements, the cash register and indicator should perform the following functions:

1. It should register the number of sales. This is done upon somewhat the same principle as a steam engine records its own revolutions.

2. It should also register the amount of each sale, and to this end it is provided with a series of keys representing different amounts from five cents to five dollars, by the pressure of which keys a corresponding amount is registered, and added to the previous aggregate of small amounts upon a revolving cylinder.

3. It should also indicate to the customer the proper amount of his purchase by exposing a tablet containing such amount in large figures, which tablet should remain in sight until the next sale is made. If the amount of such sale is a dollar and a fraction of another dollar, two such tablets are exposed, the aggregate of which represents the proper amount. It is necessary in each case that the tablet should remain exposed until another key is touched, when it ought to disappear, that the next customer may recognize the amount of his purchase. The customer is thus made to a certain extent an involuntary detective of the action of the clerk making the sale.

4. The pressure upon the key should also ring a bell, to call the attention of the customer to the exposed indicator or tablet.

5. The pressure of the key is also intended to unlock, and by the aid of a spring, to throw open, the money drawer, which should be shoved back and closed after each sale is made.

6. In some machines a record is made of the number of times the lid is opened, that the proprietor may know whether the box has been tampered with.

If the mechanism does its work properly, it should operate as a complete check upon any attempt at embezzlement, by the salesman, of the funds.

Opinion of the Court.

The patent in suit covers the registering or recording, as well as the indicating mechanism; but as the only claim of the patent alleged to be infringed deals with the indicating mechanism alone, no further reference to the other features of the patent is necessary. This mechanism consists of keys, E, having figures representing values upon their front ends, *c*, and hinged upon a horizontal shaft, D, extending across the machine. The rear end of each key is flattened and slotted to receive the lower ends of vertical rods, F, carrying tablets, H, which are labelled with a figure corresponding with that upon the key. The depression of the front ends of the keys raises the rear ends, together with the rods attached thereto, and brings the tablet into view. Back of these rods is a wing, I, pivoted at its lower edge, *f*, inclined forward, and resting at its upper edge against the rear sides of the upper parts of the rods F. Each rod contains an elbow or projection, *d*, which, as the rod rises, presses back the wing I, and when the pressure is taken off the key, the elbow catches upon the upper side of the wing, and thus holds the tablet up and exposed to view until the key is depressed again, when the wing is again pressed back, the elbow is relieved, and the tablet falls.

To secure a more perfect operation of this wing, a bar, K, is extended across and directly underneath the front ends of the keys, so that whenever any key is depressed this bar is also depressed. Connected with this bar is a train of mechanism, which appears in the drawing and is described in the specification, but which is not necessary to be set out here in full. This mechanism operates directly upon the wing I, and secures beyond peradventure the falling of the tablet, before the elbow of the next tablet rod has passed the upper edge of the wing. This subsidiary train of mechanism, operating directly upon the wing, and independently of the elbow in the rods, is the special feature of the Ritty and Birch patent.

To answer satisfactorily the question of infringement, it is necessary to refer to the state of the art, and to distinguish that which was already well known at the date of this patent, from that which Ritty and Birch contributed by their invention. While the novelty of their device is not directly at-

tacked, it is claimed that, in view of certain prior patents, their patent is subject to limitations which affect materially the construction of the first claim, and show defendant's machine not to be an infringement.

The earliest patent to which our attention is called, and which may be said to represent the infancy of the art, is that to James Russell, October 10, 1829, for an improvement in bell hanging. This patent, which was issued long before electricity was put to any serviceable use, was intended to be employed in hotels or other buildings, where a series or row of bells had theretofore been used to connect each room with the office. These bells had been hung upon wires or springs, and, when rung, oscillated long enough to call the attention of the attendant to the number of the room with which they were connected. The Russell patent substituted, for the familiar row of bells in the office, a single bell, in a box, with a series of indicators or tablets which protruded from grooves in the box as each bell was sounded. These indicators were mounted upon notched plates of metal, and as each indicator was pulled out by its wire, the plate was caught by a pivoted wing or bar, and the tablet held outside of the box until the next bell was sounded, when it fell back to its place. The wing coöperated with the notch in the metallic plate of the tablet precisely as the wing in the Ritty and Birch patent coöperates with the elbow of the tablet rod, and holds it up until the next tablet is raised. The wing is an obvious anticipation of that in the Ritty and Birch patent, and the whole device differs from it in principle, only in the absence of the connecting mechanism between the keys and the pivoted wing.

The British patent to Henry Pottin of May 28, 1877, for a cash register exhibits, in place of the pivoted wing of the Russell patent, a sliding bar operated by keys. This sliding bar is moved aside by a shoulder in each tablet rod as the rod is raised. After the shoulder has passed a coöperating latch or trip-lever, pivoted upon the bar, the latter is brought back to its position by a spring, and the tablet remains exposed to view. When the key is again depressed, another tablet rod rises, but before its shoulder has passed the coöperating latch

the first tablet falls upon the latch, which gives way to allow the rod to fall, when the last rod rises and remains exposed to view. These latches are weighted in such manner as to remain in place as the rod rises, but to give way when it is desired that the rod shall fall. The device is an ingenious one, but is chiefly valuable in this connection as showing that, prior to the Ritty and Birch patent, the sliding bar was well known as an equivalent for the pivoted wing. The device of the latches to aid in moving the bar as the tablet rod rises, and to give way at the proper moment to allow the rod to fall, as the next one rises, contains a suggestion of the connecting mechanism of the Ritty and Birch patent, but is in no sense an anticipation of it. It was intended, as in the Ritty and Birch machine, to release with certainty the exposed tablet, when another one was lifted, and it appears to accomplish that result satisfactorily, but by a wholly different means from that employed by Ritty and Birch. Each tablet rod requires a separate weighted latch, and in case of a large number of keys would take up too much room to be conveniently available as a cash register. It is subject to another difficulty, that if two keys are depressed at once, and their corresponding rods are lifted and caught upon the supporting bar, indicating a sale represented by two tablets combined, a subsequent operation of either one of these keys will fail to release either indicator, and both will remain exposed to view. The shoulders of both rods are above and resting upon the supporting bar, and as those shoulders are the only thing that can move the bar, the latter can be moved and the tablets allowed to fall only by the operation of some other key.

The patent to Michael Campbell of February 14, 1882, exhibits a modification of the Pottin sliding bar, the tablets consisting of metal plates sliding up and down between grooves, each tablet having at its upper end a horizontal finger, which engages with a swinging hook. These hooks are all fitted in slots of a transverse sliding bar, mounted at either end in guides upon the wall of the casing, and actuated in one direction by a spring, and in the other by the pressure of the hooks, which are thus caught by the horizontal finger

of the tablet. The tablet rods are raised by the key levers, with which they are connected by cords and pulleys at their rear ends. Whenever any tablet is raised by depressing the front end of the key, the finger on its upper end is caught by the hook above it, the sliding bar moved against the spring, and the tablet thereby held up. When another key is depressed, and its tablet lifted into engagement with its hook, the latter, through the medium of the sliding bar connecting all the hooks, disengages the first tablet, and permits it to drop out of view. It differs from the Pottin machine in the manner in which the sliding bar is operated, and resembles the Ritty and Birch patent only in the fact that the tablets are raised by the rear ends of the keys acting in connection with the vertical rods, although even this connection is indirect through the intervention of cords and pulleys. It may well be doubted whether this patent exhibits a practically operative combination, since the mechanism is somewhat complicated, and apparently liable to get out of order. The patent covers not only this indicating device, but a mechanism for opening the drawer automatically; and although the patent is owned by the plaintiff, it has never used its indicating mechanism, and the statement of the inventor himself is that the original model is the only machine containing such mechanism that was ever built.

Other patents were put in evidence by the defendant having a relation more or less remote to the patent in suit, but designed rather to show that some form of connecting mechanism had been previously used for other purposes — such, for instance, as ringing the bell at the other side of the machine, moving the carriage of a typewriter, or opening the cash drawer, all by means of a common bar extending above or beneath the whole line of keys, the depression of any one of which not only performs its individual function of raising a tablet, printing its particular letter upon a typewriter, or registering an amount corresponding to that indicated upon the face of the key, but also depresses a common bar, which operates this mechanism. Indeed, it must be admitted that it was no longer new in the art that each key should perform

not only its individual work of adding, writing, or indicating, but also that all the keys should perform some one common operation. In none of the prior patents, however, is there such a connecting mechanism for the purpose indicated in the Ritty and Birch patent.

To sum up the state of the art, then, at the date of the Ritty and Birch patent: The use of keys to raise vertical rods carrying tablets was not only well known, but lies at the foundation of every cash register to which our attention has been called. It was also old to use a pivoted wing or bar to catch a projection or elbow of the vertical rod, for the purpose of holding the tablet exposed to view, until another tablet was raised. So, too, the use of a sliding bar actuated in one direction by a spring and in the other by a projection from the vertical rod or its tablet, was a recognized equivalent of the pivoted wing. And, finally, a connecting mechanism operated by each one of the keys by means of a bar over or underneath them had been previously used for ringing the bell, opening the cash drawer, and in other machines for other purposes.

What then was the contribution of this patent to the art? It was found that not only must the machine be constructed with extreme and almost impossible accuracy in order to operate as desired, relying on the shoulders alone to move the wing, but that, when the machine was put to use, some of the keys would be used much oftener than others, and the shoulders on the tablet rods belonging to these keys would become worn so that, when one of these keys was operated immediately after one that was less frequently used, the shoulder on its rod would not move the wing back far enough to release the tablet rod of the infrequently used key, which was resting on the wing. So, too, any accumulation of dust, dirt, or oil upon the projections or bar would render their operation uncertain. The consequence was that two tablets might be in view of the customer at the same time. This not only failed to indicate to the customer the amount of his purchase, but afforded to the salesman an opportunity of deceiving the proprietor as to the actual amount of his sales. Indeed, it requires no expert to see that where all the rods are constructed alike, and the

fall of one rod is made to depend exclusively upon the elevation of another the mechanism would soon become so worn as to be inoperative. To obviate this, Ritty and Birch subdivided the power exerted by the keys in the operation of the pivoted wing, and caused such wing to be put in motion not only by the elbow of the rod, but by the simultaneous, though wholly independent, action of a bell-crank lever, which receives its impulse from the bar beneath the keys, and, with its other arm, shoves back the upper side of the wing far enough to permit the tablet to fall and resume its original position in time to suffer the wing to fall back and catch the elbow of the last tablet rod, and hold it up. It is insisted, however, that, as the connecting mechanism had been previously used upon the other side of the machine to ring the bell and to open the cash drawer, the employment of a similar mechanism for actuating the pivoted wing was a case of mere double use, and, if patentable at all, must be restricted to the exact device used, and cannot be construed to cover a similar train of mechanism for moving the sliding bar.

It did, however, require thought to conceive the idea (1) that a remedy for the existing defects in the machine lay in the independent operation of the wing; and (2) that such operation could be secured by a mechanical connection with the keys. Given these conceptions, it was more a matter of mechanical skill than of invention to devise such connection, since a similar train of mechanism had been operated by the keys for other purposes. It is insisted, however, that, inasmuch as such mechanical connection was well known before, and had been used for analogous purposes, it is a mere case of double use to employ a similar contrivance to actuate the wing. While the use was to a certain extent an analogous one and the mechanism was probably suggested by that employed to ring the bell, there was nothing to suggest that the object to be attained, viz., the more perfect action of the tablet rods, could be accomplished by subdividing the force exerted by the keys, and bringing a portion of their power to bear directly upon the wing itself instead of devoting the whole of such power to the act of raising the rods, and

depending solely upon the elbows of the rods to operate the wing. There is no conflict here with the principle laid down by this court in *Knapp* v. *Morss*, 150 U. S. 221, 227, and *Wollensak* v. *Sargent*, 151 U. S. 227, that the end or purpose sought to be accomplished by a device is not the subject of a patent, but only the new and useful means for obtaining that end, since the end or purpose to be accomplished in this case was not the moving of the wing, but the more perfect operation of the rods; and the means used to accomplish it was a subdivision of the power exerted by the keys, and the application of a portion of it directly to the wing itself. The fallacy of defendant's argument in this connection lies in the assumption that the object to be accomplished was the moving of the wing, whereas this was only a means for the ultimate purpose, viz., the more satisfactory operation of the rods. Indeed, this use of the connecting mechanism can hardly be termed analogous to such as similar mechanisms had been previously used for; but even if it were, the results are so important, and the ingenuity displayed to bring them about is such that we are not disposed to deny the patentees the merit of invention. The combination described in the first claim was clearly new.

The cases cited by defendant upon the subject of double use are not applicable; such, for instance, as *Brown* v. *Piper*, 91 U. S. 37, in which a claim for preserving fish and other articles in a closed chamber by means of a freezing mixture, was held to have been anticipated by a similar patent for preserving bodies, and also by the ordinary ice-cream freezer; *Pennsylvania Railroad* v. *Locomotive Truck Company*, 110 U. S. 490, in which a patent for employing a certain truck for locomotive engines was held to be invalid in view of the employment of a similar truck for railroad cars; *Aron* v. *Manhattan Railroad Co.*, 132 U. S. 84, wherein a patent for simultaneously opening two gates at the end of two adjoining passenger coaches was held invalid in view of previous patents for opening a single gate, and devices to open and close apertures at a distance from the operator *Wollensak* v. *Sargent*, 151 U. S. 221, wherein a patent for opening and

closing a transom over a door by means of a vertical rod was held to have been anticipated by a patent for opening and closing a series of passenger car ventilators or transoms by a horizontal rod; *Blake* v. *San Francisco*, 113 U. S. 679, wherein the adaptation of an automatic valve, previously known and in use to a steam fire engine, was held not to involve invention; and *St. Germain* v. *Brunswick*, 135 U. S. 227, wherein a revolving rack for billiard cues was held to be anticipated by such revolving contrivances as dining-tables and bottle castors. In all these cases the prior uses were such obviously analogous ones that there could be no doubt of the invalidity of the patent.

In the defendant's machine the sliding bar of the Campbell and Pottin patents is substituted for the pivoted wing of the Russell and the Ritty and Birch patents, but, as before observed, they were well-known equivalents for each other, and the mechanism by which they had theretofore been operated was also well known. They were apparently subject to certain defects in their operation, which impaired their efficiency, and required the use of an independent means to secure the release of the first rod before the second one was raised into place. Whether this were done by the simultaneous action of the elbow of the rod and that of the connecting mechanism upon the wing, as in the Ritty and Birch patent, or by the prior action of such mechanism, as in defendant's device, is immaterial, so long as such action is independent of the action of the rods themselves. We have already stated how this was accomplished by the Ritty and Birch patent. Defendant also employed a universal bar operated by each key, corresponding with the bar K of plaintiff's patent, but located above the keys instead of beneath them, and back of the shaft upon which the keys are pivoted instead of in front of it. The operation of the keys is, therefore, to raise this bar instead of depressing it. A rod projecting from the end of this bar engages with the arm of a bell-crank lever, the other arm of which is so connected with an arm of the sliding bar projecting downwards that the depression of the key moves the bar to one side far enough to release the tablet rod already

raised before the lug on the second or rising rod has passed the sliding bar. When the second rod has risen to its full height, the sliding bar is released from the action of the bell-crank lever, and is drawn back to its place by a spring, in time to hold the second rod up by a lug on the bar, corresponding to the lug on the rod. The operation of the two devices is the same, except that in the Ritty and Birch patent the action of the connecting mechanism in pushing back the pivoted wing is simultaneous with, and to a certain extent aided by, the elbow of the rod, while in defendant's device the action of the connecting mechanism in moving the bar is exclusive of any assistance from the rod. But, as already observed, this simultaneous action is a wholly immaterial feature of the Ritty and Birch patent. While the details of the defendant's machine are quite different from that of the plaintiff, the underlying principle of releasing the first tablet before, or simultaneously with, the elevation of the second tablet by the aid of an independent train of mechanism put in motion by the depression of the key, is precisely the same. This principle being already known, the contrivance of a connecting mechanism which should operate to move a sliding bar as the pivoted wing of the Ritty and Birch patent was moved, was a comparatively easy matter, though, perhaps, involving invention to a limited degree. In a word, there were two known methods of accomplishing the same result — a pivoted wing and a sliding bar. Ritty and Birch invented a train of mechanism to operate the pivoted wing; defendant adopted a similar method to operate a sliding bar. Had defendant also invented the sliding bar and applied this mechanism to it, the case would have fallen within our ruling in *Aron* v. *Manhattan Railroad Co.*, as the adoption of a different means of accomplishing the same result. But the means in this case being well-known equivalents for each other, we think the charge of infringement is made out.

The decree of the court below is, therefore,

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

GOLDEY *v.* MORNING NEWS.

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

No. 55. Argued and submitted December 13, 1894. — Decided March 11, 1895.

Section 1011 of the Revised Statutes, as amended by the act of February 18, 1875, c. 80, providing that there shall be no reversal by this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court," does not forbid the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant, though depending on the sufficiency of the service of the writ.

In a personal action brought in a court of a State against a corporation which neither is incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, cannot be recognized as valid by the courts of any other government.

A corporation sued in a personal action in a court of a State, within which it is neither incorporated nor does business, nor has any agent or property, does not, by appearing specially in that court for the sole purpose of presenting a petition for the removal of the action into the Circuit Court of the United States, and by obtaining a removal accordingly, waive the right to object to the jurisdiction of the court for want of sufficient service of the summons.

This was an action for a libel, claiming damages in the sum of $100,000, brought in the Supreme Court of the State of New York for the county of Kings, by Catherine Goldey, a citizen of the State of New York, against The Morning News of New Haven, a corporation organized and existing under the laws of the State of Connecticut, and carrying on business in that State only, and having no place of business, officer, agent or property in the State of New York.

The action was commenced January 4, 1890, by personal service of the summons in the city and State of New York upon the president of the corporation, temporarily there, but a citizen and resident of the State of Connecticut; and on January 24, 1890, upon the petition of the defendant, appear-

ing by its attorney specially and for the sole and single purpose of presenting the petition for removal, was removed into the Circuit Court of the United States for the Eastern District of New York, because the parties were citizens of different States, and the time within which the defendant was required by the laws of the State of New York to answer or plead to the complaint had not expired.

In the Circuit Court of the United States, the defendant, on February 5, 1890, appearing by its attorney specially for the purpose of applying for an order setting aside the summons and the service thereof, filed a motion, supported by affidavits of its president and of its attorney to the facts above stated, to set aside the summons and the service thereof, upon the ground "that the said defendant, being a corporation organized under the laws of the State of Connecticut, where it solely carries on its business, and transacting no business within the State of New York, nor having any agent clothed with authority to represent it in the State of New York, cannot legally be made a defendant in an action by a service upon one of its officers while temporarily in said State of New York." Thereupon, that court, after hearing the parties on a rule to show cause why the motion should not be granted, "ordered that the service of the summons herein be, and the same is hereby, set aside and the same declared to be null and void and of no effect, and the defendant is hereby relieved from appearing to plead in answer to the complaint or otherwise herein." 42 Fed. Rep. 112. The plaintiff sued out this writ of error.

Mr. Mirabeau L. Towns, for plaintiff in error, submitted on his brief.

Mr. Henry B. B. Stapler for defendant is error.

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

This writ of error presents the question whether, in a personal action against a corporation which neither is incorpo-

rated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation.

The defendant in error has interposed a preliminary objection that the judgment of the Circuit Court upon this question cannot be reviewed, because of the provision of the statutes, that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat. § 1011, as amended by Act of February 18, 1875, c. 80; 18 Stat. 318. But that provision, which has been part of the judiciary acts of the United States from the beginning, has never been, and in our opinion should not be, construed as forbidding the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant, though depending on the sufficiency of the service of the writ. Act of September 24, 1789, c. 20, § 22; 1 Stat. 85; *Pollard* v. *Dwight*, 4 Cranch, 421; *Harkness* v. *Hyde*, 98 U. S. 476; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194.

Upon the question of the validity of such a service as was made in this case, there has been a difference of opinion between the courts of the State of New York and the Circuit Courts of the United States. Such a service has been held valid by the Court of Appeals of New York. *Hiller* v. *Burlington & Missouri Railroad*, 70 N. Y. 223; *Pope* v. *Terre Haute Co.*, 87 N. Y. 137. It has been held invalid by the Circuit Courts of the United States, held within the State of New York; *Good Hope Co.* v. *Railway Barb Fencing Co.*, 23 Blatchford, 43; *Goldey* v. *Morning News*, 42 Fed. Rep. 112; *Clews* v. *Woodstock Co.*, 44 Fed. Rep. 31; *Bentlif* v. *London & Colonial Corporation*, 44 Fed. Rep. 667; *American Wooden Ware Co.* v. *Stem*, 63 Fed. Rep. 676; as well as in other circuits. *Elgin Co.* v. *Atchison &c. Railway*, 24 Fed. Rep. 866; *United States* v. *American Bell Tel. Co.*, 29 Fed. Rep. 17; *Carpenter* v. *Westinghouse Co.*, 32 Fed. Rep. 434; *St. Louis Co.* v. *Consolidated Barb Wire Co.*, 32 Fed. Rep. 802; *Reifsnider*

v. *American Publishing Co.*, 45 Fed. Rep. 433; *Fidelity Co.* v. *Mobile Railway*, 53 Fed. Rep. 850. It becomes necessary, therefore, to consider the question upon principle, and in the light of the previous decisions of this court.

It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. *D'Arcy* v. *Ketchum*, 11 How. 165; *Knowles* v. *Gaslight Co.*, 19 Wall. 58; *Hall* v. *Lanning*, 91 U. S. 160; *Pennoyer* v. *Neff*, 95 U. S. 714; *York* v. *Texas*, 137 U. S. 15; *Wilson* v. *Seligman*, 144 U. S. 41.

For example, under the provisions of the Constitution of the United States and of the acts of Congress, by which judgments of the courts of one State are to be given full faith and credit in the courts of another State, or of the United States, such a judgment is not entitled to any force or effect, unless the defendant was duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. Constitution, art. 4, sec. 1; Acts of May 26, 1790, c. 11, 1 Stat. 122, and March 27, 1804, c. 56, 2 Stat. 299; Rev. Stat. § 905; *Knowles* v. *Gaslight Co.*, and *Pennoyer* v. *Neff*, above cited.

If a judgment is rendered in one State against two partners jointly, after serving notice upon one of them only, under a statute of the State providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another State, or in a court of the United States, against the partner who was not served with process. *D'Arcy* v. *Ketchum*, and *Hall* v. *Lanning*, above cited.

So a judgment rendered in a court of one State, against a corporation neither incorporated nor doing business within

the State, must be regarded as of no validity in the courts of another State, or of the United States, unless service of process was made in the first State upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another State, and only casually within the State, and not charged with any business of the corporation there. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *St. Clair* v. *Cox*, 106 U. S. 350, 357, 359; *Fitzgerald Co.* v. *Fitzgerald*, 137 U. S. 98, 106; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194; *In re Hohorst*, 150 U. S. 653, 663.

The principle which governs the effect of judgments of one State in the courts of another State is equally applicable in the Circuit Courts of the United States, although sitting in the State in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments. *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 733.

For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court.

It was contended, in behalf of the plaintiff, that the defendant, by filing in the state court a petition for the removal of the case into the Circuit Court of the United States, had treated the case as actually and legally pending in the court of the State, and had waived all defects in the service of the summons. This position is supported by a decision of Mr. Justice Curtis in *Sayles* v. *Northwestern Ins. Co.*, 2 Curtis, 212; by a dictum of Chief Justice Chase in *Bushnell* v. *Kennedy*, 9 Wall. 387, 393; by opinions of Judge Coxe in *Edwards* v. *Connecticut Ins. Co.*, 20 Fed. Rep. 452, and Judge

Sage in *Tallman* v. *Baltimore & Ohio Railroad*, 45 Fed. Rep. 156; and by the judgment of the Court of Appeals of New York in *Farmer* v. *National Life Association*, 138 N. Y. 265.

But the ground of the decision in *Bushnell* v. *Kennedy* was, in accordance with earlier and later decisions, that the restriction, in former judiciary acts, upon the jurisdiction of the Circuit Court over a suit originally brought by an assignee, which his assignor could not have brought in that court, did not apply to its jurisdiction by removal of an action originally brought in a state court. *Green* v. *Custard*, 23 How. 484; *Lexington* v. *Butler*, 14 Wall. 282; *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81; *Delaware County* v. *Diebold Co.*, 133 U. S. 473. And the theory that a defendant, by filing in the state court a petition for removal into the Circuit Court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit, of the existing act of Congress regulating removals from a court of a State into the Circuit Court of the United States.

The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. *Gordon* v. *Longest*, 16 Pet. 97; *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207–209. As was said by this court in *Gordon* v. *Longest*, "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress." 16 Pet. 104.

The act of Congress, by which the practice, pleadings, and

forms and modes of proceeding, in actions at law in the Circuit Court of the United States, are required to conform, as near as may be, to those existing at the time in the courts of the State within which it is held, applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. Rev. Stat. § 914; *Southern Pacific Co.* v. *Denton*, above cited; *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S. 194.

By the act of Congress, under which the present action was removed by the defendant into the Circuit Court of the United States, any action at law, brought in a court of a State between citizens of different States, in which the matter in dispute exceeds the sum or value of $2000, may be removed into the Circuit Court of the United States by the defendant, being a non-resident of that State, by filing a petition and bond in the state court "at the time, or at any time before, the defendant is required by the laws of the State, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff;" and it shall then be the duty of the state court to proceed no further in the suit; and, upon the entry of a copy of the record in the Circuit Court of the United States, "the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court." Act of August 13, 1888, c. 866; 25 Stat. 434, 435.

It has been held by this court, upon full consideration, that the provision of this act, that the petition for removal shall be filed in the state court at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint," requires the petition to be there filed at or before the time when the defendant is so required to file any kind of plea or answer, "whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action," because, as the court said, "Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation

upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defence whatever in that court, so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States." *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 686, 687.

As the defendant's right of removal into the Circuit Court of the United States can only be exercised by filing the petition for removal in the state court before or at the time when he is required to plead in that court to the jurisdiction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court and the plea is seasonably filed in the Circuit Court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States.

Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defence, duly and seasonably reserved and pleaded, to the action, "in the same manner as if it had been originally commenced in said circuit court."

How far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant, need not be considered; because, in the petition filed in the state court for the removal of this action into the Circuit Court of the United States, it was expressed that the defendant appeared specially and for the sole and single purpose of presenting the petition for removal. This was strictly a special

appearance for this purpose only, and, whether the attempt to remove should be successful or unsuccessful, could not be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. Likewise, in the motion filed by the defendant in the Circuit Court of the United States, immediately after the action had been removed into that court, for an order setting aside the summons and the service thereof, it was expressed that the defendant appeared by its attorney specially for the purpose of applying for this order. Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity. *Harkness* v. *Hyde*, 98 U. S. 476; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194.

The necessary conclusion appears to this court to be that the defendant's right to object to the insufficiency of the service of the summons was not waived by filing the petition for removal in the guarded form in which it was drawn up, and by obtaining a removal accordingly. And it is gratifying to know that this conclusion is in accord with the general current of decision in the Circuit Courts of the United States. *Parrott* v. *Alabama Ins. Co.*, 5 Fed. Rep. 391; *Blair* v. *Turtle*, 1 McCrary, 372; *Atchison* v. *Morris*, 11 Bissell, 191; *Small* v. *Montgomery*, 5 McCrary, 440, explaining *Sweeney* v. *Coffin*, 1 Dillon, 73, 76; *Hendrickson* v. *Chicago &c. Railway*, 22 Fed. Rep. 569; *Elgin Co.* v. *Atchison &c. Railway*, 24 Fed. Rep. 866; *Kauffman* v. *Kennedy*, 25 Fed. Rep. 785; *Miner* v. *Markham*, 28 Fed. Rep. 387; *Perkins* v. *Hendryx*, 40 Fed. Rep. 657; *Clews* v. *Woodstock Co.*, 44 Fed. Rep. 31; *Bentlif* v. *London & Colonial Corporation*, 44 Fed. Rep. 667; *Reifsnider* v. *American Publishing Co.*, 45 Fed. Rep. 433; *Forrest* v. *Union Pacific Railroad*, 47 Fed. Rep. 1; *O'Donnell* v. *Atchison &c. Railroad*, 49 Fed. Rep. 689; *Ahlhauser* v. *Butler*, 50 Fed. Rep. 705; *McGillin* v. *Claflin*, 52 Fed. Rep. 657.

Judgment affirmed.

EVERS *v.* WATSON.

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

No. 180. Submitted January 25, 1895. — Decided March 4, 1895.

When it is not shown when, or at whose instance, or upon what ground a removal of a cause from a state court was effected, and no copy of the petition or of the substance of it is in the bill or annexed to it, everything must be presumed against the party objecting to it.

As, under the act of March 3, 1875, c. 137, it was in the power of the court to rearrange the parties and to place them on different sides according to the actual facts, it is to be assumed that that power was exercised by the court below, and its action in that respect is not reviewable here.

After a final decree in a case, an apparent want of jurisdiction on the face of the record cannot be availed of in a collateral proceeding.

The charges of fraud in this case are too vague to be made the basis of a bill to set aside a judicial sale.

The delay of the plaintiffs for four years to assert their claim is, under the circumstances, fatal to it.

This was a bill in equity to set aside a decree rendered in a former case of *Watson* v. *Evers et al.*, for want of jurisdiction, or that the sale of certain land by a special commissioner, under such decree, be set aside as to all the lands still in the possession of the defendants.

Plaintiffs, who were aliens, British subjects and residents of London, set forth that in 1881 or 1882 they, together with Watson and one Baldwin, citizens of Illinois, were associated together in the purchase of a large quantity of land in Mississippi, known as the Delta, amounting to 500,000 or 600,000 acres together with certain pine lands amounting to about 150,000 acres. That certain differences having arisen as to their respective interests, Watson filed a bill in the chancery court of Le Flore County (a mistake for De Soto County) against Evers, William Marshall, George F. Philips, M. S. Baldwin *et al.*, which was removed into the Circuit Court of the United States, wherein a decree was rendered on October 3, 1885, in

favor of Watson for the sum of $145,000, which was charged as a lien upon said lands, and, in the event of the failure of the defendants to pay such sum within six months from the date of the decree, the lands were to be sold by one McKee, as special commissioner, for the satisfaction of the decree. The land was accordingly sold, and most of it bought in by Watson, such sale being afterwards confirmed by the court. "That said decree was a consent decree, agreed to in a spirit of compromise, and accompanied with and based upon certain agreements to be hereinafter explained."

The bill further alleged that the Circuit Court of the United States was without jurisdiction to entertain such suit, or render such decree, by reason of the fact that Watson, the plaintiff in such bill, was a citizen of Illinois, and Baldwin, one of the defendants, and a material defendant, was likewise a citizen of Illinois.

It was further charged that before the sale of the land was had, Watson and his agents and representatives conspired with one Burroughs to prevent them (the plaintiffs) from being present at said sale, and to deter them from bidding for the lands, the result of which fraudulent collusion was that Watson bought the lands at a mere trifle per acre, except about 162,000 acres, which it was fraudulently agreed that Burroughs and his friends should buy at their own figures. That but for such fraudulent collusion the Delta lands would have sold for more than enough to satisfy the decree, and would have left, at least, the pine lands to plaintiffs in this bill and the other defendants in said suit, after fully paying their debt. Instead of this, that they succeeded in securing all the land, and still claimed a large balance against the defendants in that suit as due by the decree; more, in fact, than Watson originally advanced for the purchase of the land. That the plaintiffs were not aware of and had no knowledge of the fraud practised upon them by Watson until recently, and long after the sale had been ratified and confirmed, and that this was the first opportunity to bring the matter before the court, and they ask a restitution of their rights and an equitable redress for the fraud.

Statement of the Case.

That the decree was a compromise decree, accompanied by stipulations, one of which was that the defendants were to have six months in which to pay the decree, and that, when they acquiesced and consented to such decree, it was their intention and expectation, and it was so understood by all parties, to organize a land company in London, and to sell the lands referred to in the decree for money enough to pay off said indebtedness, and the balance in stock and debentures and working capital, within the six months allowed to them by the decree. That to accomplish this, and carry out the understanding, a company was organized, at great expense to plaintiffs, and a satisfactory sale of the lands arranged to be made to such company, which would have been perfected, and Watson's debt paid, but for the interference of Watson and his agents, who, by circulating false reports affecting the title to the land, prevented such company from being floated, and defeated the efforts of the defendants in such suit, in raising money to comply with their agreement to pay off such decree. That afterwards, a son of Watson, representing his father and the Delta and Pine Land Company, visited London, and, recognizing the fact that plaintiffs still had an interest in the lands, agreed to organize another English company, certain shares of stock in which company they agreed to receive. That plaintiffs, being ignorant of the fraud that had been practised upon them at the time of the sale, and relying upon the statements of Watson's son, at his request executed quitclaim deeds of their interests in such lands, Watson stating that he wanted such deeds in trust solely for the purpose of facilitating the sale of the lands to such company, and promising that such deeds when executed should be deposited by him with Walter Webb & Company, of Queen Victoria Street, London, the solicitors of such company. That Watson, instead of depositing the deeds with the solicitors, fraudulently and in violation of his promise and agreement, sent the deeds to Mississippi, and caused them to be registered in the several counties in which the lands were located. That this was done without the knowledge or consent of plaintiffs; that the organization of the company was

never perfected, and negotiations for the sale of the lands had been abandoned. No stock was ever issued, plaintiffs never received any consideration for the deeds, or their interest in the lands. Such deeds were obtained by fraud and false pretences and promises made by Watson, were without consideration, and are void. That plaintiffs are informed that Watson and the persons associated with him in the Delta and Pine Land Company have sold a large quantity of the lands at a good price, as well as a large amount of timber from the lands remaining in their possession, and have realized from such sales, more than enough to pay the decree and the interest thereon.

The prayer of the bill was that the court set aside the decree rendered in the case of *Watson* v. *Evers* for lack of jurisdiction, or, if mistaken as to this, that the sale by the commissioner be set aside as to all the lands still in possession of defendants; that the quitclaim deeds be held to be inoperative and void, and defendants be required to render an account of the lands and timber sold by them, and the amount of taxes paid on the land since such sale. That the sums received, after paying the taxes, be credited upon the decree, and, in case Watson proves to have been overpaid, that a decree be awarded in favor of plaintiffs for the excess, and that the land now in possession of defendants be decreed to be the property of the plaintiffs, as their interest may appear.

A demurrer was filed to this bill by Watson and the Delta and Pine Land Company, which was sustained by the court, and the bill dismissed.

From this decree plaintiffs appealed to this court.

Mr. James L. McCaskill for appellants.

Mr. Frank Johnston and *Mr. J. Hubley Ashton* for appellees.

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

To maintain this bill, plaintiffs take the position either that the Circuit Court for the Northern District of Mississippi, to

which the case was removed, was wholly wanting in jurisdiction to render the decree complained of in the case of *Watson* v. *Evers et al.*, or that the sale made in pursuance of such decree was not only voidable for fraud, but absolutely void and subject to collateral attack in this proceeding.

1. The allegations of the bill with regard to the want of jurisdiction of the Federal court are very meagre, and are simply that Watson filed a bill in the state court against Evers, Marshall, Philips, and Baldwin, which suit was removed to the Federal court and a decree rendered therein. That such court was wholly without jurisdiction since Watson, as shown in the bill, was a citizen of Illinois, and Baldwin, one of the defendants, was also a citizen of the same State. It is not shown when, or at whose instance, or upon what grounds the removal was effected, nor is there a copy of the petition or the substance of it, either incorporated in the bill or annexed thereto as an exhibit. We are left wholly in the dark as to these important particulars, and, under these circumstances, everything must be presumed against the pleader. We are bound only to inquire whether a suit to which two citizens of the same State were originally plaintiff and defendant could possibly have been removed to the Federal court. The presumption is that the court did have jurisdiction, and that its decree is valid, and, assuming for the present that the court may attack it collaterally, the burden is clearly upon the plaintiffs in this case to show that the decree was void.

We are not even informed by the amended bill of the year in which the bill was filed in the state court or the removal had; but, as it is averred that the parties to such suit were associated together in 1881 or 1882, and the decree was rendered in 1885, we are left to infer that the removal must have taken place under the act of March 3, 1875, c. 137, 18 Stat. 470, which, at that time, determined the jurisdiction of the Federal courts. By section 2 of that act, "any suit of a civil nature, at law or in equity, now pending, or hereafter brought, in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . .

in which there shall be . . . a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district, and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

The position of Baldwin as defendant in the case was not conclusive as to his actual interest in the litigation. For aught that appears, his interests may have been identical with those of Watson, and adverse only to his alien codefendants. In such case, it would have been perfectly competent for the court to ascertain the real matter in controversy, and to have rearranged the parties to the suit upon the opposite sides of such controversy, and thus sustain the jurisdiction of the court. The power of the court under the act of 1875, thus to rearrange the parties, and to place them on different sides of the matter in dispute according to the actual facts, has been recognized by this court in several cases. *The Removal Cases*, 100 U. S. 457; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *Harter* v. *Kernochan*, 103 U. S. 562. If such were the case here, the suit would then stand as one, wherein two citizens of the same State were plaintiffs, and aliens were defendants, which would be removable, irrespective of the question, whether, under the second clause of the section, a separate controversy between citizens and aliens could be removed. It would appear from the opinion of the District Judge that this was the view taken by him. Even if he had been mistaken as to the actual community of interest between Watson and Baldwin, as matter of fact his decision in respect thereto would not be reviewable collaterally. *Grignon's Lessee* v. *Astor*, 2 How. 319; *Michaels* v. *Post*, 21 Wall. 398; *Chapman* v. *Brewer*, 114 U. S. 158, 169; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165. Even upon the theory of the plaintiffs, to authorize the court to hold the decree in that case void

in a collateral proceeding, it was necessary to show beyond any controversy that, upon the record, the court could not have had jurisdiction. This the pleader has failed to do.

But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it after a final decree, and in a collateral proceeding. Thus in *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, a case which had been reversed by this court and sent back to the Circuit Court, was discovered to be one not within the jurisdiction of that court. But as it appeared that the merits had been finally decided in this court and its mandate required only the execution of the decree, it was held that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that court was not alleged in the pleadings. So in *McCormick* v. *Sullivant*, 10 Wheat. 192, a prior judgment between privies in estate was pleaded in bar of the remedy sought to be enforced in the suit then under consideration, and objection was made that the proceedings did not show that the parties to it were citizens of different States, and, consequently, that the court was without jurisdiction and the decree void. It was held, however, that the courts of the United States, though of limited, were not of inferior jurisdiction, and that, if jurisdiction were not alleged in the pleadings, their judgments and decrees were erroneous, and might be reversed for that cause; but that they were not absolute nullities, and that the decree in the former case, while it remained unreversed, was a valid bar to the suit under consideration. To the same effect are *Ex parte Watkins*, 3 Pet. 193; *Kennedy* v. *Georgia State Bank*, 8 How. 586; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, and the recent case of *Dowell* v. *Applegate*, 152 U. S. 327.

These authorities are especially pertinent to this case, in view of the fact that, after the removal of the case to the Federal court, the parties thereto, including the plaintiffs herein, acquiesced in its jurisdiction, and entered into a consent decree, which was designed to settle the entire controversy.

2. It is also evident that the charges of fraud are altogether too vague to be made the basis of a bill to set aside the sale.

The Delta and Pine Land Company is made a defendant to the bill, but for what reason does not clearly appear. It is only averred that Watson's son, representing his father and the Delta and Pine Land Company, visited London and agreed to organize another English company, and that plaintiffs should have certain shares of stock in that company; and that said Watson and the other persons associated with him in the Delta and Pine Land Company have sold a large quantity of such lands at a good price, and that they have also sold a good deal of timber off the lands remaining in their possession, and have realized more than enough to pay the sum due upon the decree. But there is no averment to whom the quitclaim deeds in London were executed, or what the interest of the Delta and Pine Land Company was in the lands, or how it became possessed of such interest, though, from the fact that plaintiffs call upon the company to account for the money received from the sale of such lands, it would appear that in some way it became the purchaser of a portion of such lands. There is no averment, however, of such purchase, or, if it were made, that the company purchased with the knowledge of the fraud alleged.

There is a general allegation that Watson and his agents conspired fraudulently with one Burroughs and others to prevent plaintiffs from being present at the sale, and to deter them from bidding; but it is not averred by what representations or other fraudulent means, contemplated bidders were prevented from attending an official sale, which the law required to be advertised for a certain number of weeks; and it is highly improbable that if plaintiffs had designed to buy in this land they would have omitted to attend the sale and permit Watson to buy them at a mere trifle per acre. A fraudulent agreement is also averred that Burroughs and his friends should buy about 162,000 acres, but the particulars of the alleged arrangement are entirely wanting. There is also an averment of fraudulent collusion of Watson and his representatives preventing all competition, and that, had it not been for such collusion, the Delta lands alone would have sold for more than enough to pay off the decree, and would

have left the pine lands to the plaintiffs and the other defendants in such suit after fully paying their debt. There is no averment, however, of the means used to prevent competition, and the whole allegation is vague and unsatisfactory. There is also an averment that the complainants were not aware of and had no knowledge of the fraud practised upon them by Watson until recently, and long after such sale had been ratified and confirmed. But it appears that such sale occurred in 1886, was a matter of public record, and yet was allowed to rest until 1890 without action or challenge, when this bill was filed.

It further appears that one of the stipulations, under which the consent decree was entered, was that defendants were to have six months in which to pay and satisfy the decree, and that it was their intention to organize a land company in the city of London, and to sell the lands referred to, and pay off the indebtedness; but that this scheme was also thwarted by the interference of Watson and his agents, who, by circulating false reports affecting the title of the lands, prevented the company from being floated. But the bill does not allege what these false reports were, or to whom they were made, or any facts from which the court can determine whether they were likely to affect the organization of the company or not. It does not appear when Watson's son visited London, or what means were used to induce plaintiffs to execute quitclaim deeds of their interests, or when such deeds were executed, or to whom they were executed. There is no reason given why plaintiffs did not, in view of all these alleged frauds, apply to the court which ordered the sale for an order vacating the same. If the transactions took place as stated by them, they could hardly have been ignorant of the fraud practised upon them. As the sale and the prices paid were matters of record, plaintiffs were bound to inform themselves of the facts, and to take steps to protect their interests. *Foster* v. *Mansfield, Coldwater &c. Railroad*, 146 U. S. 88. It does not even appear whether the transaction in London occurred before or after the sale, though the inference is that it was some time after, when the plaintiffs must have been

aware of the suspicious circumstances attending the sale, or at least should have made inquiries. In short, the bill is much more remarkable for what it omits, than for what it alleges.

It does appear, however, that Watson had a claim against these parties, which was settled by the consent decree at $145,000; that 162,000 acres of these lands were purchased by Burroughs, who is not made a party to this suit, although he is alleged to have fraudulently conspired with Watson; and a large portion of these lands have been sold, presumptively, to *bona fide* purchasers, and that, in the lapse of time that has intervened, it would be impossible to restore the parties to their original positions.

It is apparent that the whole case depends upon the validity of the sale made by the special commissioner. If this sale were valid, plaintiffs lost all their interests in the lands, they had nothing left to convey by their subsequent quitclaim deeds, and the cancellation of such deeds would not revest them with any interest. If the sale were voidable, either by reason of a fraudulent combination to deter the plaintiffs from being present, or to prevent competition, or by reason of the false reports circulated in London, to prevent the plaintiffs from carrying out their agreement to satisfy the decree within six months, it was the duty of the plaintiffs, instead of executing quitclaim deeds, and thus putting themselves again into the hands of parties whom they allege to have twice played them false, to promptly disaffirm their acts, and seek to repossess themselves of the property. Their delay of four years, during which much of the property has been sold, presumptively to parties who have purchased without notice, is fatal to their claim.

The decree of the court below sustaining the demurrer and dismissing the bill was correct, and it is, therefore,

Affirmed.

ARD *v.* BRANDON.

ARD *v.* PRATT.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Nos. 141, 142. Argued January 10, 1895. — Decided March 4, 1895.

A., being qualified to make a homestead entry, entered in good faith upon public land within the indemnity limits of a railroad grant, but not within the place limits. He demanded at the local land office the right to enter 160 acres as a homestead. This was refused on the ground that the tract was within the limits of the grant, although at that time the land had not been withdrawn from entry and settlement. This was subsequently done, and the land conveyed to the railway company. A. remained upon the land, cultivating it. In an action to recover possession from him, brought here from a state court by writ of error, *Held*, that the application was wrongfully rejected, and that his rights under it were not affected by the fact that he took no appeal.

These two cases may be considered together, for the initial fact in defendant now plaintiff-in-error's claim of right is the same in each case. The actions were commenced by the respective defendants in error as plaintiffs in the District Court of Allen County, Kansas, the first, to recover the possession of the north half of the northeast quarter of section 11, township 26, range 20, and the other to recover possession of the west half of the southeast quarter of section 2, township 26, range 20. These two tracts, each of 80 acres, adjoin, and are so situated as to be the subject of one homestead entry. Rev. Stat. §§ 2289 and 2298.

The first of these tracts was on April 10, 1873, certified by the United States to the State of Kansas, and by it on May 19, 1873, conveyed to the Missouri, Kansas and Texas Railway Company. The second was patented November 3, 1873, by the United States directly to the Missouri, Kansas and Texas Railway Company. The respective plaintiffs hold under conveyances from the railway company.

A jury having been waived, the cases were submitted to

the court upon certain admissions, and the single testimony of the defendant. No special findings of facts appear in the record, but by both the trial and the Supreme Court of the State the facts testified to as well as those admitted were treated as facts in the case. Among the matters admitted were these: "At the time defendant made settlement he was competent to make a legal homestead or preëmption entry, and has ever since been duly competent and qualified to make a valid homestead entry, and that he still resides on said land, with a wife and six children, and that he has all the required improvements to perfect a homestead or preëmption. It is admitted that the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, sec. 2, 26, 20 E., was selected by the Missouri, Kansas and Texas Railway Company, April 14, 1873, and it was patented to said company the 3d day of November, 1873, under the act of Congress of July 26, 1866. The N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 11, 26, 20 E., was selected by both companies jointly — Missouri, Kansas and Texas Railway Company and L., L. & G. R. R., August the 8th, 1872. This tract was approved to the State for the M., K. & T. Co., April 10, 1873, under the act of Congress of March 3, 1863. Both tracts were selected as indemnity lands, and both tracts are over 12 miles from both roads and lie within the indemnity limits of both the L., L. & G. and M., K. & T. R. R. Said defendant also testified that when said defendant settled on said land he did it in good faith and for the sole purpose of making it his homestead."

So much of defendant's testimony as bears upon his original occupation of the 160 acres, and his first transaction at the government land office, is as follows:

"The first work said defendant did on said land was about the last of June, 1866; that he broke about two acres of prairie and three hedge rows on said land, making about five acres in all. Then I went to the U. S. land office at Humboldt, Kansas, which was on the 14th day of July, 1866, and there I made out a homestead application for said land, as described, and tendered the application and the land office fees to the register of the U. S. land office, of which Watson Stewart was register of said land office, and at that time I was a single

man and over 21 years of age, a citizen of the United States, and had never had the benefit of the homestead or preëmption laws of the United States, but said register, Watson Stewart, rejected said application and fees, as he claimed, on the ground that said land was situate within the granted limits of the L., L. & G. R. R. and was double minimum lands, and that he could *not* let me homestead only 80 acres, as the land was double in price. Said register advised me if I wanted said 160 acres that I could first make a preëmption filing on 80 acres of land and put a house on said land within 12 months and prove up and pay for it at $2.50 per acre, and then I could homestead 80 acres more, and by that plan I could get 160 acres; but said register told me that I could change a preëmption filing at any time if I wanted to into a homestead, so I told said register as he would not allow my homestead I would make a preëmption filing on part of the land, as he would not let me only on 80 acres, so he made out the filing and I paid him a fee of $2.00, which he said was the fee.

"A copy is hereto attached and admitted as in evidence:

"'Register's Office,

"'No. 2115. Humboldt, Kansas, *July 14th*, 1866.

"'I certify that Newton L. Ard has this day filed in this office his notice to claim by right of preëmption the west half of the southeast quarter of section No. 2, in township No. 26 S., in range No. 20 east, of the sixth principal meridian, in the State of Kansas. $2.50 per acre, within R. R. limits.

"'Watson Stewart,

"'*Register.*'

"Said words and figures '$2.50 per acre, within R. R. limits,' being written in red ink transversely across the face of the certificate."

It also appears from his testimony that subsequently and in the fall of 1866 and the spring of 1867 he did further work on the land, and built a house thereon; that about July 1, 1867, he again went to the land office, but was told by Colonel N. S.

Goss, then the register, that he could neither change his preemption into a homestead entry nor prove up under the preemption law. In 1872 he made formal application to prove up on the land, but his application was denied by the local land officers. From this denial he prosecuted an appeal to the Commissioner of the General Land Office, and thence to the Secretary of the Interior, by both of whom the decision of the local land officers was affirmed.

The judgments of the District Court were in favor of the plaintiffs, which judgments were afterwards affirmed by the Supreme Court of the State on the ground that the legal title passed by the instruments offered in evidence through the railway company to the plaintiffs, and that the decision of the Land Department upon the facts of defendant's occupation and improvements was conclusive as against his equitable rights. To reverse these judgments the defendant sued out writs of error from this court.

Mr. William Lawrence for plaintiff in error.

Mr. A. B. Browne, (with whom were *Mr. A. T. Britton* and *Mr. George R. Peck* on the brief,) for defendant in error.

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

As these lands were not within the place limits of either the Leavenworth, Lawrence and Galveston Railroad or the Missouri, Kansas and Texas Railway, and as they were within the indemnity limits of both roads, it is not open to question that the certification by the Land Department to the State of Kansas and the conveyance by it to the railway company of the one tract, and the patent directly from the United States of the other, operated to transfer the legal title to these two tracts to the railway company; and also that the United States has no cause of action against the railway company or its grantees to disturb the legal title thus conveyed. *Kansas City, Lawrence &c. Railroad* v. *Attorney General*, 118 U. S. 682;

United States v. *Missouri, Kansas & Texas Railway*, 141 U. S. 358. But it is equally clear under the authority of the last cited case, as well as of many others, that no adjudication against the government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued. Referring to allegations in the bill of the United States in that case of matters very like those presented here, Mr. Justice Harlan, speaking for the court, said (page 379): "If the facts are as thus alleged, it is clear that the Missouri Kansas Company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to *bona fide* settlers who acquired rights under the homestead and preemption laws, which were not lost by reason of the Land Department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company."

The question, therefore, is whether the cases disclose equitable rights in the defendant superior to the claims of the railway company. If his rights are only those which spring from his preëmption entry and subsequent occupation of the lands, it may well be, as held by the Supreme Court of the State, that the decisions of the Land Department upon the questions of fact are conclusive against him. But we are of the opinion that the testimony shows a right anterior to his preëmption entry — a right of which he was deprived by the wrongful acts of the local land officer, and which he did not forfeit or lose by virtue of his subsequent efforts to preëmpt the land. According to this testimony he had commenced improving the premises prior to July 14, 1866. He was qualified under the laws of the United States to make a homestead entry. The land was not within the place limits of either road, and had not been withdrawn by the Land Department from entry and settlement, for the orders of withdrawal were not made until March 19 and April 30, 1867. He had therefore, on July 14, when he went to the land office, the right to enter the entire 160 acres as a homestead. This right he demanded. He made out a homestead application for the land as described,

tendered the application and the land office fees to the register of the land office, but the register rejected the application, giving as a reason therefor that the land was within the granted limits of the Leavenworth, Lawrence and Galveston Railroad, and was double minimum lands, and that 80 acres was the limit of a homestead entry of such lands. As to this matter of fact the register was mistaken, and his rejection of the application was wrongful, and denied to defendant that homestead entry which under the law he was then entitled to. In the case of *Shepley* v. *Cowan*, 91 U. S. 330, 338, this court said, after referring to the cases of *Frisbie* v. *Whitney*, 9 Wall. 187, and the *Yosemite Valley Case*, 15 Wall. 77:

"But whilst, according to these decisions, no vested right *as against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right. So in this case, Chartrand, the ancestor, by his previous settlement in 1835 upon the premises in controversy, and residence with his family, and application to prove his settlement and enter the land, obtained a better right to the premises, under the law then existing, than that acquired by McPherson by his subsequent state selection in 1849. His right thus initiated could not be prejudiced by the refusal of the local officers to receive his proofs upon the declaration that the land was then reserved, if, in point of fact, the reservation had then ceased. The reservation was asserted, as already mentioned, on the ground that the land was then claimed as a part of the commons of Carondelet. So soon as the claim was held to be invalid to this extent by the decision of this court in March, 1862, the heirs of Chartrand presented anew their claim to preëmption, founded upon a settlement of their ancestor."

Within the authority of that case we think the defendant

has shown an equity prior to all claims of the railway company. He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them — and wrongfully rejected by him. Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application.

"The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person." *Clements* v. *Warner*, 24 How. 394, 397.

There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government. We do not mean to hold that the government or its grantees are concluded by the mere fact that one of its officers has given erroneous advice. If there was nothing more in this case than that the defendant consulted the officers of the land office as to how he could best obtain title to the land, that they gave him advice which was founded upon a mistake of fact and was not good advice, that he pursued the plan they suggested, and yet failed to acquire the title, he would have

to bear the consequences of the error. But here a rightful application was wrongfully rejected. This was not a matter of advice but of decision. Doubtless the error could have been corrected by an appeal, and perhaps that would have been the better way; but when, instead of pursuing that remedy, he is persuaded by the local land officer that he can accomplish that which he desires in another way — a way that to him seems simpler and easier — it would be putting too much of rigor and technicality into a remedial and beneficial statute like the homestead law to hold that the equitable rights which he had acquired by his application were absolutely lost.

For these reasons we are of opinion that there was error in the conclusion of the Supreme Court of the State of Kansas, and the judgments in these two cases are

Reversed for further proceedings in accordance with the views herein expressed.

Mr. Justice Gray was not present at the argument and took no part in the decision of these cases.

MADDOX *v.* BURNHAM.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 144. Argued January 10, 1895. — Decided March 4, 1895.

In the year 1866 the mere occupation of public land, with a purpose at some subsequent time of entering it for a homestead, gave the party so occupying no rights.

This case resembles the preceding in so far as the legal title is concerned. The action was commenced in the District Court of Allen County, Kansas, by a grantee from the railway company. In that court judgment was rendered in favor of the defendant, which judgment was afterwards

reversed by the Supreme Court of the State, and judgment ordered in favor of the plaintiff for the possession of the land in controversy.

Mr. William Lawrence for plaintiff in error.

Mr. A. B. Browne, (with whom were *Mr. A. T. Britton* and *Mr. George R. Peck* on the brief,) for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The only thing distinguishing this case from the preceding and calling for any comment is the equitable claim which the defendant presents. It appears from the testimony that the defendant moved upon the land in October, 1866, but made no attempt to enter it as a homestead until the succeeding spring, and after the withdrawals had been ordered by the Secretary of the Interior. In support of his claim the defendant called as a witness his father-in-law, who, after stating that defendant and himself went upon the tracts, on which they still resided, somewhere about the 20th of October, 1866, testified as follows:

"We drove on to the land on Saturday evening, and on Monday morning I took a horse and went to Humboldt to the land office to see if we could have permission for Maddox and me both — I went for both of us — to get these pieces of land and put up our houses and live in them till the next spring, and then we would make our homestead, and he gave us the permission to do so. He said that he had given others permission to do so. I told him that we were scarce as to money then, but that we would have some money in the spring and then we wanted to make our homestead."

He further said that under this permission they occupied the lands and made improvements; that when they went in the succeeding spring for the purpose of making their homestead entries, they were told that the lands had been withdrawn. On cross-examination he was asked this question: "Q. The first time that you went there you did not offer to

file your homestead, but simply to inquire about it?" and answered it in the affirmative. The defendant himself, on cross-examination, gave this testimony:

"Q. Why did you not make the homestead entry when you first went there in the fall?

"A. Well, sir, the reason is this: We did not have money enough to do it, and we were in a new country and a strange country and we did not know whether we would get anything to do.

"Q. Do you remember how much money you had at the time?

"A. About thirteen dollars — both of us — between us."

Upon these facts he insists that his equitable rights antedated the withdrawals, and are superior to the legal title.

This claim of the defendant cannot be sustained. At the time of these transactions the mere occupation of land with a purpose at some subsequent time of entering it for a homestead gave to the party so entering no rights. The law in force (12 Stat. 392, c. 75) made the entry at the land office the initial fact. Sec. 1 authorized any one possessed of the prescribed qualifications "to enter one quarter section, or a less quantity, of unappropriated public lands." Sec. 2 provided that the person applying should, upon his application, make affidavit, among other things, "that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, . . . and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of lands specified." So the law stood until May 14, 1880, 21 Stat. 141, c. 89, when an act was passed, the third section of which is as follows:

"Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office, as is now

allowed to settlers under the preëmption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preëmption laws."

By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement. But this act was passed long after the rights of the railway company had accrued and the legal title had passed to it. It is not operative, therefore, to divest such legal title, or enlarge as against such title any equitable rights which the defendant theretofore had. They must be determined by the law as it stood at the time he made his entry, or at least prior to the time that the title passed to the railway company. Now, from his own testimony, while he moved on the land in October, 1866, he made no application to enter it until after the lands had been withdrawn. It is true that he claims that he had permission from the register of the land office to go upon the land and occupy it, but the register had no power to give such permission; he had no general control over the unappropriated public lands; he could vest no rights, legal or equitable, in any individual other than such as are authorized by statute. His authority was limited to receiving and acting upon applications for homestead or preëmption entry, and it cannot be that any such unauthorized permission of a local land officer can create a right not given by the statute, or defeat a title conveyed by the government in full compliance with the law. This is not like the cases just decided in which the local land officer refused to receive an application which he ought to have received; neither is it one in which such officer failed to do anything which he ought to have done. No application was made for an entry. The excuse tendered is that he was not possessed of sufficient money to pay the required fees; the father-in-law and the son-in-law had but thirteen dollars between them, and twenty dollars was the amount necessary for the entry of the two homesteads; but unfortunate as the defendant's situation then was, much as he may be entitled to sympathy, it cannot be

that when he fails, even by reason of his poverty to do that which the law prescribes as the initiation of any rights in the land, he is nevertheless entitled to the same protection which he would receive had he complied with the statute. Leniently as the conduct of a settler is always regarded by the courts, it cannot be that such leniency will tolerate the omission by him of any of the substantial requirements of the statute in respect to the creation of rights in the public lands.

There was no error in the conclusions of the Supreme Court of the State, and its judgment is, therefore,

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

WOOD *v.* BEACH.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 143. Argued January 10, 1895. — Decided March 4, 1895.

In 1870 W. entered upon public land within the indemnity limits of a railway grant, occupied it, and continued to do so. It had then been withdrawn from the market by the Secretary of the Interior under instructions from Congress, and was eventually selected by the railroad company as part of its grant. *Held*, that W. acquired no equitable rights, as against the railroad company, by his occupation and settlement.

This case resembles those immediately preceding in that the plaintiff, now defendant in error, claiming title to a certain tract by deed from the Missouri, Kansas and Texas Railway Company, brought his action in the District Court of Allen County, Kansas, to recover possession of the land. Judgment was rendered in his favor in that court, which judgment was affirmed by the Supreme Court of the State, and from that court the case has been brought here on a writ of error.

Opinion of the Court.

Mr. William Lawrence for plaintiff in error.

Mr. A. B. Browne, (with whom were *Mr. A. T. Britton* and *Mr. George R. Peck*,) for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The land in controversy is in an odd-numbered section, and within the indemnity limits of the Leavenworth, Lawrence and Galveston Railroad, and also within the like limits of the Missouri, Kansas and Texas Railway. The tract was selected, certified to the State, and by it patented to the railway company. The selection was made on August 8, 1872, and approved April 10, 1872, and the deed from the State was on May 9, 1873. Within the decision in *Kansas City, Lawrence &c. Railroad* v. *The Attorney General*, 118 U. S. 682, the legal title passed to the railway company. Mary E. Wood, the defendant, is the widow of C. B. Wood, who during his lifetime moved upon the land with his family, and sought to enter it as a homestead. But his occupation and settlement, as appears from the agreed statement of facts, commenced on June 8, 1870, and while this was prior to the selection by the railroad companies, the land had years before been withdrawn from sale or location, preëmption or homestead entries. Two orders of withdrawal were made by the Department of the Interior — one on March 19, 1867, for the benefit of the Leavenworth, Lawrence and Galveston Railroad Company, and the other on April 30, 1867, for the Missouri, Kansas and Texas Railway Company. These orders of withdrawal were received at the local land office on April 3, 1867, and May 10, 1867, respectively. When Mr. Wood made application to file upon the land he was informed that the land had been withdrawn, and his application was rejected. If those withdrawals were valid, no rights, legal or equitable, were acquired by his occupation and settlement.

It was said in *Wolsey* v. *Chapman*, 101 U. S. 755, 768: "The proper executive department of the government had determined that, because of doubts about the extent and

operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley* v. *Wells*, was sufficient to defeat a settlement for the purpose of preëmption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal."

This has been and is the settled rule of the courts and the Land Department. It is only a recognition of the limitations prescribed in the statutes, for, by Rev. Stat. § 2258, "lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose" are expressly declared to be not subject to the rights of preëmption, and § 2289, the one giving the right to enter for a homestead, limits that right to "unappropriated public lands." The fact that the withdrawals were made by order of the Interior Department, and not by proclamation of the President, is immaterial.

"A proclamation by the President reserving lands from sale is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. If the President himself had signed the order in this case, and sent it to the registers and receivers who were to act under it, as notice to them of what they were to do in respect to the sales of the public lands, we cannot doubt that the lands would have been reserved by proclamation within the meaning of the statute. Such being the case, it follows necessarily from the decision in *Wilcox* v. *Jackson* that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. It was, therefore, as we think, such a proclamation by the President reserving the lands from sale as was contemplated by the act."

These withdrawals were not merely executive acts, but the

latter one at least was in obedience to the direct command of Congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas and Texas Railway Act of July 26, 1866, c. 270, § 4, 14 Stat. 290, is as follows:

"SEC. 4. And be it further enacted, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The map of the line of definite location called for by this section was filed on December 6, 1866, and the withdrawal followed in the succeeding spring.

Upon these admitted facts it is clear that Mr. Wood acquired no equitable rights by his occupation and settlement. He went upon lands which were not open to homestead or preëmption entry, and cannot make his unauthorized occupation the foundation of an equitable title. He was not acting in ignorance, but was fully informed both as to the fact and the law. He deliberately took the chances of the railway company's grant, being satisfied out of lands within the place limits, or by selections of lands within the indemnity limits other than this, and trusted that in such event this tract would be restored to the public domain and he gain some advantage by reason of being already on the land. But the event he hoped for never happened. The party for whose benefit the withdrawal was made complied with all the conditions of title and took the land.

The judgment of the Supreme Court of the State was correct, and it is

Affirmed.

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

UNITED STATES *v.* BERDAN FIRE-ARMS MANUFACTURING COMPANY.

BERDAN FIRE-ARMS MANUFACTURING COMPANY *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 128, 135. Argued January 7, 8, 1895. — Decided March 4, 1895.

Even if there were findings sufficient to show that the United States had in any manner infringed letters patent No. 52,925, granted February 27, 1866, to Hiram Berdan for an improvement in breech-loading fire-arms, in the absence of anything disclosing a contract the use would be a tort, creating no cause of action cognizable in the Court of Claims.

Where several elements, no one of which is novel, are united in a combination which is the subject of a patent, and these several elements are thereafter united with another element into a new combination, and this new combination performs a work which the patented combination could not perform, there is no infringement.

As to letters patent No. 88,436, granted to Hiram Berdan March 30, 1869, for an improvement in breech-loading fire-arms, it appears that the use of that invention was with the consent and in accordance with the wish of the inventor and the Berdan Company, and with the thought of compensation therefor, which facts, taken in connection with other facts referred to in the opinion, establish a contractual relation between the parties sufficient to give the Court of Claims jurisdiction.

The contract was not a contract to pay at the expiration of the patent, but the right to recover accrued with each use, and the statute of limitations is applicable to all uses of the invention prior to six years before the commencement of the action.

The Court of Claims did not err in fixing the amount of the royalty.

THESE are cross-appeals from a judgment of the Court of Claims, entered December 8, 1890, in favor of the petitioner against the United States, for the sum of $95,004.36. The case as it was presented in the Court of Claims contained two distinct causes of action, each founded upon a patent issued to Hiram Berdan and by him assigned to petitioner. The first patent was dated February 27, 1866, being No. 52,925, and entitled "improvement in breech-loading fire-arms." The

second was dated March 30, 1869, being No. 88,436, and entitled in the same way. The court found against the petitioner in respect to the first cause of action, and in its favor on the second. The findings of facts made by that court are quite voluminous, and it would needlessly encumber this statement to quote them all at length.

In reference to the first of these causes of action it will be sufficient to note these facts, taken from the findings, and which present all that is necessary for a determination of the questions involved. In January, 1866, the Secretary of War convened a board of officers of the army, of which General Hancock was named as president. This board, known as the Hancock board, was "ordered to examine thoroughly the following questions and make recommendations thereon:

"(1) What form and caliber of breech-loading arm should be adopted as a model for future construction of muskets for infantry?

"(2) What form and caliber should be adopted as a model for future construction of carbines for cavalry?

"(3) What form of breech-loading arm should be adopted as a model for changes of muskets, already constructed, to breech-loading muskets?

"Each person who submits an arm to the above board will be required to state in writing the lowest price at which it will be furnished in the event of its being adopted by the government."

It met at Washington on March 10, 1866. In the same month it issued a circular to the public, with the following blank form of proposal, to be signed by those presenting arms for trial:

"——— ———, of ———, being the proprietor of the patent right to manufacture a breech-loading arm, known as ———, do hereby bind ——— heirs, executors, and assigns, to grant to the United States government, if called on within three years from this date to make such grant, the right to manufacture the aforesaid breech-loading arm on the following terms, viz.:

"For payment to ——— of ——— dollar per arm for the

privilege of manufacturing fifty thousand; of ——— dollar per arm for the privilege of manufacturing one hundred thousand; of ——— dollar per arm for the privilege of manufacturing two hundred thousand; and of ——— dollar per arm for the privilege of manufacturing any additional number of arms; provided, that when the government shall have paid the total amount ——— dollars, counting each and every payment, then it shall have the full and entire privilege of manufacturing ——— patented arms, for its own use, without further payment to ——— on account of ——— patent right. Each payment, as above specified, to be made for not less than five thousand arms. Or, by the payment of ——— dollars within three years from this date, the privilege of manufacturing as many arms as may be desired shall be granted to the United States."

In response to the circular the petitioner, among others, on March 27, 1866, forwarded a communication, a part of which is as follows:

"The Berdan Fire-arms Co., of New York, New York, being the proprietor of the patent right to manufacture a breech-loading arm known as the Berdan breech-loader, do hereby bind ourselves, heirs, executors, and assigns, to grant to the United States government, if called on within three years from this date to make such grant, the right to manufacture the aforesaid breech-loading arms on the following terms, viz.:

"For payment to us of two dollars per arm for the privilege of manufacturing fifty thousand; of one and three-quarters dollars per arm for the privilege of manufacturing one hundred thousand; of one and one-half dollars per arm for privilege of manufacturing two hundred thousand; and of one and one-quarter dollars per arm for the privilege of manufacturing any additional number of arms."

Later, and on May 21, 1866, it presented a gun, called No. 4, which, while similar in many respects to the one described in the specifications and drawings of the patent No. 52,925, differed in others. One of such differences is thus stated in the latter part of the fifth finding:

"A friction plunger (which did not exist in the patented gun) was placed in the gun (No. 4) shown the Hancock board; this plunger appeared in the middle of the bottom of the breech-receiver, close to the barrel's mouth, and was so placed that when the gun was loaded the spring was held up against the cartridge head and in contact with it by a flat spring placed underneath the barrel. The friction plunger was introduced for the reason stated in finding XIII."

Finding No. 8 is as follows:

"June 4, 1866, the said board of officers concluded its labors and made a final report to the Secretary of War, which contained this recommendation and statement, namely: 'Fourth. This board recommends the plan of alteration submitted by H. Berdan. This gives the stable breech pin, secures the piece against premature discharge, and involves only a slight change of our present pattern of arms.'"

In finding No. 9 is this statement:

"No gun has been bought by the government from defendants (petitioner?) and no gun has been manufactured by the government which is a copy of the gun recommended by the Hancock board."

Findings 11, 12, and 13 disclose these facts:

"11. Several models of Springfield arms have been placed in evidence, and as to them we find: The model of 1865 was the Allin gun. The model of 1866 (finding XII) was a tight-jointed mechanism, and except for the ejector device, elsewhere described in these findings, the Berdan model has no bearing upon this case. The loose-jointed mechanism appeared in 1868, with the new ejector device elsewhere in these findings described. For the purposes of this action the model of 1868 and those subsequent are alike, and for these purposes the description given in these findings of the Springfield gun applies to all models subsequent to that of 1866.

"12. The Berdan gun (patent 52,925) was not loose-jointed; when the breech-block was down there was no play, for then the block abutted against the barrel at one end and the brace against the breech-screw at the other; Berdan, by joining his block (making thus a block and brace) procured a square recoil

shoulder against the end of the breech-pin; but he did not procure any play in the parts; there were elongated holes in the plate fastening of his breech-block, as shown in the Patent Office model, a device replaced in the gun shown the Hancock board (No. 4) by a band which has a minute slip upon the barrel under strong pressure; but neither the holes nor the band are claimed to give, nor do they give, looseness of construction; they merely take up slight wear of the parts. It is admitted that no single element in patent 52,925 is new. The combinations shown in claims 1, 2, 4, and 5 were novel and useful.

"13. The Berdan extractor (patent 52,925) was intended for rim-fire cartridges; with those cartridges it was successful; it was not successful when used with centre-fire cartridges, for this reason: The flange of the rim-fire cartridges expanded somewhat at the time of explosion, and the shell thus took a firm seat in the barrel. This expansion did not occur in the centre-fire cartridges, and therefore the shell was pressed back by the ejector spring in proportion to the speed with which the breech-block was raised; the movement thus communicated to the cartridge was therefore not sufficiently fast to throw the cartridge out of the receiver. To counteract this difficulty, Berdan introduced the friction plunger into the receiver just behind the cartridge-head, thus counteracting the backward pressure of the spring until the breech-block was open sufficiently to allow the shell to clear the face of the breech-block when ejected, so that the motion backward should not be impeded by the intervening breech-block. This friction plunger, singly or in combination, was not patented by Berdan.

"It appears that the ejector in patent 52,925 would only operate when a rim-fire cartridge was used. The government uses centre-fire cartridges."

Patent No. 88,436 was for what is called an extractor ejector. In reference to the cause of action under this patent, findings 16, 17, and 19 are as follows:

"16. Extraction and ejection of cartridges was thus performed in all Springfield guns, beginning with the model of 1868, and continuing since.

Statement of the Case.

"Extraction: By an extractor plate swinging on the hinge-pin, and struck above its centre of motion by the forward end of the breech-block near the completion of its movement in opening.

"Ejection: By accelerating the movement of the extractor by means of a spiral ejector spring which surrounds the stem of the ejector spindle, and bears against the bottom of its hole in the receiver at one end, and against the head of the spindle at the other end. When the extractor is revolved by the opening of the block, the ejector spring is compressed by the ejector spindle, the point of which rests in a cavity in the back of the extractor above its axis of motion. The continued revolution of the extractor finally brings the prolongation of the ejector spindle below the axis of motion; as soon as the centre is passed the sudden release of the ejector spring causes the extractor to rapidly rotate about its axis and to carry the empty cartridge shell against the bevelled surface of the ejector stud, by which it is deflected upward and thrown clear of the gun.

"This specific device was perfected by Benjamin F. Adams, an employé in the Springfield Armory. He invented it in the autumn of 1868.

"17. The extraction and ejection of cartridges was thus performed in the Russian-Berdan gun, patent No. 88,436.

"Extraction: By an extractor swinging on the joint screw and struck above its centre of motion by the forward end of the breech-block nearer the completion of its movement in opening.

"Ejection: By accelerating the movement of the extractor by the ejector spring, one end of which has a solid bearing on the hinge strap slide, and the other resting on the extractor above the centre of motion, causes the spring to be compressed by the movement of the latter until the direction of the resistance passes below the centre of motion; the sudden release of the spring then throws out the extractor, carrying with it the shell, which in passing out is deflected by the bevelled surface of the ejector stud, and is thus thrown clear of the piece.

"The only difference between the Berdan and Adams devices is that Berdan used a flat spring while the government

used a spiral spring with a spindle or plunger; both perform the same office and attain the same result in the same way; the use of the flat spring or of the spiral spring is matter of choice, and is in no way material to the result.

"Adams, when he made his invention, was ignorant of Berdan's prior invention.

"19. The War Department is early and regularly informed of all improvements and inventions in fire-arms and ammunition. It is aware of the state of the art at all times, and generally knows of all patents upon fire-arms as soon as issued.

"The attitude of the War Department towards inventors in ordnance has been one of neutrality; it has neither denied nor admitted the legal rights, if any there were, of inventors; in an endeavor to perfect the government arm that department has taken advantage of all knowledge within its reach and of all inventions; it does not deny the claims of inventors, but has proceeded upon the policy that executive officers should not decide upon such claims against the government or upon conflicting claims, but that the claim should be presented without prejudice before some other tribunal than an executive department. Berdan, as an officer of plaintiffs herein, assignees of his inventions during the period covered by this action, was in constant communication with the ordnance officers, requesting the use of his devices by the government; they knew him as an inventor and knew his inventions as soon as they were patented. In 1867, it was known that Berdan was at work upon an ejector, and in August, 1868, that he had applied for patents for improvements in fire-arms, but it does not appear that prior to issue of patent the ordnance officers knew of the specific devices protected by letters patent No. 88,436, issued March 10, 1869, upon application filed July 21, 1868, except as hereinafter appears."

Finding 23 contains these statements:

"In 1867, during the autumn, Berdan showed to Colonel Benton, commandant of the Springfield Armory, at the armory, a transformed musket, containing the extractor-ejector subsequently described in the specifications and claims of patent number 88,436. Colonel Benton then and there examined and

tested the device; he neither approved nor disapproved it; his attitude was neutral.

"August 3 or 4, 1868, Berdan had a conversation with General Dyer, then Chief of Ordnance, in the Ordnance Office, upon the subject of his devices. During this conversation the Chief of Ordnance said, in substance, that he had recommended that some steps should be taken or some court constituted for the purpose of determining the value of the various claims for devices used in the Springfield gun, the army officers (in his opinion, he said) being powerless to settle the question.

"Berdan's application for patent No. 88,436 was then pending in the Patent Office, and Berdan explained generally its features. The Chief of Ordnance said, in substance, that if any of the features should be used by defendants in the Springfield gun, the ordnance officers expected to pay for them when the claimant had gone through the proper channels and settled the claim.

"While this application for patent 88,436 was pending in the Patent Office the following letters were written:

"'WASHINGTON, *August* 3, 1868.

"'GENERAL: I hold some patents on the system of converting muzzle-loading muskets into breech-loaders, recently adopted by the United States. I am also the inventor of other points in the same system not yet patented, but applications for which have been made some time since, and I am now informed that the business of this branch of the Patent Office is some five months behindhand, and that my application would be acted upon at once on a receipt of a note from the department that it is desirable that these applications should be disposed of to enable me to present my claim to the government for the use of said patent.

"'Trusting that you will grant me this favor,

"'I am, very respectfully, your obedient servant,

"'H. BERDAN.

"'Bvt. Maj. Gen. A. B. DYER,

"'*Chief of Ordnance.*'

"'WAR DEPARTMENT, WASHINGTON CITY,

"'*August* 12, 1868.

"'SIR: I have the honor to transmit herewith a communication, dated the 3d instant, from H. Berdan, asking that his application for patents for various improvements in firearms be acted upon immediately by the Patent Office, in order that he may present his claims against this department for its use of said inventions, and to state that so far as this department is concerned the early consideration of the aforesaid claims is regarded as being desirable.

"'Very respectfully, your obedient servant,

"'J. M. SCHOFIELD,

"'*Secretary of War.*'

* * * * *

"The Berdan extractor and ejector device (patent 88,436) was exhibited in competition with other guns to a board of officers detailed to test guns and called the 'Terry board,' in the year 1873; in the report of that board the device was fully described. General Benêt became Chief of Ordnance in June, 1874, and has since held this position; he understood the Springfield device for extracting and ejecting the shell, as described in the 'Terry' report, as 'seemingly identical, certainly the mechanical equivalent,' of Berdan's device for the same subject, covered by patent 88,436. After the decision of the case of *McKeever* v. *The United States*, in this court (December term, 1878, 14 C. Cl. R., p. 396) General Benêt has been of this 'decided opinion:'

"'First. That the Supreme Court having given the opinion in the case of *Seymour* v. *Osborne*, (11 Wallace U. S. S. C. Reports, p. 533,) that "inventions secured by letters patent are property in the holder of the patent, and are as much entitled to protection as any other property, consisting of a franchise during the terms for which the franchise or the exclusive right is granted;" that patent rights are private property and cannot be taken by the United States without due compensation; and,

"'Second. That a use of an invention protected by a patent is the use of private property that must be paid for, and, therefore, an implied contract that has a place in court, and that if the validity of the patent is sustained, and its use by the government is proved to the satisfaction of the court, the inventor must be paid.'

"General Benét, 'with this understanding,' continued the manufacture of the Springfield gun, containing the disputed ejector and extractor device, after adjournment of the 'Terry board,' with the expectation that if the court sustained a claim by Berdan against the government upon his patent No. 88,436, then the government must pay him for the use of his invention. Plaintiffs have desired that the government should use their patented devices and have also desired and requested compensation for such use.

"Upon the foregoing facts the court find that since 1874 the Berdan extractor-ejector device (described in patent No. 88,436) has been used by defendant's ordnance officers knowingly and without claim of adverse right, believing the device in the Springfield gun to be the device, or the mechanical equivalent of the device, covered by said letters patent, and with the anticipation that should the understanding of the said ordnance officers as to plaintiff's rights be judicially decided to be correct the defendant would compensate plaintiffs for such use."

Mr. Assistant Attorney General Conrad, for the United States, said, upon the question of a contract:

In the case of *Palmer* v. *United States*, 128 U. S. 262, 269, Palmer had exhibited his invention to a board of army officers, which recommended its adoption, and the Secretary of War adopted the device as a part of the equipment of infantry. The government thereupon manufactured and used the patented invention. Action being brought to recover royalty upon the theory of an implied contract, plaintiff was successful; and on appeal to the Supreme Court the judgment

was affirmed. Mr. Justice Bradley, delivering the opinion of the court, said:

"The government used the claimant's improvements with his consent; and certainly with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use. . . . 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."

The government is altogether willing that its liability to the demand made here shall be determined by the tests suggested in the foregoing opinion. It submits that from the findings of fact in this case it is ascertained that it not only did not "use claimant's improvements with his consent," but did not use them at all and expressly declined to use them. It submits that this is not a "claim of compensation for authorized use," but is clearly and distinctly a "claim for an infringement." The sole basis of this claim, as appears as well from claimant's petition as from the opinion of the court, is that the government is liable, not because it has used Berdan's device, but because in using Adams's device, it has used a mechanical equivalent to Berdan's. This fact, considered in connection with the further fact that upon competitive trial it expressly rejected Berdan's and chose Adams's device, would seem to be conclusive of the character of its liability (if any) in this case; that is, that it is a liability for an infringement and not a liability upon a contract.

We do not mean to be understood as saying that the government may not be held liable for its appropriation and use of the patented invention of another. What we do mean to say is, that such liability can only arise under conditions from which a contract, promise, or undertaking on the part of the government can be reasonably implied; and we submit that, under the conditions which the findings of fact here disclose, no such promise or undertaking can be implied, because the

government has expressly refused to use the explicit device for which compensation is here claimed; and having thus refused to use it, the only ground upon which liability can be claimed is, that in using the device which it has intentionally employed it has thereby unwittingly infringed the patented rights of Berdan.

Mr. George S. Boutwell and *Mr. Joseph H. Choate* for the Berdan Co. said as to the statute of limitations:

Upon this subject of the entirety of the contract, there is in this court a very instructive and quite conclusive case. In *Steam Packet Company* v. *Sickles*, 10 How. 419, at p. 440 to 441, the plaintiff had entered into a contract with the defendants for the use by the defendants of a certain patented machine of the plaintiff's upon the steamboat of the defendants, the purpose of the machine being to save fuel in the operation of the boats. By the terms of the contract the defendants were to continue the use on their boat "*during the continuance of the patent.*" The plaintiffs having sued without regard to the stipulations of the contract, and having threatened to bring an action *every week* to recover the amount due under the terms of the contract, and the court below having substantially instructed the jury that such an action *ad interim* would lie, this court, in holding such instruction to be error, said:

"If the plaintiffs had complied with the request of the president of the company, in a letter addressed to them on the 14th of April, 1841, after the dispute about the nature of the contract had arisen, and taken their cut-off from the boat, and thus put an end to the contract, the instructions given by the court would have been undoubtedly correct. But as the record shows that the plaintiffs have refused to annul the contract, a very important question arises — whether this action and five hundred others, which the plaintiffs have expressed their determination to continue to institute, can be supported on this one contract. By the contract as proved and declared

on, the defendants, after the machine has been erected on their boat, are to continue to use it 'during the continuance of the patent,' if the boat should last so long. The compensation to be paid by the defendants is to be measured by the amount of saving of fuel which the machine shall effect. The mode of ascertaining this saving is pointed out, and the ratio in which it is to be divided. The first $250 saved are all to go to the plaintiffs, and three-fourths of all the balance. *But the contract is wholly silent as to the time when any account shall be rendered or payments made. The defendants have not agreed to pay by the trip, or settle their account every day, or week, or year; or at the end of* 27½ *weeks, the time for which this suit is instituted.* The agreement on the part of the plaintiffs is, that the defendants shall use their machine for a certain time, in consideration of which defendants are to pay a certain sum of money. *It is true the exact sum is not stated; but the mode of rendering it certain is fully set forth. It is one entire contract, which cannot be divided into a thousand, as the plaintiffs imagine.* If the defendants had agreed to pay by instalments at the end of every week, or twenty-seven weeks, doubtless the plaintiffs could have sustained an action for the breach of each promise as the breaches successively occurred. But it is a well-settled principle of law that '*unless there be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is a condition precedent. Being one consideration and one debt, it cannot be divided.*' It was error, therefore, to instruct the jury that the plaintiffs were entitled to recover on the first count, if their machine was used by the defendants and was beneficial to them, without regard to the fact of the rescission, or continuance, or fulfilment of the contract on the part of the plaintiffs."

The question of the nature and of the entirety of the contract, being purely one of intention, the circumstances of this case and the transactions of the parties, coupled with the nature of the subject-matter of the contract and of the contemplated user, absolutely demonstrate that in this instance the

contract is entire for a continuous user during the life of the patent, and not a several and distinct contract in respect of each gun. The statute of limitations is therefore no bar to any part of the claim.

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

Three questions are presented: First, did the court err in denying relief to the petitioner on the first cause of action; second, was the petitioner entitled to recover from the United States on the second cause of action; and, third, if so, was there any mistake in the amount awarded?

With respect to the first little need be said. The ninth finding is express, that the government never bought any guns from petitioner, (for the word "defendants" is obviously a clerical error,) and has never manufactured a gun after the model recommended by the Hancock board. It, therefore, never received any tangible property from the petitioner, nor ever trespassed upon any intangible right created by the patent. Beyond this it also appears that the patent was only for a combination, no single element of which was new; that it was intended for and was successful when used with rim-fire cartridges, and was not successful when used with centre-fire cartridges; that the government uses only the latter cartridges; that in order to adapt his patent to these cartridges the inventor added a new element for which neither singly nor in combination did he take out any patent. If, therefore, the government had used model No. 4, which was presented to the Hancock board, it would not have infringed any patent right. For where several elements, no one of which is novel, are united in a combination which is the subject of a patent, and these several elements are thereafter united with another element into a new combination, and this new combination performs a work which the patented combination could not, there is no infringement. Even if there were findings sufficient to show that the government had in any manner infringed upon this patent, there is nothing disclosing a contract, express or

implied, and a mere infringement, which is only a tort, creates no cause of action cognizable in the Court of Claims. *Gibbons* v. *United States*, 8 Wall. 269; *Morgan* v. *United States*, 14 Wall. 531; *Hill* v. *United States*, 149 U. S. 593; *Schillinger* v. *United States*, 155 U. S. 163.

With regard to the second question: It appears that Berdan invented the extractor-ejector; that he received a patent therefor and assigned such patent to the petitioner. It also appears that the government has made use of this invention, or at least one differing from it only in the substitution of a spiral for a flat spring. These springs "perform the same office and attain the same result in the same way," and the use of the one for the other is a "matter of choice, and is in no way material to the result." Upon these facts alone, thus briefly stated, the defendant, were it a private person, would be liable to an action of infringement. Nor would it be a defence to the action that such person had, subsequent to Berdan's invention, and without knowledge thereof, devised the contrivance which he was using. He would be in the attitude of a subsequent inventor, and the prior inventor is the one who, under the statutes, is entitled to the monopoly. Rev. Stat. §§ 4884–4886. "For any one invention but one valid patent can exist; and of several distinct inventors of the same invention one only is entitled to receive a grant of the exclusive right. This one is the original and first inventor." 1 Robinson on Patents, sec. 58. That the peculiar contrivance used by the government was devised by Adams, one of its employés, and that it differs from the Berdan invention in the use of a spiral instead of a flat spring, in no manner diminish the patent rights of Berdan or his assignee, the petitioner, or change the fact that the use made by the government of the extractor-ejector was an infringement upon such rights.

But as heretofore stated, something more than a mere infringement, which is a tort and not within the jurisdiction of the Court of Claims, is necessary to enable the petitioner to maintain this action. Some contractual liability must be shown. In *United States* v. *Palmer*, 128 U. S. 262, 269, it appeared that the petitioner was the inventor of certain im-

provements in infantry equipments; that he presented such improvements to a board of officers appointed by order of the Secretary of War to meet, consider, and report upon the subject of a proper equipment for infantry soldiers; that such board recommended the use of his improvements; and that the improvements were adopted by the Secretary of War as part of the equipment of the infantry soldiers of the United States army. Upon these facts the court found that there was an implied contract, Mr. Justice Bradley, speaking for the court, saying: "No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. 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. . . . 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. The objection, therefore, that this is an action for a tort falls to the ground."

In the case at bar, according to the nineteenth finding, "Berdan, as an officer of plaintiffs herein, assignees of his inventions during the period covered by this action, was in constant communication with the ordnance officers, requesting the use of his devices by the government; they knew him as an inventor, and knew his inventions as soon as they were patented;" and, by the twenty-third, "plaintiffs have desired the government should use their patented devices, and have also desired and requested compensation for such use." So far, then, as the petitioner is concerned, the use of this invention was with its consent, in accordance with its wish, and with the thought of compensation therefor.

While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued; no

claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner.

The nineteenth finding, besides showing knowledge on the part of the officers of the government of Berdan's invention, states, in a general way, that "the attitude of the War Department towards inventors in ordnance has been one of neutrality; it has neither denied nor admitted the legal rights, if any there were, of inventors; in an endeavor to perfect the government arm that department has taken advantage of all knowledge within its reach and of all inventions; it does not deny the claims of inventors, but has proceeded upon the policy that executive officers should not decide upon such claims against the government or upon conflicting claims, but that the claim should be presented without prejudice before some other tribunal than an executive department."

The twenty-third finding discloses that while Berdan's application for patent No. 88,436 was pending the Chief of Ordnance of the Army said, in substance, that if any of the features of that patent should be used by the defendant in the manufacture of the Springfield gun, the officers expected to recommend the payment for their use when the claims had gone through the proper channels and were settled; that the inventor wrote to the Chief of Ordnance asking the assistance of the War Department in securing speedy action on the pending application in the Patent Office, which letter was transmitted by the Secretary of War to the Secretary of the Interior, stating that "the early consideration of the aforesaid claims is regarded as being desirable."

By the same finding it also appears that this patent was exhibited in 1873, in competition with other guns, to a board of officers called the Terry board, detailed to inspect guns; that in the report of this board the device is fully described; that General Benét became Chief of Ordnance in June, 1874; "that he understood the Springfield device for extracting and

ejecting the shell, as described in the 'Terry' report, as 'seemingly identical, certainly the mechanical equivalent' of Berdan's device for the same subject, covered by patent 88,436;" and also understood "that a use of an invention protected by a patent is the use of private property that must be paid for, and, therefore, an implied contract that has a place in court, and that if the validity of the patent is sustained, and its use by the government is proved to the satisfaction of the court, the inventor must be paid;" and "'with this understanding,' continued the manufacture of the Springfield gun, containing the disputed ejector and extractor device, after adjournment of the 'Terry board,' with the expectation that if the court sustained a claim by Berdan against the government upon his patent No. 88,436, then the government must pay him for the use of the invention."

The import of these findings is this: That the officers of the government, charged specially with the duty of superintending the manufacture of muskets, regarded Berdan as the inventor of this extractor-ejector; that the difference between the spiral and flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use as for other private property which it might take, and this, although they did not believe themselves to have the authority to agree upon the price.

These facts bring the case clearly within *United States* v. *Palmer*, *supra*, and show that the judgment of the Court of Claims was not founded upon a tort resulting from a mere infringement, but upon a contract to which both parties assented. That no price was agreed upon, or that the officers of the government were not authorized to agree upon a price, is immaterial. No price was fixed in *United States* v. *Palmer*, *supra*, or in *United States* v. *Russell*, 13 Wall. 623. The question is whether there was a contract for the use, and not whether all the conditions of the use were provided for in such contract. This is the ordinary rule in respect to the purchase of property or labor.

With regard to the third question, we are of opinion that the Court of Claims ruled correctly that the statute of limitations was a bar to any recovery for the use of the patented invention prior to six years before the action was commenced.

The Berdan device has been used by the government since January, 1869, and the petition in this case was filed July 26, 1887. Between January, 1869, and July 26, 1881, there were manufactured 224,952 muskets containing this device. Between July 26, 1881, and the expiration of the patent the number of muskets so manufactured was 159,940. The Court of Claims found that five per cent upon the lowest cost of manufacturing the musket during the period covered by this action was a fair and reasonable royalty.

One contention of the petitioner is that the contract, to be implied from the facts in this case, was entered into at the commencement of the use by the government of this patented device, and was a single contract in respect to the entire manufacture, under which no cause of action accrued to the petitioner until it was fully completed, and that therefore the statute of limitations began to run only from such time. The foundation of this claim lies in the fact that the blank form of proposal prepared by the Hancock board contained "the cardinal feature that the price should be fixed on a sliding scale — the more used the less rate;" and that the proposition made by the petitioner was in exact response thereto, and named the prices graduated by the number of arms that should be manufactured, to wit, "two dollars per arm for the privilege of manufacturing 50,000; one and three-quarters dollars for the privilege of manufacturing 100,000," and so on; and that all the offers made at the time were on some sliding scale of compensation.

It is further insisted that no other mode of determining the compensation was ever agreed upon between the parties; that the whole history of the transactions between them indicate that that must have been the mode contemplated by each; that in the nature of things, and in accordance with the ordinary rules which control matters of this kind, the price should vary with the number or quantity, and that

until the government had ceased using the device, or at least until the patent had expired, there could be no satisfactory determination of what was a reasonable price for its use.

It is a sufficient reply that the proceedings before the Hancock board were abortive and resulted in nothing. The proposition made by the petitioner was never accepted, and the government never bought any gun from it or manufactured any like that recommended by the Hancock board. The proposition contemplated no rights other than the petitioner then had. It did not in terms, or by implication, extend to patents that it might thereafter acquire, and cannot be construed as underlying any action by the government commenced three years thereafter with reference to a different subject-matter. Because the petitioner, in 1866, offered the government certain patent rights at specified prices, it does not follow that those prices were to control in respect to other patent rights not then in existence, and which were subsequently tendered by it. If the prices are not to control, there is no reason for insisting that the other terms of the original proposition entered into the later transaction. When the negotiations of 1866 failed they failed for all purposes, and in the absence of some specific evidence indicating an intent to carry forward the terms of the proposition then made into the new arrangement of 1869, the conditions of this new contract must be determined by the circumstances which attended it.

But further, the negotiations of the Hancock board contemplated intermediate payments. In the blank form of proposal issued by the board was this provision: "Each payment, as above specified, to be made for not less than five thousand arms," and the same language was inserted in the offer made by the petitioner. Evidently the parties intended that any contract which might be entered into should provide for payments from time to time, such payments to be for not less than five thousand arms, and not for a single payment when the government had finished the use, or the patent had expired. And, of course, the moment any payment should become due, that moment, as to it, the statute of limitations would begin to run. Whatever, however, may

have been the thought of the parties in respect to the contract then proposed, the actual use by the government of the device covered by patent No. 88,436 was, so far as appears from any of the findings, upon no understanding that the prices named in 1866 for the device then tendered were to control, or that any sliding scale existed by which the price should be reduced as the number increased, or that the manufacture was to continue for any specified time, or that any particular number of muskets containing the device were to be manufactured. It was the use of the device in each single musket, with no other agreement or understanding than that a reasonable price should be paid therefor. It was like the ordinary purchase of a series of articles: no time for payment being named, payment is due for each article as it is delivered.

The case of *Steam Packet Co.* v. *Sickles*, 10 How. 419, 441, is not in point, for in that case the contract specifically provided that the machine should be used by the defendants during the continuance of the patent, and that after paying for its construction, the savings caused thereby in the consumption of fuel should be divided between the defendants and plaintiffs, one-quarter to defendants and three-quarters to plaintiffs. It was in view of this feature of the contract that the court said: "The agreement on the part of the plaintiffs is, that the defendants shall use their machine for a certain time, in consideration of which defendants are to pay a certain sum of money. It is true that the exact sum is not stated; but the mode of rendering it certain is fully set forth. It is one entire contract, which cannot be divided into a thousand, as the plaintiffs imagine." But here there is no pretence that the government agreed to use in all its muskets this device; or to continue the use of the device in any that it should manufacture during the life of the patent. There was no obligation on the part of the government as to time or number.

It is further contended that the royalty fixed by the Court of Claims is less than it should have been. In support of this contention reference is made to finding number twenty-two, which contains these statements:

"The cost of manufacturing the extractor-ejector now in use (since 1868) is $1.25 per gun less than the cost of manufacturing the Allin device. Several witnesses of high military position, experts in the practical use of arms of this description, and familiar with the cost of manufacture, have testified to the great value of the extractor-ejector device, claimed to be covered (and understood by them to be covered) by patent No. 88,436, and they are of the opinion that a reasonable royalty for the use of this device would be the saving in cost over the Allin device plus a sum varying somewhat with each witness, but of which the average is $1.41⅔ per musket, thus giving as royalty the sum of $2.66⅔ per musket. It does not appear upon what facts these witnesses based their opinions, or that they were cognizant of facts in relation to sales or licenses of this or other similar inventions upon which to found their opinions."

In this finding the court also states that it "finds the ultimate fact that five per cent upon the lowest cost of manufacturing the musket during the period covered by this action" was a fair and reasonable royalty. It gives the cost of manufacturing during the various years, and, in addition to the matters just quoted, the amount paid in other cases for the use of other devices in fire-arms. It also gives a table of the rates offered by the fifty-six different patentees of fire-arms to the Hancock board. Now, it may be that the finding as to the reasonable royalty is something in the nature of an arbitrary determination, and it is true that the court refers to the various matters above indicated as furnishing the basis upon which it reaches this conclusion, yet the question of a reasonable royalty is a question of fact to be determined by the Court of Claims, and its determination, as expressed in its findings, is conclusive upon us, unless from other findings it is apparent that there was error. We are not satisfied that there was any such error. The question is, what, under the circumstances, was a reasonable price to be paid by the government? It does not appear that there was any customary royalty, or that anybody, other than the government, has used this device. It is fair also to bear in mind that the particular structure which the government used was devised by one of its own

employés, and while the difference between it and the Berdan device is slight, and Berdan was the prior inventor, yet it is not unreasonable to take into consideration this slight difference between the two structures, and that the government constantly held to the specific device invented by its own employé. The question is not whether, from the other facts stated in the findings, we should have reached the same conclusion as the Court of Claims, but whether, from such other facts, we can see that that court erred. We are not prepared so to hold.

These are the only questions presented in this record, and, finding no error in them, the judgment of the Court of Claims is

Affirmed.

Mr. Justice White took no part in the decision of these cases.

CORINNE MILL CANAL AND STOCK COMPANY *v.* JOHNSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 216. Argued January 31, 1895. — Decided March 4, 1895.

In an action to recover possession of land in Utah the plaintiff set up that it was part of a grant to a railroad company under which he claimed. In the statute making the grant there were exceptions and reservations. The plaintiff failed to show that the tract he claimed was not within them. The trial court ruled that he had failed to show title, and its ruling was upheld by the Supreme Court of the Territory. *Held*, that this was not error.

This was an action brought by the plaintiff in error, plaintiff below, in the District Court of the First Judicial District of Utah to recover possession of certain real estate. A trial before the court and a jury resulted in a verdict and judgment for defendant, which judgment was on appeal affirmed by the Supreme Court of the Territory. 7 Utah, 327.

Counsel for Plaintiff in Error.

The contention of plaintiff was that the lands were within the grant made by the acts of Congress of July 1, 1862, (12 Stat. 489,) and July 2, 1864, (13 Stat. 356,) to aid in the construction of a railroad from the Missouri River to the Pacific Ocean, and that by virtue of the admitted completion of the road the title to them had passed to the Central Pacific Railroad Company, under whom it claimed. The statement on motion for a new trial and appeal, signed by the trial judge, which is substantially the equivalent of a bill of exceptions, does not contain any patent from the government for the lands, nor does it purport to contain all the testimony offered on the trial. The trial court in its instructions to the jury expressed the opinion that the plaintiff had failed to prove any title, but, while expressing such opinion, submitted to them the question of the statute of limitations. The views of the Supreme Court of the Territory are summed up in these two paragraphs:

"In this case no evidence having been offered that the railroad ever obtained a patent for the lands in dispute, nor that it filed its map showing its line as definitely located within the time provided by the law, nor any proof as to the time when said railroad was completed, nor that the lands were not within any of the exceptions or reservations provided in the statute, we think plaintiff failed to show its title, and that there was no error in the instruction given by the court to the jury.

"The trial court submitted to the jury the issue of the statute of limitations raised in defendant's answer, and this is assigned as error, upon the ground that there was no evidence tending to support this issue. We have examined the evidence contained in the record, and while it does not purport to contain all the evidence in the case, yet from the evidence set out in the printed transcript we think no error was committed in this respect, and the judgment of the District Court is affirmed."

Mr. J. M. Wilson for plaintiff in error. *Mr. C. W. Bennett* and *Mr. John A. Marshall* filed a brief for same.

Mr. O. B. Hallam for defendant in error.

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

The grant to the railroad company was not of all the odd-numbered sections within twenty miles of its line of definite location, but of those sections subject to certain exceptions. Proof that the road had been located and completed and that the tracts claimed were odd-numbered sections within the twenty-mile limit, was not sufficient to establish title in the company. The evidence must go further, and the burden was on the plaintiff to show that they were not of the lands excepted. *Maxwell Land Grant Co.* v. *Dawson*, 151 U. S. 586.

Now the defect in this record which is fatal to the case of the plaintiff in error is that nowhere is it shown that all the testimony received on the trial is preserved. Under such circumstances we are not at liberty to assume that there was in evidence a patent, or other instrument of itself working a transfer of the legal title from the government to the railroad company, or evidence of any character removing all doubt as to the matter of exceptions, nor, on the other hand, that there was not testimony which conclusively established the existence of some one or more of those exceptions.

Take for illustration the question whether these were mineral lands. The grant in terms excepted such lands from its operation. There was no evidence of any adjudication by the Land Department, either through the issue of a patent or otherwise, that they were non-mineral lands. *Barden* v. *Northern Pacific Railroad*, 154 U. S. 288. While there was on the part of the plaintiff some testimony of a general character tending to show that the lands were grazing lands, and that no mineral had ever been discovered in them, yet for aught that appears, there may have been overwhelming evidence that mines had in fact been opened and worked in them, or that there had been an express adjudication by the Land Department that they were mineral lands and excepted from the grant. And so of other exceptions.

The presumptions are all in favor of the rulings of the trial court. And before it can be adjudged that it erred in instructing that the plaintiff had failed in its proof of title, the record must affirmatively show that the title was in fact proved, and that, as we have seen, includes proof that the lands were not within the exceptions named in the statute.

The Supreme Court of the Territory, whose judgment we are reviewing, did not err in refusing upon such a record to disturb the decision of the trial court that the plaintiff had not established its title to the land. The judgment is, therefore,

Affirmed.

PITTSBURG AND SOUTHERN COAL COMPANY *v.* BATES.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 3. Argued January 10, 11, 1895. — Decided March 4, 1895.

Coal, shipped by the owners at Pittsburg in their own barges to Baton Rouge for the purpose of being sold there or sent thence to supply orders, and moored at Baton Rouge in the original barges in which it was shipped at Pittsburg, is subject to local taxation there as a stock in trade, and such imposition of a tax violates no provision of the Constitution of the United States.

Brown v. *Houston*, 114 U. S., 622, affirmed and applied to this case.

The Pittsburg and Southern Coal Company, a corporation organized under the laws of Pennsylvania and domiciled in the city of Pittsburg, Pennsylvania, and a citizen of that State, filed its petition in the Seventeenth Judicial District Court of the parish of East Baton Rouge, Louisiana, alleging that the petitioner was and had been for some time engaged in the business of buying and selling coal from the mines in Pennsylvania upon the Mississippi River and other navigable rivers of the country.

That it was the owner of a large number of vessels and barges which it had bought with cargoes of coal, and was

therewith engaged in trade, commerce, and navigation upon the Mississippi River and other navigable rivers of the United States;

That in the course of the trips and voyages of its vessels and barges down the Mississippi River, it was often convenient, advantageous, or necessary that the vessels should be stopped and moored at different places or landings on the Mississippi River, for different periods of time, in the States of Tennessee, Mississippi, Arkansas, and Louisiana pending the arrangements being made by its officers and agents for the reception and disposition of the cargoes of the vessels;

That during the current year it had sent down the Mississippi River a large number of vessels, the property of the petitioner, to supply the trade of Louisiana along the Mississippi and its navigable tributaries, which vessels and cargoes of coal were consigned to Schneidau, the agent of the petitioner in New Orleans;

That the agent, Mr. Schneidau, not having yet made the necessary arrangements to receive and dispose of the cargoes of the vessels at New Orleans or elsewhere, the vessels, being about one hundred in number, were stopped and moored in the Mississippi River at a convenient mooring place about nine miles above the port of Baton Rouge, where they awaited the orders of petitioner's agent, to be thence navigated to such place or places as he might deem convenient or advantageous to the trade in which petitioner was engaged, and the vessels and the cargoes of coal therein were still the property of the petitioner;

That one J. W. Bates, who was the sheriff and *ex officio* tax collector of the parish of East Baton Rouge, had notified the petitioner through said Schneidau, its agent, that it was indebted for state taxes for the year 1887 on movable property (as stock on hand) belonging to the petitioner, as per the assessment rolls and state and parish books of 1887, in the sum of twelve hundred dollars, ($1200,) and threatened, unless the amount was paid within three days, to seize, advertise, and sell movable property of the petitioner sufficient to pay the debt;

Statement of the Case.

And the petitioner was informed, and believed, and so averred, that by the movable property referred to, and designated as "stock in trade," it was intended to describe the cargoes of coal on board the vessels of the petitioner which were moored in the Mississippi River about nine miles above the city of Baton Rouge.

That the tax claimed by Bates, sheriff and *ex officio* tax collector of the parish of East Baton Rouge, was not due or owing by petitioner or by the cargoes of the vessels, and the pretended assessment and tax claimed thereunder were illegal, unconstitutional, null, and void, for the following reasons:

1. That the pretended assessment, under which the tax was claimed, was vague, indefinite, erroneous, and informal, and not such as was required by the laws of Louisiana;

2. That the coal formed the cargoes of vessels owned in Pittsburg, Pennsylvania, and engaged in trade and commerce between different States; was still upon the vessels upon the navigable waters of the United States; had never been landed in the parish of East Baton Rouge or the State of Louisiana; had never been mixed or commingled with the mass of the movable property in that State, and never ceased to be the property of the petitioner;

3. That petitioner was not carrying on any business in the parish of East Baton Rouge; had no agent there; and the coal was not stock in trade on hand, but formed the cargoes of vessels employed in interstate commerce, and lying temporarily off the shore of East Baton Rouge, in the Mississippi River, from whence they would proceed at proper and convenient times to places of final destination;

4. That the tax was in violation of article one, section eight, clause three, of the Constitution of the United States — the clause which provides that Congress shall have power to regulate commerce with foreign nations and among the several States;

5. That it was in violation of article one, section ten, clause two, of the Constitution — the clause which provides that no State shall, without the consent of Congress, lay any imposts or duties except what may be absolutely necessary for executing the inspection laws;

6. That it was in violation of article four, section two, clause one, of the Constitution — the clause which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;

7. That it was in violation of article one, section nine, clause five, of the Constitution — the clause which declares that no tax or duty shall be laid on articles exported from any State.

The petitioner represented that notwithstanding the illegality, nullity, and unconstitutionality of the assessment and tax, for the reasons given, and numerous other reasons, that J. W. Bates, sheriff and *ex officio* tax collector of the parish of East Baton Rouge, had threatened and intended and would, unless restrained by an injunction, seize, advertise, and sell the vessels of the petitioner and their cargoes of coal or some part thereof, in order to pay the illegal tax; which action of Bates, if permitted, would injure the petitioner in a sum exceeding six thousand dollars, and cause it irreparable injury.

Whereupon the petitioner prayed that a writ of injunction to restrain Bates from thus seizing, advertising, or selling the vessels and coal of the petitioner lying in the Mississippi River, and hereinbefore fully described, in order to pay any tax of 1887, and from in any manner interfering with the property under color of enforcing the alleged tax.

The petition was signed by the attorneys of petitioner, and verified by one of them.

A writ was accordingly issued restraining Bates, the sheriff and *ex officio* tax collector, from seizing or advertising the vessels and coal of the petitioner for the alleged tax.

The sheriff and tax collector appeared in answer to the petition and denied its allegations; admitting, however, that in his capacity as tax collector he had caused the demand to be served upon the agent of the petitioner, and it was his intention, unless restrained by order of the court, to seize and sell the property.

And he averred that the coal was personal, taxable property, belonging to the Pittsburg and Southern Coal Company as "stock in trade," situated in the parish of East

Baton Rouge, and owed the state tax to the State of Louisiana, and was legally assessed according to the laws of the State.

On the trial it was admitted that the property on which the demand was made was on the Mississippi River, in boats of the plaintiff in injunction, which were moored to the shores, the boats being known as coal boats, and that the coal was brought down in them from mines in Pennsylvania, on the navigable streams leading therefrom.

Mr. Schneidau, the agent of the company, testified that the company was taxed at Pittsburg; that some of the coal moored at Natchez was sold there and some at other points below; that the company sold its coal in different States; that East Baton Rouge was not the final destination of the coal stopped there, but that some of it was there sold; that he had been the agent of the company since December, 1886; that during the whole of that time the company had kept a fleet of canal-boats up the river in this parish — on an average of about fifty boats — averaging about one hundred or more boats and barges; that coal was sold at different times by the company along the river, but that all was sold within the State of Louisiana.

It was admitted that the assessor made the assessment in due form of law, and that the property, consisting of their vessels and coal, had been assessed at $200,000.

The defendant at the hearing of the case, moved that the injunction be dissolved and the suit be dismissed with costs.

And it was contended that the cargoes of vessels owned in Pittsburg, Pennsylvania, and engaged in trade and commerce between different States, were still upon vessels upon the navigable waters of the United States, had never been landed in that parish or in the State of Louisiana, had never been mixed or commingled with the mass of movable property of the State, and had never ceased to be the petitioner's property; that it carried on no business in the parish of East Baton Rouge, had no agent there, and that the coal was not stock on hand in trade, but formed the cargoes of vessels employed in commerce and then lying temporarily off

the shore of Baton Rouge on the Mississippi, whence it would be sent to its final destination, and that the tax violated article one, section eight, clause three, of the Constitution of the United States — the power of Congress to regulate commerce with foreign nations and among the several States — and article one, section ten, clause two, of the Constitution, which declares that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, and that it was in violation of article four, section two, clause one, of the Constitution — the article which provides that citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States — and of article one, section nine, clause five, of the Constitution, which provides that no tax or duty shall be laid on articles exported from any State.

On the 24th of January, 1888, the court of the Seventeenth Judicial District of East Baton Rouge gave judgment dissolving the injunction in the case, and decreeing that the suit be dismissed at plaintiff's cost, and that the defendant proceed to collect the tax.

From this judgment the Pittsburg and Southern Coal Company appealed to the Supreme Court of the State.

On the 5th of March, 1888, that court affirmed the judgment of the Seventeenth Judicial Court of East Baton Rouge.

From this judgment of affirmance the case was brought to the Supreme Court of the United States by the plaintiff in the original suit on writ of error.

Mr. W. S. Benedict and *Mr. George A. King*, (with whom was *Mr. Charles W. Hornor* on the brief,) for plaintiff in error.

In *Brown* v. *Houston*, 114 U. S. 622, it was held that coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to

taxation under general laws of that State, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port.

We urge as reasons for regarding *Brown* v. *Houston* as inapplicable to control the determination of the present case:

1. That in this case the coal had not reached New Orleans, the port of destination, but was still on the Mississippi River, nine miles above Baton Rouge, and in actual course of transit.

2. Because *Brown* v. *Houston* has been in effect overruled by more recent decisions of this court.

As to the first of these grounds it will be observed from the testimony that the company had but one office in the State of Louisiana, and that was situated in the city of New Orleans. In the progress of the coal from Pittsburg down the Ohio and Mississippi Rivers it passed through numerous States, and usually tied up at night. It would be sold at any point in the different States as brought down to any person applying for it. It would hardly be claimed, we think, that the fact that the coal was liable to be sold at any point where it happened to tie up for the night, subjected the whole of it to liability for tax in any or all the half dozen States through which it passed in its course from Pittsburg to New Orleans. If not, why should it be subject to tax in the parish of East Baton Rouge almost as soon as it arrived in the State of Louisiana, and before reaching its destination at New Orleans? Surely, on the most liberal view of the taxing power of the State, the power to tax that which is brought in from another State cannot begin until the goods have reached their actual destination and place of rest within the State to which brought, even though a portion of them may be liable to be sold in the meantime.

We do not, however, place our main reliance for a reversal of the judgment in this case upon this ground.

Our principal ground for urging a reversal is that *Brown* v. *Houston*, 114 U. S. 622, in which a tax imposed under similar, if not in all respects identical, circumstances was sustained,

can no longer be regarded as the law of this court in the light of more recent decisions, particularly that in *Leisy* v. *Hardin*, 135 U. S. 100. In that case the whole subject of the power and jurisdiction of the States over property brought in from other States in the course of interstate commerce was examined, and the power of the State in that respect redefined, overruling expressly some, and impliedly others, of the prior decisions of this court.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, for defendant in error.

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

The plaintiff company in this court objects to the judgment of the Supreme Court of Louisiana dissolving the injunction in the original suit which inhibited the state tax collector from selling coal lying in boats on the Mississippi River to pay taxes alleged to be due to the State thereon, and directing that the defendant proceed to collect the tax.

It is contended that the law under which the sheriff and tax collector assumed to act exempted the coal from taxation as property in process of transportation and not on consignment for sale. Such would seem to be the direct declaration of the law of Louisiana. And independently of that direction such would seem to be the import of the decision of this court in *Brown* v. *Houston*, 114 U. S. 622. That case resembles, in important features, the present one. It was brought by the plaintiff in error in the Civil District Court for the parish of Orleans in the State of Louisiana in December, 1880, to enjoin the state tax collector from seizing and selling a certain lot of coal belonging to the plaintiff situated in New Orleans. They alleged that they were residents and did business in Pittsburg, Pennsylvania; that the state tax collector had officially notified their agents that they were indebted to the State of Louisiana in the sum of three hundred and fifty-two dollars and eighty cents, state tax for the year 1880, upon a certain lot of Pittsburg coal assessed as

their property and valued at fifty-eight thousand and eight hundred dollars; that they were delinquent for the tax to the tax collector, who was about to seize, advertise, and sell the coal to pay the tax.

They alleged that they were not indebted to the State of Louisiana for the tax, and that they were the sole owners of the coal and were not liable for any tax thereon, having paid all taxes legally due for the year 1880 on the coal in Pennsylvania, and that the coal was simply under the care of their agents, Brown and Jones, in New Orleans, for sale.

They further alleged that the coal was mined in Pennsylvania and was from that State imported into the State of Louisiana, as their property, and was then and had always remained in its original condition, and never had become mixed or incorporated with other property in that State. That when the assessment was made the coal was afloat on the Mississippi River, in the parish of Orleans, in the original condition in which it was exported from Pennsylvania, and that the agents notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as stated, and was not subject to taxation; and they protested against the assessment for that purpose.

The tax collector notified the agents of the plaintiffs that in conformity with provisions of the law of 1880 the state tax assessed to them on movable property in the parish, which amounted to the sum of three hundred and fifty-two dollars and eighty cents, fell due and should have been paid before the first day of the current month; that they had become delinquent for the tax on the first day of December, and that after the expiration of twenty days he, as tax collector, would advertise for sale the movable property upon which the taxes were due, in the manner provided by law for judicial sales, when he would sell such portion of the property for cash, and without appraisement, as they should point out and deliver to him, and in case they did not point out and deliver to him sufficient property, that he would sell, without appraisement, the least quantity of the movable property which any bidder would buy for the amount of the taxes assessed.

The defendant answered with a general denial, admitting the assessment of the taxes and his intention to sell the property for its payment.

Witnesses were produced to sustain the allegations of the petition.

One of the witnesses testified that he was the general agent and manager of the business of Brown and Jones, of New Orleans, and that when the assessment complained of was made the firm had paid the state taxes due upon their capital stock and had paid state and city licenses to do business for that year. That at the time of assessment of the tax the coal upon which it was levied was in the hands of Brown and Jones, as agents of the plaintiffs, for sale, having just arrived from Pittsburg, Pennsylvania, by flatboats, and was in the boats in which it had arrived and afloat on the Mississippi River. That it was held by Brown and Jones to be sold for the account of plaintiffs by the boat load, and that since that time more than one-half of it had been exported from the country on foreign steamships and the balance sold in the interior of the State for plantation use, by the flatboat load.

One of the plaintiffs testified that they were the owners of the coal in question; that it was mined in Allegheny County, Pennsylvania; that the tax of two or more mills was paid on it in Pennsylvania, as a state tax thereon in 1880, and that a tax was also paid in the county of Allegheny in the year 1880; that it was shipped from Pittsburg, Pennsylvania, in 1880, and was received in New Orleans in its original condition and its original packages, and was still owned by the plaintiffs.

The Louisiana statute of April 9, 1880, under which the assessment was made provided:

That in the calendar year 1880, and for every succeeding calendar year, there should be levied, annually, taxes amounting in the aggregate to six mills on the dollar of the assessed valuation to be made on all property situated within the State of Louisiana, except such as was expressly exempted from taxation.

Exemptions from taxation, under the constitution of Louisiana, did not affect the question considered, and upon the case

as thus made the District Court of the parish dissolved the injunction and dismissed the suit. On appeal to the Supreme Court of the State the judgment was affirmed, and it came to this court on writ of error.

The errors assigned were that the tax in question violated article 4, section 2, clause 1 of the Federal Constitution; and article 1, section 8, clause 3, and article 1, section 10, clause 2 of the same instrument. The clauses therein referred to were:

1. That the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;

2. That the Congress shall have the power to regulate commerce with foreign nations and among the several States, and with the Indian tribes; and,

3. That no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

In considering the questions presented the court observed that it was decided in the case of *Woodruff* v. *Parham*, 8 Wall. 123, that the term "imports" as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State to another, but only to articles imported from foreign countries into the United States, and therefore it was not necessary to consider the questions thus raised, and which were based upon the assumption that the tax complained of was an impost or duty upon imports.

The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power, if, in the absence of Congressional action the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of

regulation, and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction.

So long as Congress does not pass any law to regulate commerce among the several States it thereby indicates its will that commerce shall be free, and any regulation upon the subject by the States is repugnant to such freedom. Thus, as observed Mr. Justice Strong: "It seems hardly necessary to argue at length that, unless the statute can be justified, as a legitimate exercise of the police power of the State, it is an usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations."

Such being the recognized law, the question arose before the court in the case of *Brown* v. *Houston*, whether the assessment of the tax upon the coal in question in the barges afloat amounted to any interference with or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania to the State of Louisiana. In other words, whether the tax amounted to a regulation or restriction upon commerce of the States, or only to the exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject, and that is one of the precise questions in the present case. And it was held that as to the character and mode of the assessment it was not a tax imposed upon the coal as a foreign produce, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the

coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxable for the current year as all other property in the city of New Orleans was taxable. Under the law it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana. It was treated exactly in the same manner as such goods were treated.

And the court held that it could not be seriously contended, at least in the absence of any congressional legislation to the contrary, that goods which are the product of other States are to be free from taxation in the State to which they might be carried for use or sale. And it may be added that the correct rule is for the assessor or tax collector to assess all property found within his jurisdiction, being there for the purpose of remaining till used or sold, and constituting part of the great mass of the general property of the country, provided always that the assessment does not discriminate between the products of different States.

And the court further observed that it saw no conflict in that case, either in the law itself or in the proceedings which had been had under it and sustained by the state tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

The decision of the court in *Brown* v. *Houston*, thus rendered, seems to be conclusive of the case now before the court. The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here. *Judgment affirmed.*

PITTSBURG AND SOUTHERN COAL COMPANY *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 10. Argued January 10, 11, 1895. — Decided March 4, 1895.

No. 147 of the Laws of Louisiana of July 12, 1888, providing for the appointment of coal and coke boat gaugers and making it compulsory upon all persons selling coal or coke in a barge to have the same inspected and gauged according to the provisions of that act, is not a regulation of commerce; nor does it lay an impost or duty upon imports or exports from or to other States and Louisiana; nor is such legislation forbidden by the act of February 20, 1811, c. 21, 2 Stat. 641, providing for the admission of Louisiana into the Union; nor does it work an unconstitutional discrimination between the coal of Pennsylvania and the coal of Alabama, coming into Louisiana.

On the 12th July, 1888, the legislature of Louisiana passed an act for the appointment of two coal and coke boat gaugers, to fix their compensation, and define their duties. No. 147, Laws of 1888, page 207. It provided that they should be appointed by the governor of the State, with the approval and consent of the Senate, to hold their offices in the city of New Orleans, with a proviso that the governor should have the power to remove any one of them upon satisfactory proof to him of negligence and official misconduct. The act further provided that each of the gaugers should give a bond payable to the governor, or his successor in office, with two sufficient sureties in the penal sum of five thousand dollars, conditioned for the faithful performance of his duties. The act declared that it should be the duty of the gaugers, when called upon for that purpose, to gauge any coal or coke boat or barge in the port of New Orleans or the State of Louisiana; that such gauging should consist in reducing the length, breadth, and depth, inside measurement, of boats or barges, deducting all obstructions and displacements, into cubic inches and dividing the cubic inches by twenty-six hundred and eighty-eight, thus

ascertaining the net measurement in bushels; and that two bushels and six-tenths of a bushel should constitute a barrel; that in all cases it should be the duty of the gaugers, or either of them, to respond promptly to any call made for their or either of their services, and to furnish a full and detailed certificate of the gross measurement of the boat or barge gauged and the allowance for obstructions or displacements; that the fee for gauging or regauging should be ten dollars for each boat, and five dollars for each barge, to be paid by the seller, except as subsequently provided; that the purchaser of any boat or barge of coal or coke should have the privilege of calling upon the said gauger or gaugers to regauge boats or barges, in all cases where the original gauge was not satisfactory, and such regauge should be adopted as the correct measure; that if the original gauge should be found to be correct, then the purchaser should pay the fee for regauging; but if the regauge should show a less measure, then the seller should pay the fee.

The law also declared that no boatload of coal or coke should be sold in the city or State until it had been inspected, as provided for in the act, and that any person who should sell a boatload of coal or coke that had not been gauged as required should be liable to a penalty of fifty dollars for each boat or barge thus sold, to be recovered, with costs of suit, in any court of competent jurisdiction, for the benefit of the Charity Hospital of New Orleans.

The term of office of said gaugers was made four years, the act to take effect from its passage.

The present action was brought by the State of Louisiana against the Pittsburg and Southern Coal Company, a corporation organized under the laws of Pennsylvania, and domiciled in the city of Pittsburg, of that State, in which it was a citizen, to recover the penalty of fifty dollars for selling in New Orleans one boatload of coal in violation of section eight of the act. It was commenced in the First City Court of New Orleans by the attorney general of the State for the use of the Charity Hospital of the city.

The defendant appeared by counsel and answered, alleging, besides, that it was a corporation under the laws of Pennsyl-

vania and domiciled in the city of Pittsburg in that State and a citizen thereof, that its business was that of coal mining, buying and selling coal and coke, that coal and coke were the products of the State of Pennsylvania, and were, by respondent, loaded in boats and barges on the Ohio and Mississippi Rivers, and navigated down to the South on those rivers and sold to purchasers along the banks thereof and of their various southern tributaries; that it every year sends down the Mississippi River, a navigable river of the United States, a number of barges and boats with cargoes of coal, and moors the same in the river, retaining them, as the property of the respondent, in the vessels in which they are brought down the rivers to the city of New Orleans and other points, and holds the same until they are sold to its customers, which is the object with which the boats and barges are loaded and navigated from the State of Pennsylvania to the State of Louisiana and other States, the vessels always remaining on the navigable waters of the United States and sold thereon.

Respondent averred that the demand herein made was by virtue of act No. 147 of the acts of 1888 of the State of Louisiana, and that the coal boat No. 1098, for selling which a penalty of fifty dollars was claimed, had been gauged by gaugers employed by the respondent, and that the boat, at the time of sale, was upon the Mississippi River, a navigable stream of the United States, within the jurisdiction of the United States, and the measurement thereof made by the gaugers was in accordance with section four of the act; and that the firm of W. G. Coyle & Company, to whom the boat of coal and coke had been sold, were satisfied with the measurement, and desired no further measurement thereof, and no certificate of the amount of coal therein; that the price was agreed on between the respondent and W. G. Coyle & Company, and any further gauging of the boat and coal was totally unnecessary, uncalled for, and would have been productive of no good or benefit to anybody.

Respondent further averred that the coal boat No. 1098 was laden with a cargo of coal which was mined in Pennsylvania, and was by the respondent navigated down the Ohio and Mis-

sissippi Rivers to a point or place thereon within the boundaries of the State of Louisiana, for the purpose of selling the vessel and cargo upon the river in pursuance of the trade or commerce which is carried on by respondent thereon and within the body of the various States through which it flows between Pennsylvania and the Gulf of Mexico.

The respondent further averred that the act No. 147 of 1888, making the gauging of the boat compulsory and exacting ten dollars on each boat sold in Louisiana, under which the attorney general, in the name of the State, proceeded, was contrary to the constitution of the State of Louisiana, and void upon various grounds, four of which were based upon the alleged repugnance of the act to certain provisions of the constitution of the State. These were not considered, as they were deemed immaterial to the disposition of the case. The other grounds were as follows:

1. That it was in violation of article one, section ten, of the Constitution of the United States, in that it impaired the obligation of a contract in this, that respondent had paid to the State of Louisiana the sum of two hundred and fifty dollars as a license for permission to carry on its business of selling coal and coke within the State; that the two hundred and fifty dollars being accepted by the State of Louisiana and the city of New Orleans and a license issued to the respondent thereunder, the same constituted a contract between the respondent and the State and the city, which has also issued a license to the respondent in payment of the sum, giving to them the right to sell coal and coke in the city and State during the year 1888 without further opposition or hindrance or imposition of any charge or claim or impost on the part of the State or city; that the license was obtained and granted by the State and the city prior to the passage of act No. 147 of the regular session of 1888.

2. That it was in violation of section ten of article one of the Constitution of the United States, in that it seeks to lay an impost or duty on imports in the State of Louisiana from the State of Pennsylvania, which was not necessary for the execution of any inspection law.

3. That it was in violation of the Fifth Amendment to the Constitution of the United States.

4. That it was in violation of section one of the Fourteenth Amendment of the Constitution of the United States.

5. That it was in violation of section eight of article one of the Constitution of the United States in that it was a regulation of commerce among the several states, and it sought to regulate upon the Mississippi River the sale of the vessels and coal of respondent, which are the subjects of commerce and trade carried on by the respondent on the river between the State of Pennsylvania and other States of the Union and foreign countries.

The respondent averred that the act was repugnant to the provisions of the Constitution of the United States and the laws thereof, in that it was a discrimination against imports brought into the State of Louisiana, in boats upon the navigable waters of the United States in favor of those brought in by land to the State; in that it subjected the one to the payment of duties, imposts, and exactions set forth in the act which were not imposed upon those brought in by land.

Respondent averred that the act discriminated against coal and coke, the produce of the State of Pennsylvania, in favor of the coal and coke, the produce of the State of Alabama.

That the act was an oppressive and unwarrantable interference with the right of citizens freely to contract and carry on trade and commerce, and contrary to individual liberties.

Wherefore the respondent prayed that the act No. 147 of 1888 be decreed contrary and repugnant to the constitution of the State of Louisiana and of the United States, and therefore null and void, and that judgment be rendered rejecting the plaintiff's demand, and dismissing the respondent with costs.

The testimony was then taken both on the part of the defendant and the plaintiff.

It was admitted that the coal sold was the property of the defendant; that it was sold to W. G. Coyle & Co. on the 30th of August, 1888; that it was gauged by a professional coal-boat gauger, but not one of the two appointed by the State

under the statute, and that the method employed by him was that described in the statute, and that no application was made to the state gaugers appointed under that act, and the boat was never gauged by them.

The agent of the Pittsburg and Southern Coal Company testified that the domicil of the corporation was at Pittsburg, Pennsylvania; that its business consisted in selling coal in the Southern markets, and that the business was carried on by wholesale in boats and barges on the river, the barges containing about 400 to 450 tons, and the boats from 900 to 950 tons; that the boats were loaded with Pittsburg coal on the Ohio and Mississippi Rivers, and on arrival in Louisiana were sold to dealers, planters, and other purchasers, but in no quantity less than a boat or barge load; that they were gauged by a regular gauger employed by the company; that the boat, for selling the load of which the penalty was claimed, came from Pittsburg, and was the property of the Pittsburg and Southern Coal Company; that it was sold to W. G. Coyle & Co., of New Orleans, and was gauged by a gauger employed by the company, and by the system adopted by the state law; that Coyle & Co. made no objection to the gauge of the boat, required no certificate from the state officers, and no such certificate would have been of any benefit or advantage to either party to the transaction; that there was some competition in the trade in coal from Alabama, which came by rail, and that very small quantities also came from Tennessee; that there was no coal produced in Louisiana, and that the agent had taken out a license as a wholesale coal dealer for that State for the year 1888.

The trial court rendered judgment in December, 1888, rejecting the demand of the state. It proceeded upon the ground that the employment of the State gaugers was not compulsory; that in the case at bar the boat was gauged by the very standard required by the Louisiana statute; that the measurement was satisfactory to both the vendor and the purchaser, and that the only complaint of the State being that the state gaugers had not been employed, the defendant had not violated the act.

From this judgment appeal was taken to the Supreme Court of the State.

That court reversed the judgment of the trial court and condemned the defendant to pay to the State for the benefit of the Charity Hospital of New Orleans the penalty of fifty dollars imposed by section eight of the statute in question. It proceeded upon the ground that the gauging by the state inspectors was compulsory, and that the statute attacked was not in conflict with the constitution either of the State or of the United States.

To reverse that judgment the present writ of error was prosecuted.

The plaintiff assigns the following as errors of the Supreme Court:

1. In sustaining the statute of Louisiana, that being in conflict with that clause of the Constitution of the United States which declares that Congress shall have the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes;"

2. In sustaining the statute of Louisiana because it was in conflict with that clause of the Constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of the Congress;"

3. In sustaining the statute of Louisiana which was in conflict with that portion of the act of Congress entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the State into the Union on an equal footing with the original States, and for other purposes," which provided: "That the river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico shall be common highways and forever free, as well to the inhabitants of the

said State as to other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State;" and

4. In sustaining the statute of Louisiana which is in conflict with that portion of the act of Congress which provides: "That it shall be taken as a condition upon which the said State is incorporated in the Union, that the river Mississippi and the navigable rivers and waters leading into the same and into the Gulf of Mexico shall be common highways and forever free, as well to the inhabitants of the said State as to the inhabitants of other States and the Territories of the United States, without any tax, duty, impost, or toll therefor imposed by the said State; and that the above condition, and also all other the conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed, and taken fundamental conditions and terms upon which the said State is incorporated in the Union."

Mr. W. S. Benedict and *Mr. George A. King* for plaintiff in error. *Mr. Charles W. Hornor* was on their brief.

Mr. George Gray for defendant in error.

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

There is nothing in the provisions of the act of Louisiana providing for the appointment of two gaugers of coal and coke boats, which can properly be considered as regulations of commerce, in conflict with the power vested in Congress over the subject. They only prescribe the rule by which the capacity of the carrying vessels of coal and coke can be determined, and the weight of the coal or coke carried ascertained, which may be readily done at any time. They were adopted for the convenience of the owners of the boats and loads. They are properly to be regarded as a part of those innumerable police regulations which every State may enact for the convenience and comfort of its inhabitants in the conduct of their business.

They do not add to the increase or to the diminution of the productions of the State or to the facility of their transportation or of their loading or landing. They may in some cases in a slight degree affect commerce, but not to such an extent or in such a sense as to be properly designated as regulations of commerce.

As this court said in *Smith* v. *Alabama*, 124 U. S. 465, 473: "There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations. If their operation and application in such cases regulate such commerce, so as to conflict with the regulation of the same subject by Congress, either as expressed in positive laws or implied from the absence of legislation, such legislation on the part of the State, to the extent of that conflict, must be regarded as annulled. To draw the line of interference between the two fields of jurisdiction, and to define and declare the instances of unconstitutional encroachment, is a judicial question often of much difficulty, the solution of which, perhaps, is not to be found in any single and exact rule of decision. Some general lines of discrimination, however, have been drawn in varied and numerous decisions of this court. It has been uniformly held, for example, that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. 'But upon an examination of the cases in which they were rendered,' as was said in *Sherlock* v. *Alling*, 93 U. S. 99, 'it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on.' In that case it was held that a statute of Indiana, giving a

right of action to the personal representatives of the deceased where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio River engaged in interstate commerce, and did not amount to a regulation of commerce in violation of the Constitution of the United States. On this point the court said (p. 103): 'General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might, with equal propriety, be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. 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 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 indirectly 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.' "

We do not think that the statute of Louisiana was in conflict with the commercial power of Congress prescribed by the Constitution, and the Supreme Court of Louisiana did not err, therefore, in sustaining it. It provided only a regulation for the measurement of the coal and coke boats on the Mississippi, and of the coal and coke carried, which neither increased nor impaired the commerce of the country in the carrying form of the boats or in the coal and coke carried.

Nor do we perceive that the statute of Louisiana in any respect lays an impost or duty on imports or exports from Pennsylvania and Louisiana. The terms "imports" and "exports" apply only to articles imported from foreign countries or exported to them. The inhibition imposed is the laying of duties on imports from foreign countries, and not on such as came from one State to another. This was directly held in *Woodruff* v. *Parham*, 8 Wall. 123. The exception from this restriction from levying a tax on imports and exports is confined to such as may be absolutely necessary to execute the inspection laws.

Nor do we perceive that there is any inhibition to the statute of Louisiana in the act approved February 20, 1811, c. 21, 2 Stat. 641, enabling the people of the Territory of Orleans to form a constitution and state government and for the admission of the State of Louisiana into the Union on an equal footing with the original States, or in the act of Congress which provides, as the unalterable condition on which the State of Louisiana was admitted into the Union, that the river Mississippi and the navigable rivers and waters leading into the same or into the Gulf of Mexico shall be common highways and forever free, as well to the inhabitants of said State as to other citizens of the United States, without any tax, duty, impost, or toll therefor imposed by the said State. The tax, duty, impost, or toll thus referred to and thus prohibited are such as are directed against the commerce of the rivers, and not such as are imposed by any regulation for convenience in the measurement or storage of coal or coke carried. The freedom contemplated is that which would be destroyed by denying equality of right to any particular class of vessels or mode of navigating the Mississippi and other rivers leading into the Gulf of Mexico. All such rivers are to be deemed highways and equally open to all persons who choose to pursue commerce upon them.

Nor is there any discrimination in the transportation of the coal and coke from Alabama and that from Pennsylvania, as in any respect impairs the efficiency of the laws of Louisiana. The difference between the transportation of the coal and coke from Pennsylvania and from Alabama is only the difference

Statement of the Case.

arising from one being transported by water and the other by land. There is a difference arising between water and land carriage, arising from the nature of the two modes, but not one created by legislation, direct or indirect, or by any efforts of the state legislature to give or recognize a discrimination in the case of either.

Judgment affirmed.

SALTONSTALL *v.* WIEBUSCH.

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

No. 150. Argued January 15, 1895. — Decided March 4, 1895.

Carpenters' pincers, scythes, and grass-hooks, made of forged steel, imported into the United States in March, 1889, were dutiable under the last clause of Schedule C in the act of March 3, 1883, c. 21, 22 Stat. 488, 500, as "manufactures, articles or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, or any other metal.

THIS was an action by a corporation known as Wiebusch & Hilger, Limited, against the collector of the port of Boston, to recover an alleged excess of duty imposed upon a certain consignment of carpenters' pincers, scythes, and grass-hooks, imported from Antwerp in March, 1889.

The collector exacted upon this importation a duty of 45 per cent under the last clause of schedule C of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 500, which provides for "manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, . . . or any other metal, and whether wholly or partly manufactured, forty-five per centum ad valorem."

Plaintiff protested against this classification, and in due time brought suit, contending that the articles were dutiable at $2\frac{1}{2}$ cents per pound, under a provision of the same schedule, for "forgings of iron and steel, or forged iron, of whatever shape, or in whatever stage of manufacture, not specially enumerated or provided for in this act."

Upon trial before a jury, the court directed a verdict for the plaintiff, holding the classification of the collector to have been incorrect, and the defendant sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Francis Lynde Stetson for defendant in error. *Mr. Charles P. Searle*, *Mr. Albert Comstock*, and *Mr. Everit Brown* were on his brief.

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

This case raises the single question whether the pincers, grass-hooks, and scythes, which constituted this importation, should have been classified as manufactures of metal, or forgings of iron or steel. All the articles were made of forged steel.

There was no evidence in this case that the word "forgings" was used in any commercial or technical sense among manufacturers, and, in the absence of such evidence, we are bound to presume that it was used in its ordinary and commonly accepted sense of metal shaped by heating and hammering. *Swan* v. *Arthur*, 103 U. S. 597; *Maddock* v. *Magone*, 152 U. S. 368. Of this use of words the court takes judicial notice. *Nix* v. *Hedden*, 149 U. S. 304.

The pincers in question are made of two flat pieces of iron about eight inches long, which are put into the fire, so that one end of each piece is heated. They are then taken out, split at the heated end, and a small piece of steel inserted and welded in to form the bite. They are again heated, the jaws shaped, and a hole punched in each jaw for the reception of the rivet. They are again heated and rehammered to make the shanks round and shape the knob at each end. While cold they are fastened together by a rivet, which is itself hammered out of a rod, the rivet being heated and clinched after it is inserted. The jaws are brought to a point by a

rough file, and are then rubbed, and the whole article polished with an emery wheel. The pincers are then ready for use. The non-forging process bears to the forging process the proportion of 3 to 4 per cent.

The scythes and grass-hooks are made out of flat pieces of metal, which are shaped by forging, and are tempered and again heated to give them the blue color of steel. After this is done they are sharpened upon a grindstone and are then in condition to receive a wooden handle for use. They were not provided with handles at the time they were imported, owing to the high price of wood in Europe.

From the separate enumeration of "forgings of iron and steel" and "forged iron, of whatever shape, or in whatever stage of manufacture," it would seem that Congress intended to distinguish between the two, and to apply the term "forgings," though perhaps not exclusively, to such articles as are completed by the action of the hammer. Hence, we are not prepared to accept the theory of the government in this case that the articles in this paragraph are confined to such as are incomplete, or in process of manufacture, as there may be many articles which would naturally fall within the designation of "forgings" which are finished and ready for use —such, for example, as ornamental iron work, wrought iron railings, and grilles, none of which are subjected to any further process of manufacture. This view is strengthened to a certain extent by the separate enumeration in the same schedule of "anvils, anchors or parts thereof, mill irons and mill cranks, of wrought irons and wrought iron for ships, and forgings of iron and steel, for vessels, steam engines, and locomotives, or parts thereof, weighing each twenty-five pounds or more, two cents per pound." Apparently all of these fall within the same category of forgings, and apply to completed articles.

But we do not understand the term "forgings" to be applicable to articles which receive treatment of a different kind than hammering before they are complete; such, for example, as grinding, tempering, or polishing, although the witnesses agreed that welding and punching are properly forging processes. It may well be doubted, too, whether the

word be applicable to such small articles as tools of trade or the ordinary implements of husbandry. The fact that the further process, which the articles specified in this case underwent, represented but three or four per cent of the total labor expended upon them, is by no means decisive, when it is a question of classification, since the very object of Congress may have been to protect the additional labor. The lines between different articles enumerated in the tariff law are sometimes very nicely drawn, and a trifling amount of labor is often sufficient to change the nature of the article, and determine its classification. Thus in *Worthington* v. *Robbins*, 139 U. S. 337, the merchandise imported was known as "white hard enamel," and was used for various purposes, including the making of faces or surfaces of watch dials, scale columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes where a smooth or enamelled surface was desired. The articles were claimed by the collector to be dutiable as "watch materials," but as it was shown that their form and condition would have to be changed by grinding or pulverizing, they were held to be dutiable as non-enumerated manufactures.

The articles in question were properly classified by the collector, and the judgment of the court below must therefore be

Reversed and the case remanded for a new trial.

GRIMM *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 424. Argued and submitted January 23, 1895. — Decided March 4, 1895.

While the possession of obscene, lewd, or lascivious books, pictures, etc., constitutes no offence under the act of September 26, 1888, c. 1039, 25 Stat. 496, it is proper in an indictment for committing the offence pro-

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hibited by that act to allege the possession as a statement, tending to interpret a letter written and posted in violation of that act.

A letter, however innocent on its face, intended to convey information in respect of the place or person where or of whom the objectionable matters described in the act could be obtained, is within the statute.

In an indictment for a violation of that act it is sufficient to allege that the pictures, papers, and prints were obscene, lewd, and lascivious, without incorporating them into the indictment, or giving a full description of them.

When a government detective, suspecting that a person is engaged in a business offensive to good morals, seeks information under an assumed name directly from him, and that person responding thereto, violates a law of the United States by using the mails to convey such information, he cannot, when indicted for that offence, set up that he would not have violated the law, if the inquiry had not been made of him by the government official.

SECTION 3893, Revised Statutes, as amended by section 2 of the act of Congress of September 26, 1888, c. 1039, 25 Stat. 496, provides that "every obscene, lewd, or lascivious book, pamphlet, picture, . . . and every written or printed card, letter, . . . giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, . . . shall, for each and every offence, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both, at the discretion of the court."

On June 6, 1891, the defendant was indicted in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri for a violation of this statute. The indictment was in four counts. The second is as follows:

"And the grand jurors aforesaid upon their oaths aforesaid do further present that afterwards, to wit, on the day and year aforesaid, at the division and district aforesaid, said

William Grimm, late of said division of said district, then and there received a letter, addressed and delivered to him, of the following tenor:

"'Richmond, Ind., July 21, 1890.

"'Mr. William Grimm, St. Louis, Mo.

"'Dear Sir: A friend of mine has just showed me some fancy photographs and advised me that they could be obtained from you. I am on the road all the time, and I am sure many of them could be sold in the territory over which I travel. How many different kinds can you furnish? Send me price list showing your rates by the hundred and dozen. Address me at once at Indianapolis, Ind., care Bates House, and I will send you a trial order.

"'Herman Huntress.'

"And the grand jurors aforesaid upon their oaths aforesaid do further present that on the day and year first aforesaid the said William Grimm then and there had in his possession and under his control a large number, to wit, eight hundred, obscene, lewd, and lascivious pictures, papers, and prints of an indecent character and intended and adapted for an indecent and immoral use, and that said William Grimm, in response to said letter, on the day and year first aforesaid, did then and there unlawfully, feloniously, and knowingly deposit and cause to be deposited in the post office of the United States at St. Louis, Missouri, for mailing and delivery, a written and printed letter and notice giving information, directly and indirectly, to one Robert W. McAfee and divers other persons, whose names are to the jurors aforesaid unknown and for that reason cannot be herein stated, how, where, of whom, and by what means obscene, lewd, and lascivious pictures, papers, and prints of an indecent character and intended and adapted for an indecent and immoral use might be obtained, which said letter and notice was then and there non-mailable matter and was then and there contained in an envelope and wrapper bearing and having thereon the address and superscription following, to wit, 'Mr. Herman

Counsel for Plaintiff in Error.

Huntress, care of Bates House, Indianapolis, Ind.,' and which said letter and notice is of the following tenor:

"'Wm. Grimm, photograph and art studio, N. E. cor. of Jefferson avenue and Olive street.

"'St. Louis, July 22, 1890.

"'Mr. Huntress, Richmond.

"'Dear Sir: I received your letter this morning. I will let you have them for $2.00 per doz. & $12.50 per 100. I have about 200 negatives of actresses.

"'Respectfully, Wm. Grimm.'

"And the grand jurors aforesaid upon their oaths aforesaid do further present that on the day and year first aforesaid the said William Grimm, when he so deposited and caused to be deposited said last-named letter and notice in said post-office, unlawfully, feloniously, and knowingly meant and intended thereby to give notice and did thereby give notice and information to the writer of said first-named letter and to said McAfee and divers other persons, whose names are to the grand jurors aforesaid unknown, where, how, of whom, and by what means obscene, lewd, and lascivious pictures, papers, and prints of an indecent character and intended and adapted for an indecent and immoral use might be obtained, contrary to the form of the statutes of the United States in such case made and provided and against its peace and dignity."

The fourth count charged another and like offence in a similar form. A demurrer to the indictment having been overruled, the case came on for trial, and a verdict was returned finding the defendant guilty under the second and fourth counts, and not guilty under the first and third. A motion for a new trial having been overruled, the defendant was, on May 21, 1892, sentenced to imprisonment for one year and one day. To reverse such judgment this writ of error was taken.

Mr. D. P. Dyer for plaintiff in error submitted on his brief.

Mr. Solicitor General for defendants in error.

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

The sufficiency of the indictment is the first question presented. It is insisted that the possession of obscene, lewd, or lascivious pictures constitutes no offence under the statute. This is undoubtedly true, and no conviction was sought for the mere possession of such pictures. The gravamen of the complaint is that the defendant wrongfully used the mails for transmitting information to others of the place where such pictures could be obtained, and the allegation of possession is merely the statement of a fact tending to interpret the letter which he wrote and placed in the post-office.

It is said that the letter is not in itself obscene, lewd, or lascivious. This also may be conceded. But however innocent on its face it may appear, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute.

Again, it is objected that it is not sufficient to simply allege that the pictures, papers, and prints were obscene, lewd, and lascivious; that the pleader should either have incorporated them into the indictment or given a full description of them so that the court could, from the face of the pleading, see whether they were in fact obscene. We do not think this objection is well taken. The charge is not of sending obscene matter through the mails, in which case some description might be necessary, both for identification of the offence and to enable the court to determine whether the matter was obscene, and, therefore, non-mailable. Even in such cases it is held that it is unnecessary to spread the obscene matter in all its filthiness upon the record; it is enough to so far describe it that its obnoxious character may be discerned. There the gist of the offence is the placing a certain objectionable article in the mails, and, therefore, that article should be identified and disclosed; so, here, the gist of the

offence is the mailing of a letter giving information, and, therefore, it is proper that such letter should be stated so as to identify the offence. But it does not follow that everything referred to in the letter, or concerning which information is given therein, should be spread at length on the indictment. On the contrary, it is sufficient to allege its character and leave further disclosures to the introduction of evidence. It may well be that the sender of such a letter has no single picture or other obscene publication or print in his mind, but, simply knowing where matter of an obscene character can be obtained, uses the mails to give such information to others. It is unnecessary that unlawful intent as to any particular picture be charged or proved. It is enough that in a certain place there could be obtained pictures of that character, either already made and for sale or distribution, or from some one willing to make them, and that the defendant, aware of this, used the mails to convey to others the like knowledge.

A final matter complained of grows out of these facts: It appears that the letters to defendant — the one signed "Herman Huntress," described in the second count, and one signed "William W. Waters," described in the fourth count — were written by Robert W. McAfee; that there were no such persons as Huntress and Waters; that McAfee was and had been for years a post-office inspector in the employ of the United States, and at the same time an agent of the Western Society for the Suppression of Vice; that for some reasons not disclosed by the evidence McAfee suspected that defendant was engaged in the business of dealing in obscene pictures, and took this method of securing evidence thereof; that after receiving the letters written by defendant, he, in name of Huntress and Waters, wrote for a supply of the pictures, and received from defendant packages of pictures which were conceded to be obscene. Upon these facts it is insisted that the conviction cannot be sustained, because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers; that they were directed and mailed to fictitious persons; that

no intent can be imputed to defendant to convey information to other than the persons named in the letters sent by him, and that as they were fictitious persons there could in law be no intent to give information to any one. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of *United States* v. *Whittier*, 5 Dillon, 35; *United States* v. *Matthews*, 35 Fed. Rep. 890; *United States* v. *Adams*, 59 Fed. Rep. 674; *Saunders* v. *People*, 38 Michigan, 218, in support of the contention that no conviction can be sustained under the facts in this case.

It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official — a detective, he may be called — do not of themselves constitute a defence to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defence that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. Among others reference may be made to the cases of *Bates* v. *United States*, 10 Fed. Rep. 92, and the authorities collected in a note of Mr. Wharton, on page 97; *United States* v. *Moore*, 19 Fed. Rep. 39; *United States* v. *Wight*, 38 Fed. Rep. 106, in which the opinion was delivered by Mr. Justice Brown, then District Judge, and concurred in by Mr. Justice Jackson, then Circuit Judge; *United States* v. *Dorsey*, 40 Fed. Rep. 752; *Commonwealth* v. *Baker*, 155 Mass. 287, in which the court held that one who goes to a house alleged to be kept for illegal gaming,

and engages in such gaming himself for the express purpose of appearing as a witness for the government against the proprietor, is not an accomplice, and the case is not subject to the rule that no conviction should be had on the uncorroborated testimony of an accomplice; *People* v. *Noelke*, 94 N. Y. 137, in which the same doctrine was laid down as to the purchaser of a lottery ticket, who purchased for the purpose of detecting and punishing the vendor; *State* v. *Jansen*, 22 Kansas, 498, in which the court, citing several authorities, discusses at some length the question as to the extent to which participation by a detective affects the liability of a defendant for a crime committed by the two jointly; *State* v. *Stickney*, 53 Kansas, 308. But it is unnecessary to multiply authorities. The law was actually violated by the defendant; he placed letters in the post-office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt.

These are all the questions presented by counsel. We see no error in the rulings of the trial court, and the judgment is, therefore,

Affirmed.

BLACK DIAMOND COAL MINING COMPANY *v.* EXCELSIOR COAL COMPANY.

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

No. 200. Argued January 30, 1895. — Decided March 4, 1895.

If there be any invention in the machine patented to Martin R. Roberts by reissued letters patent No. 7341 for an improvement in coal screens and chutes, dated October 10, 1876, (upon which the court expresses no opinion,) it is clear that it was not infringed by the defendant's machine.

The court takes judicial notice of the fact that hoppers with chutes beneath them are used for many different purposes.

Statement of the Case.

THIS was an action at law by the Excelsior Coal Company to recover damages for the infringement of reissued letters patent No. 7341, granted October 10, 1876, to Martin R. Roberts for an "improvement in coal screens and chutes."

It seems, by the statement of the patentee, that, previous to this invention, in unloading vessels of coal, the coal had, for the most part, been hoisted from the hold, over the bulwarks, and dumped upon the wharf or upon the coal previously dumped, or, if chutes were used, such chutes were fixed; nor, so far as the patentee was aware, had a movable chute ever been known or used by which the coal could be received from the vessel at any point on the wharf and be screened and delivered to the cart. The patentee further states in his specification: "My invention consists of a portable apparatus for receiving coal from the bucket, by which it is hoisted from the ship, and for screening and delivering it to carts on the wharf, said apparatus being adapted for ready removal from place to place when required."

"By this apparatus I am able to save repeated handlings and consequent expense and the breakage of the coal, and the apparatus can be changed from one point to another where the vessel may be placed."

The invention is shown in the following drawing:

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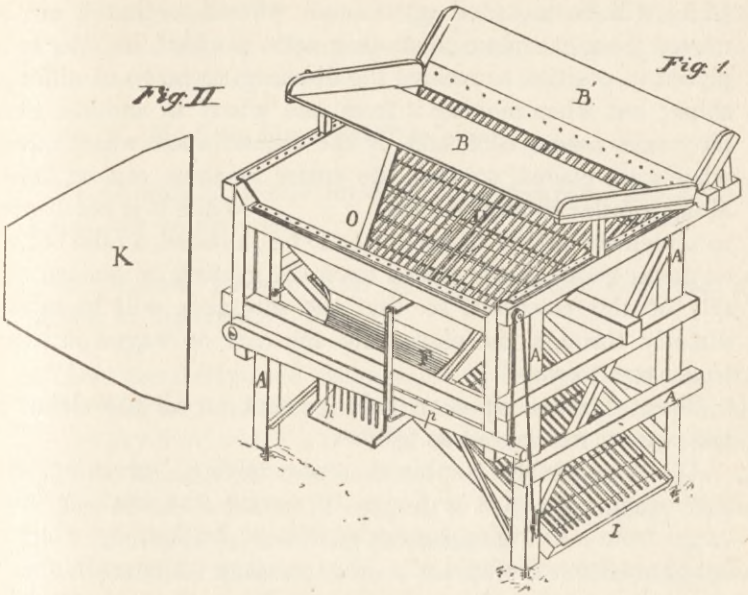

The invention in question consisted substantially of a strong frame (A) surmounted by a hopper (BB'), in the form of a trough, into which the coal is dumped from the hoisting buckets. The coal falls through the hopper upon an inclined screen (D), whose meshes, constructed of horizontal wires, are coarse enough to detain only the larger lumps, which accumulate in a reservoir (O), formed by the screen on one side, and three inclined surfaces on the other. This reservoir is in fact a secondary hopper, at the bottom of which is located a chute (F), and a gate (*h*) through which the large coal is drawn off as required into the cart or other vehicle. The smaller coal, which passes through the meshes of the screen (D), falls upon a second inclined screen (I), standing transversely to the upper one, whose meshes are finer than the other. The coal is again sifted by this screen into two grades, the coarser of which is discharged down the incline at one side of the machine, while the finer falls through the meshes upon the floor or wharf beneath the frame.

The patentee further added in his specification: "The frame

(AA) will be mounted upon small wheels, so that it can be moved from one place to another upon a wharf, in order to be placed in position to receive the discharging cargo of different ships; but when moving it from one wharf to another, I employ axles across each end of the frame, upon which strong wheels are placed, so that the entire machine can be drawn along similar to any vehicle. . . . When it is not desired to screen the article or substance to be unloaded, a false bottom or metal blank (K), is placed upon the grating or inclined side (D) of the reservoir, so that the substance will be carried directly through the chute into the cart or wagon intended to convey it away."

Plaintiff relied upon an infringement of all the claims of the patent, which read as follows:

"1. A portable combined coal-receiving, screening, and delivering apparatus arranged to receive the coal or other cargo from a swinging suspended tub or bucket, by which it is hoisted from the hold of a ship or other water-craft, and to screen it automatically and deliver it into carts, said apparatus being constructed and arranged substantially as described.

"2. The receiving hopper BB', in combination with the reservoir O, with its screen or grating side D, chute F, with its toothed gate *h*, and one or more independent screens, I, all combined and arranged substantially as and for the purpose above described.

"3. The metal blank or false bottom K, in combination with the receiving hopper BB', reservoir O, chute F, and gate *h*, substantially as and for the purpose above described.

"4. The combination or the hopper BB', for receiving the coal from a swinging bucket, the reservoir O, arranged to receive the coal as it passes from the hopper, with the chute F and gate *h*, all constructed to operate substantially as and for the purpose set forth.

"5. In combination with the elongated hopper, the screen D, reservoir O, and chute F, with its gate *h*, the combination being substantially as is herein set forth."

The case was tried before a jury, and resulted in a verdict of $8830.90 for the plaintiff, upon which a judgment was subse-

quently entered. To review this judgment the Black Diamond Coal Mining Company, defendant therein, sued out this writ of error.

Mr. M. M. Estee for plaintiff in error.

Mr. Charles R. Miller for defendant in error. *Mr. John L. Boone* was on his brief.

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

There are thirty-nine assignments of error in this case, but in the view we have taken, it will only be necessary to consider the twenty-first, which is: "That the court erred, [in refusing] upon the close of all the testimony in the case, and upon the request of the defendant's counsel, to instruct the jury to render a verdict in favor of the defendant."

The patent in question is for a portable coal screening device which may be moved to any place on the wharf where a vessel happens to be discharging her cargo. The portability of the device, however, is not mentioned in any of the claims except the first, which also includes the screen as an element of the combination. The coal is hoisted from the hold of the vessel in buckets or tubs, which are swung over the machine, and the coal dumped into the hopper, through which it falls upon the first screen and lodges in the reservoir until required for use, when the coarser coal slides down upon a chute, having an outlet or gate, through which it is withdrawn into carts. The finer coal falls through the first screen upon a second, where it is again sifted, the coarser sliding down to the side of the machine, the finer falling through the meshes upon the wharf, directly beneath the hopper.

The defendant also uses a portable machine consisting simply of a square hopper, of the form ordinarily used in grist mills and elevators, through which the coal of all sizes falls directly upon a chute having an outlet or gate toward, but some distance from, the bottom, which can be raised or lowered at pleasure, and through which the coal is withdrawn

as required. There is no provision whatever for screening the coal shown in the drawings of defendant's chutes put in by one of plaintiff's witnesses, nor in his model introduced as an exhibit.

As the combinations described in the first, second, and fifth claims of the Roberts patent include a screen or screens as an element, it is entirely clear that the defendant's machine, as above described, does not infringe those claims.

The third claim includes the metal blank or false bottom (K), in combination with the receiving hopper (BB'), reservoir (O), chute (F), and gate (*h*), the fourth claim, the combination of the hopper, the reservoir, the chute, and the gate, differing only from the third in the omission of the metal blank or false bottom.

Now, in determining the question of patentability raised by the twenty-first assignment of error, we are to take into consideration only the device alleged to be infringed. Granting for the purposes of this case that the combinations set forth in the first, second, and fifth claims, of all of which the screens are an element, constitute a patentable invention, it does not follow that, if these screens be omitted, as they are by the substitution of the false bottom or metal blank (K) in lieu of the upper screen, this machine, which is the only one alleged to be infringed by the defendant, contained a patentable combination. Eliminate the screens by the substitution of the false bottom, and there is nothing left but an elongated hopper, a reservoir beneath, a chute, and a gate. Hoppers with chutes beneath them have been used for a dozen different purposes, but principally for grain elevators, by means of which vessels lying alongside a wharf are loaded in a fraction of the time required by hand or animal power. Indeed, these devices are so common that we think judicial cognizance may be taken of them. *Brown* v. *Piper*, 91 U. S. 37; *Terhune* v. *Phillips*, 99 U. S. 592; *King* v. *Gallun*, 109 U. S. 99; *Phillips* v. *Detroit*, 111 U. S. 604.

If there be any invention at all, then, in the combinations specified in the third and fourth claims, it is in the introduction of the reservoir (O) beneath the hopper, which is really

an enlargement of the chute, for the purpose of affording a lodgment for the coal until it is drawn off for use. Great stress was laid by plaintiff's counsel upon this feature of the invention, but even conceding it to be patentable, there is nothing corresponding to it in the defendant's machine. On the contrary, the coal falls through a square opening in the bottom of the hopper, directly upon the chute, where it is detained by a gate, which is kept closed until the coal is withdrawn. It is evident that the hopper itself is substantially the only reservoir, although a small amount of coal is necessarily detained in the upper part of the chute until the gate is raised. The chute is nowhere enlarged to form a reservoir.

The fact that the machine is portable undoubtedly adds to its usefulness, but its portability is only made an element of the first claim, of which the screens are also an element. So that if portability were itself a patentable feature, which it is not, (*Hendy* v. *Miners' Iron Works*, 127 U. S. 370,) there is no infringement of the first claim, as the defendant does not use the screens.

There was some evidence tending to show that one of the machines used by the defendant was provided with a chute, the bottom of which consisted of a screen, and that it was used until about the time this suit was brought, when the screen was covered over with planking and the bottom of the chute made solid. This machine doubtless approximated more closely to that described in the plaintiff's patent. No attempt, however, was made to separate the damages arising from the use of this device from those arising from the use of the chute with the solid bottom. The trial appears to have proceeded largely upon the theory that there was no distinction between the two devices. The court instructed the jury that the plaintiff's patent was not limited to a device in which a screen is one of the elements, and that if they found that defendant had used a device substantially identical with the device shown in the patent, but having a solid bottom to the reservoir, and a chute which extends from the receiving hopper instead of having a screen bottom, that such device was also covered by the patent and was an infringement.

An exception was taken to this portion of the charge, and the twenty-fourth assignment of error was intended to cover it. For the reasons given above, we think the court erred in its interpretation of the patent. If there was any invention at all disclosed, it was in the use of the reservoir and the screening device, and without expressing an opinion upon this point of patentability, it is clear that no infringement was involved in the use of defendant's hopper and chute, with or without a solid bottom, if for no other reason, because it lacked the reservoir of the plaintiff's patent.

There was no question to go to the jury in the case, and the court should have directed a verdict for the defendant.

The judgment of the court below is, therefore,

Reversed, and the case remanded with directions to set aside the verdict and grant a new trial.

JOHNSON *v.* ATLANTIC, GULF AND WEST INDIA TRANSIT COMPANY.

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

No. 77. Argued November 14, 1894. — Decided March 4, 1895.

The road between Fernandina and Cedar Key was the road designated and pointed out in the various acts of the legislature of Florida referred to in the opinion, as the one on whose completion and after default the trustees were authorized to sell.

The Trustees of Internal Improvements in the State of Florida, who took possession of the railroad and sold it, were legally entitled to act as such trustees, on the well-settled doctrine that the acts of the several States, in their individual capacities and of their different departments of government — executive, judicial, and legislative — during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are to be treated as valid and binding.

The weight of the evidence, apart from the evidential character of the answers, is clearly to the effect that the railroad, at the time of the sale, was in a thoroughly dilapidated condition, and, in view of its condition, and the state of the country, the price realized was not inadequate.

Statement of the Case.

THIS was a suit in equity, brought for the purpose of subjecting certain railroad property, formerly in the possession of a corporation known as the Florida Railroad Company, to the effect of an alleged lien thereon of second mortgage bonds of that company, some of which bonds were held and owned, as averred, by the complainants. The various bills filed in the cause, upon which proceedings were had, were dismissed by the court below, and permission was denied certain of the complainants and others to file what was styled by them a bill of supplement, revivor, and amendment against the original defendants and others. The complainants were allowed an appeal to this court.

The Florida Railroad Company was a corporation organized under an act of assembly of the State of Florida, approved January 8, 1853. By this, the act of incorporation of the company, all persons who should become subscribers for stock thereof were enabled "to purchase, receive, retain, and enjoy to them and their successors and assigns, lands and tenements, goods and chattels, . . . and the same to grant, sell, mortgage, and dispose of," etc. The seventh section of the act provided that the company should have the right and privilege to construct and complete a railroad, to commence in East Florida, upon some tributary of the Atlantic Ocean, within the limits of the State of Florida, having a sufficient outlet to the ocean to admit of the passage of sea steamers, and thence to continue, in the most eligible direction, through the State, to some point, bay, arm, or tributary of the Gulf of Mexico, south and east of the Suwanee River, having a similar outlet, and that, so soon as practicable after the organization of the company, a competent engineer, under the direction of the president and directors, should proceed to locate the eastern terminus, and survey the route of said railroad to the southwestern terminus, and should make the proper estimates and the necessary charts and diagrams, which should be filed in the office of the company.

On January 6, 1855, an act of assembly of the State of Florida was approved, entitled "An act to provide for and encourage a liberal system of internal improvements in this State,"

c. 610, [No. 1] Acts of 1854–1855, page 9. The declared purpose of this act was to carry out a provision of the constitution of the State for the encouragement of internal improvements, making it the duty of the general assembly to ascertain by law proper objects of improvements in relation to roads, etc., and to provide for a suitable application of such funds as might be appropriated for such improvements. The first section of the act provided for the setting apart of certain lands granted to the State by the United States, and of the proceeds of the sales made and to be made thereof, as a fund to be called the internal improvement fund of the State of Florida, and provided that such lands and proceeds were to be strictly applied according to the requirements of the act. Other essential provisions of the act were as follows:

"SEC. 2. *Be it further enacted*, That for the purpose of assuring a proper application of said fund for the purposes herein declared, said lands and all the funds arising from the sale thereof, after paying the necessary expenses of selection, management and sale, are hereby irrevocably vested in five trustees, to wit, in the governor of this State, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, to hold the same in trust for the uses and purposes hereinafter provided, . . . and to pay out of said fund, agreeably to the provisions of this act, the interest, from time to time, as it may become due on the bonds to be issued by the different railroad companies under authority of this act; also, to receive and demand, semi-annually, the sum of one-half of one per cent (after each separate line of railroad is completed) on the entire amount of the bonds issued by said railroad company, and invest the same in stocks of the United States, or state securities, or in the bonds herein provided to be issued by said company. Said trustees shall also invest the surplus interest of said sinking fund investment as it may accrue. Said trustees shall also demand and receive from each railroad company named in this act the amount due to the internal improvement fund from said railroad company, according to the provisions herein con-

tained, on account of interest on the bonds issued by said company. . . .

"SEC. 3. *Be it further enacted*, That all bonds issued by any railroad company under the provisions of this act shall be recorded in the comptroller's office and so certified by the comptroller, and shall be countersigned by the state treasurer, and shall contain a certificate on the part of the trustees of the internal improvement fund that said bonds are issued agreeably to the provisions of this act, and that the internal improvement fund, for which they are trustees, is pledged to pay the interest as it may become due on said bonds. All bonds issued by any railroad company under the provisions of this act shall be a first lien or mortgage on the roadbed, iron, equipment, workshops, depots, and franchises; and upon a failure on the part of any railroad company accepting the provisions of this act to provide the interest as herein provided on the bonds issued by said company, and the sum of one per cent per annum as a sinking fund, as herein provided, it shall be the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property of every kind and advertise the same for sale at public auction to the highest bidder, either for cash or additional approved security, as they may think most advantageous for the interest of the internal improvement fund and the bondholders. The proceeds arising from such sale shall be applied by said trustees to the purchase and cancelling of the outstanding bonds issued by said defaulting company, or incorporated with the sinking fund: *Provided*, That in making such sale it shall be conditioned that the purchasers shall be bound to continue the payment of one-half of one per cent semi-annually to the sinking fund until all the outstanding bonds are discharged, under the penalty of an annulment of the contract of purchase, and the forfeiture of the purchase money paid in.

"SEC. 4. *Be it further enacted*, That a line of railroad from the St. John's River, at Jacksonville, and the waters of Pensacola Bay, with an extension from suitable points on

said line to St. Mark's River, or Crooked River, at White Bluff on Apalachicola Bay, in Middle Florida, and to the waters of St. Andrew's Bay, in West Florida, and a line from Amelia Island, on the Atlantic, to the waters of Tampa Bay, in South Florida, with an extension to Cedar Key, in East Florida; also a canal from the waters of St. John's River on Lake Harney to the waters of Indian River, are proper improvements to be aided from the internal improvement fund, in manner as hereinafter provided.

"SEC. 5. *Be it further enacted*, That the several railroads now organized or chartered by the legislature, or that may hereafter be chartered, any portion of whose routes as authorized by their different charters, and amendments thereto, shall be within the line or routes laid down in section four, shall have the right and privilege of constructing that part of the line embraced by their charter on giving notice to the trustees of the internal improvement fund of their full acceptance of the provisions of this act, specifying the part of the route they propose to construct; and upon the refusal or neglect of any railroad company now organized to accept, within six months from the passage of this act, the provisions of the same, any other company, duly authorized by law, may undertake the construction of such part of the line as they may desire to make, and which may not be in progress of construction under a previous charter.

* * * * *

"SEC. 8. *Be it further enacted*, That on the completion of the grading and the furnishing of the cross-ties of twenty miles continuously, and every additional ten miles, as provided by this act, said railroad company are hereby authorized to issue coupon bonds, having not more than thirty-five years to run, and drawing not more than seven per cent annual interest, payable semi-annually in the city of New York or Tallahassee, at the option of the purchaser, at the rate of eight thousand dollars per mile for the purchase and delivery of the iron rail, spikes, plates, and chairs, and after the rail has been laid down on the line, the additional sum of two thousand dollars per mile for the purchase of the necessary equipments; and said

bonds shall always afterwards constitute and be a first lien or mortgage upon the roadbed, iron, equipment, workshops, depots, and franchises.

* * * * *

"SEC. 11. *Be it further enacted*, That it shall be the duty of the president and directors of every railroad company accepting the provisions of this act, while the road is under construction, to report to the trustees of the internal improvement fund every six months, under the oath of the president and at least two of the directors, the gross receipts of said company from the traffic of the road for the past six months, the cost of transportation and repairs, and the total amount of the net receipts of said company; and it shall be the duty of the president and directors to pay to the trustees of the internal improvement fund fifty per cent of said net receipts every six months, which sum or sums shall be applied by the trustees of the internal improvement fund toward the payment of the interest of any bonds issued by said company.

"SEC. 12. *Be it further enacted*, That every railroad company accepting the provisions of this act shall, after the completion of the road, pay to the trustees of the internal improvement fund at least one-half of one per cent on the amount of indebtedness or bond account every six months as a sinking fund, to be invested by them in the class of securities named in section two, or to be applied to the purchase of the outstanding bonds of the company; but it shall be distinctly understood that the purchase of said bonds shall not relieve the company from paying the interest on the same, they being held by the trustees as an investment on account of the sinking fund.

* * * * *

"SEC. 14. *Be it further enacted*, That for all payments made by the trustees of the internal improvement fund on account of interest for any railroad company agreeably to the provisions of this act, said trustees shall demand and receive from said railroad company equal amounts of the capital stock of said company, which stock shall entitle the internal improvement fund to all the privileges and advantages of private stockholders."

Statement of the Case.

On March 6, 1855, D. L. Yulee, president of the Florida Railroad Company, wrote to the president of the board of trustees of the internal improvement fund as follows:

"Sir: By instruction of the board of directors of the Fla. R. R. Co. I beg leave to inform the board of trustees of the int. imp. fund that the company make full acceptance of the terms and provisions of the act passed at the late session of the general assembly relative to a system of internal improvements in the State.

"I beg leave to say that they propose to construct a road from Amelia Island in the direction of Tampa, as far as a point proper for divergence, to Cedar Keys, and from said diverging point to Cedar Keys, by way of extension; and that if the amendment to the charter of the company, now pending in the general assembly, is granted, they will also construct the balance of the road from the diverging point to Tampa."

An act to amend the act incorporating the Florida Railroad Company was approved on December 14, 1855. Acts of 1855, 16, c. 729 [No. 120]. It contained, among other provisions, the following: "Sec. 1. That the act incorporating the Florida Railroad Company, approved the 8th day of January, A.D. 1853, is hereby amended so that the said company shall have power to construct the railroad from Amelia Island on the Atlantic to the waters of Tampa Bay in South Florida, with an extension to Cedar Key in East Florida, under the provisions of an act to provide for and encourage a liberal system of internal improvements in this State, approved the 6th day of January, A.D. 1855. . . . Sec. 4. That the president and directors of the Florida Railroad Company may set off any portion of their line to persons desirous of constructing the same, and in that event such portion may have a distinct organization, with all the grants, rights, powers, duties, and privileges conferred on the Florida Railroad Company, with the right to adopt a different name, in order to keep the stock account and liabilities separate: *Provided*, That two months' notice shall be given to the board of trustees of the internal improvement fund of such set-off or assignment, and a copy of the same be filed with said board of trustees."

Subsequently to the approval of this act the following letter was written:

"TALLAHASSEE, December 6, 1858.

"*To the Trustees of the Internal Improvement Fund.*

"GENTLEMEN: Doubts having been expressed as to the sufficiency of the notices heretofore given as to the efficacy of the terms of the first section of the act of December, 1855, amending the charter of the Florida Railroad Company in placing the part of the route between the Cedar Keys and Tampa Junction within the provisions of the internal improvement act without any special notice, I hereby and now, to put at rest any future doubts, formally notify the trustees of the full acceptance by the Florida Railroad Company of the provisions of the act of January 6, 1855, entitled 'An act to provide for and encourage a liberal system of internal improvements' for that part of the route designated in their amended charter which lies between Tampa and the point of junction with the Cedar Keys extension; or, in other words, for all that part of the routes covered by their charter which may not be regarded by the trustees to be included in the effect of the notice filed by them of the date of March 6, 1855.

"I have the honor to be, respectfully yours,

"D. L. YULEE,

"*President of the Florida Railroad.*"

Both this letter and that dated March 6, 1855, were certified by the commissioner of lands and immigration of the State of Florida on April 7, 1882, to be on file in his office.

In accordance with the provisions of the internal improvement act, part or all the first mortgage bonds authorized thereby were issued, and the company also issued second mortgage bonds, which were made a lien on the railroad property, inferior to that of the first mortgage bonds, but a first lien on the company's lands within the town sites of Fernandina and Cedar Key, and on other lands of the company along the line of the road. To secure the payment of the principal and interest of the second mortgage bonds all the property of

the company was conveyed by it, in the year 1856, to James F. Soutter and John McRae, in trust.

The road was completed between Fernandina and Cedar Key in March, 1861, and, as appears by the testimony of Yulee, a separate contract was made on August 20, 1858, for the construction of a portion of that part of road which extended from Waldo, a point on the line between Fernandina and Cedar Key, to Tampa Bay.

On November 3, 1866, the trustees of the internal improvement fund conveyed to "Edward N. Dickerson and his associates" all the railroad property of the said company by an indenture which stated in its recitals the provisions of the third section of the internal improvement act, and also that the Florida Railroad Company had entirely failed since November 5, 1863, to pay the one-half of one per cent semi-annually on the bonds issued by it according to the provisions of the internal improvement act, and also the interest on the same; that, according to the provisions of the third section of that act, the trustees of the internal improvement fund on October 6, 1866, took into their possession the railroad and all its property of every kind, and advertised the same for sale for cash at public auction, at the town of Gainesville, Florida, on November 1, 1866; that on the day and place last mentioned the terms of the sale were announced, namely, that the sale and the rights of the purchaser at the same were subject to all the conditions of the internal improvement act; that the railroad and all its property of every kind was then and there put up for sale, and was purchased by Isaac K. Roberts, he being the highest and best bidder, having bid the sum of $323,400 for the same, and that the said Isaac K. Roberts had directed that the railroad and all the property thereof should be conveyed to Edward N. Dickerson and associates.

Immediately upon the making of this conveyance the purchasers of the said property organized themselves into a new company, which they called the Florida Railroad Company. On May 12, 1869, they issued bonds aggregating in amount $2,300,000, bearing interest at the rate of seven per cent per annum, maturing January 1, 1900, and, to secure the payment

of the principal and interest of the same, on May 26, 1869, they made a conveyance of the railroad property, in trust, to John A. Stewart and Frederic A. Conkling.

Afterwards the said purchasers formed a new corporation, having the name of the Florida Railroad Company, under the provisions of an act of assembly approved June 24, 1869, entitled "An act to perfect the public works in this State," which provided, in the 29th section thereof, as follows: "That in all cases of seizure and sale of the railroad property and franchises of any company by the trustees of the internal improvement fund under the provisions of the act to provide for and encourage a liberal system of internal improvement, the purchaser or purchasers shall be entitled to do whatever acts may be necessary to enable him or them to exercise and enjoy the franchises granted by the charter of incorporation under the provisions of the said original charter and the amendments thereto." Laws of 1869, Extra Session, c. 1716 [No. 4].

By an act approved January 18, 1872, it was provided that the corporate company owning the property formerly known as the Florida railroad, and which had theretofore been known as the Florida Railroad Company, should thereafter be known as the Atlantic, Gulf and West India Transit Company, and the rights, franchises, and privileges, as well as the duties, responsibilities, and liabilities of the said corporation, should in all respects remain and continue the same as though no change had been made in their said name. Laws of 1872, c. 1918 [No. 56].

On August 21, 1873, Robert H. Johnson, a citizen of the State of New York, brought his bill in equity in the Circuit Court of the United States for the Northern District of Florida against the said Atlantic, Gulf and West India Transit Company; John McRae, as trustee, appointed by the Florida Railroad Company, for the benefit of the holders of second mortgage bonds thereof, a citizen of the State of North Carolina; Marshall O. Roberts and Edward N. Dickerson, of the State of New York; Isaac K. Roberts, a citizen of the State of Louisiana; Samuel A. Swann, a citizen of the State of Florida; David L. Yulee, of Florida, and the Florida Railroad

Company, in which bill the complainant alleged that he was the holder and owner of two second mortgage bonds of $1000 each of the Florida Railroad Company, dated March 1, 1856, payable March 1, 1891; that these bonds were a second mortgage on the Florida railroad, and on property pretended to belong to the Atlantic, Gulf and West India Transit Company; that by the terms of the bonds the trustees named therein were empowered to sell or otherwise dispose of the said property, without judicial proceeding, for the benefit of the holders of the bonds in default of the payment of the principal or interest thereof to an amount equal to one year's interest; that there was then due on the bonds held by the complainant all of the principal and $1760 of interest, amounting in all to $3760, being in amount more than one year's interest; that by reason of default of payment of interest the principal had become demandable of the company, and that for the payment of the same all the said railroad property had become liable.

The complainant then referred to the issue of the first mortgage bonds under the internal improvement act, and averred that the railroad had never been completed; that by the terms of its charter its main track was to be extended to Tampa Bay; that this main track had never been built, and that the net earnings of the road had never at any time exceeded six per cent of the capital stock, bonded debt, and sinking fund. It was alleged, therefore, that the interest due on such of the first mortgage bonds as might be outstanding was demandable of the internal improvement fund, and was not a charge upon the company or the road. The complainant claimed that if, however, it should be decreed that such interest was payable by the company, he was entitled to pay such interest and redeem the road.

The complainant stated that Soutter, one of the trustees for the benefit of the second mortgage bondholders, was not living, and averred that McRae, the other trustee, had neglected and refused to execute the powers of his trust for the benefit of the bondholders, and had suffered a large quantity of the lands conveyed to him for the purposes of the trust to

be fraudulently and collusively sold for the benefit of the defendant, David L. Yulee, and the Atlantic, Gulf and West India Transit Company. He averred that the railroad was of great value, and worth much more than enough to pay the whole amount of the outstanding bonds and other debts of the company; that the original Florida Railroad Company was identical with the Atlantic, Gulf and West India Transit Company, subject to the same trusts and liabilities, and composed in part, if not altogether, of the same persons, and that the companies were in privity of estate and of person; that the change of name had been made in guile and covin and with intent to defraud the creditors of the Florida Railroad Company; that the stockholders of that company, except the trustees of the internal improvement fund, and except such stockholders as had accepted stock in payment of debts due them for aiding in the construction of the road, were credit stockholders who had subscribed for stock chiefly in large amounts, and had paid only a small assessment thereon; that the majority of the stock was held in this manner by persons who had paid merely nominal sums thereon; that David L. Yulee was the president of the Florida Railroad Company, and had controlled, either in his own name or through Dickerson and associates, a majority of the shares of the capital stock of the company; and that the cost of construction of the railroad was paid almost entirely, if not altogether, out of moneys and credits resulting from negotiations of the first mortgage bonds and the sale of the second mortgage bonds.

It was further stated that the associates of Dickerson were unknown to the complainant, but the complainant stated that he was informed and believed that such associates included Yulee, and he prayed for a discovery from Yulee of the names of all such associates and of the terms and manner of their association.

Other allegations of the bill were as follows: That in 1866, within six months after the establishment of the so-called provisional government of the State of Florida, Yulee, then president of the Florida Railroad Company, effected an arrangement by which the defendant Marshall O. Roberts advanced the money to Yulee and Dickerson and associates

to purchase the first mortgage bonds of the company then outstanding, at about 20 per cent of their face value, for the benefit of Yulee and Dickerson and associates; that these bonds were so purchased by Yulee or by Dickerson and associates, or by Roberts for them, under an agreement that the railroad should be sold for the interest then accrued upon the bonds, and be bought in by Yulee and Dickerson and associates and be held by them to the exclusion of the internal improvement fund and its interest in the capital stock of the company, and be divested of the trusts and liens theretofore created, and be freed from the debts and obligations due the complainant and the creditors of the company; that Yulee, president of the company, procured an order from the alleged governor and other officers of the pretended provisional government of Florida, claiming to be trustees of the internal improvement fund, for the seizure and sale of the railroad for the satisfaction of the one per cent per annum due the sinking fund; that Yulee, president as aforesaid, agreed to pay in at such sale the majority of the outstanding first mortgage bonds, and further agreed with the said trustees to guarantee that the railroad should be purchased at the sale for an amount sufficient to pay 20 per cent of the first mortgage bonds; that in pursuance of that agreement the railroad was seized and sold by the trustees, and was bid in by Isaac K. Roberts for the benefit of Edward N. Dickerson and associates for the sum of $314,000, of which all but about $96,000 was paid in the said first mortgage bonds; that the trustees, under an agreement negotiated by Yulee, also transferred to him and Dickerson and associates not less than 100,000 acres of public lands belonging to the said fund in payment of interest accrued on the first mortgage bonds, for the debt of which bonds Yulee and Dickerson and associates were liable as stockholders of the company; that thus the trustees not only received those bonds and cancelled them, in violation of law, before their principal had become due, but likewise conveyed the land to Yulee and Dickerson and associates on the pretence that the interest of the same was due and demandable of them, the said trustees, and was a charge upon the said fund, and

then really paid to Yulee and Dickerson and associates representing the company a large and valuable consideration for paying their own or the company's debt; that since the alleged purchase of the road Yulee and Dickerson and associates had continued in the possession, management, and ownership of the railroad as before, and that Yulee had directed its affairs and received its funds; that at the time of the sale the iron rails on the road were worth in cash a sum greater than the purchase money paid for the road, and that all the property of the company was then, at the time of the sale, worth not less than $1,000,000; that the internal improvement trust was a public trust, and that Yulee and Dickerson and associates had express notice thereof; that it was pretended by Yulee and Dickerson and associates that the road was seized and sold by the trustees because of the inability and failure of the company to pay the one per cent per annum due the sinking fund, when, in reality, the company was able to pay the same, and its failure so to do was the act and default of the persons who controlled it and who procured its seizure and sale in the interest of Yulee and Dickerson and associates; that the persons pretending to be governor, comptroller, treasurer, attorney general, and register of state lands, and, as such officers, trustees of the said fund, were without authority as such trustees; that such persons, having been placed in office under an unconstitutional exercise of power by the President of the United States, were without lawful authority to exercise the functions of their respective offices; that, therefore, the seizure and sale of the railroad as aforesaid were not only an intrusion and a trespass, but that such sale and the said purchase were absolutely void; that all that was paid by Yulee and his associates for the railroad at the sale thereof was a check for $26,000 and about $1,000,000 of first mortgage bonds, the principal of which was not due until 1892, which bonds were bought either by or for Yulee and his associates at about 20 per cent of their face value; that those bonds, at the time they were procured to be sold and bought by Yulee and his associates for the purpose of obtaining the said sale, had not been sold in the

manner required by law, but had been hypothecated by the company to effect a loan of money and to secure the repayment of the same, and were subject to hypothecation at the time they were so purchased; and that the holders of the bonds were not then demanding payment of the same, but were induced to sell them by the representations of Yulee, which the complainant believed to be untrue and to have been made with fraudulent intent, that the road could not be put in running order after the injuries it had sustained during the war without an advance of capital by the holders of the bonds, and that it was not then in condition to pay operating expenses.

The prayers of the bill were that the court might decree that the second mortgage bonds held by the complainant constituted a lien on the property of the Florida Railroad Company; that the complainant had a right to enter upon the property and sell or otherwise dispose of the same for the payment of the principal and interest of his bonds; that inasmuch as the trustees of those bonds had failed and refused to perform their duties, the powers confided to them should be executed by the court; that the sale made by the trustees of the internal improvement fund was without authority and absolutely null and void, and in no way affected the complainant's right to have the property disposed of for the satisfaction of the said second mortgage bonds; that the persons who pretended to act as governor, comptroller, treasurer, attorney general, and register of state lands, and, as such, to be trustees of the internal improvement fund, did not hold such offices, in law, and therefore that the pretended sale by them of the road was void; that if such sale of the property was valid for any purpose, the purchase thereof inured to the benefit of the stockholders, bondholders, and other creditors of the company, and of the internal improvement fund; that at the time of the sale the railroad was not a completed road within the meaning of the internal improvement act, and therefore that the interest which had then accrued on the first mortgage bonds was not a charge upon the railroad, and that the same was not liable, under the provisions of the said act, to seizure and sale; that, either in the event that such interest should be

decided by the court to be payable out of the said fund, or in the event that it should be decided to be a charge upon the railroad, the complainant had a right to pay the interest due on the outstanding first mortgage bonds, and to redeem the road for the satisfaction of his demands; that the said companies be foreclosed of all equity of redemption in the property; and that the same be sold for the payment of the complainant's bonds, subject to the lien of the principal of the first mortgage bonds.

The complainant further prayed for an injunction to restrain the defendant company and others from receiving the income of the road and directing the business of the same, and for the appointment of a receiver to collect such income and to manage the business of the road under the orders of the court.

September 11, 1873, the said complainant filed an amended bill, making George H. Dawson, executor of William Phelan, deceased, a party defendant, showing that Phelan had been the holder of certain bonds of the Florida Railroad Company, known as the southern section bonds, and asserting that the lien of the same upon the said property was inferior to that of the bonds held by the complainant.

On the same day Mark A. Knowlden, stating himself to be an executor of the said William Phelan, deceased, filed a cross-bill relating to the same southern section bonds described in the complainant Johnson's amended bill, which bonds, as alleged, were secured by a deed of trust on the portion of the Florida railroad between Waldo and Tampa. Upon this bill no proceedings appear to have been had.

The defendant Dickerson did not put in an answer to the complainant's bill, but on September 26, 1873, he filed an affidavit containing, among other things, the following statement: "At the time of the purchase the road was entirely destroyed for many miles, the iron being removed to other roads and States, and the whole wood superstructure was decayed or destroyed and worthless. There were very few cars on the road, and the few that were there were entirely worthless, and not one of them is now in existence. The purchasers rebuilt the road, purchased an entirely new rolling stock, built

and furnished with new machinery the workshops and other needed buildings, there being none at either end of the road, and set the road in operation. In doing this the purchasers have expended more than five hundred thousand dollars more than the road has received by way of earnings from all sources whatever, and not one dollar has been repaid to any of the parties whose money has been expended in this work." He further stated that from the time of the purchase of the road to the filing of the complainants' bill no demand was ever made by the complainants in the case, or by any one, upon the owners of the road for payment of the second mortgage bonds, and that he never thought, or heard it suggested, that any such claim would be made; that the deed of trust to Stewart and Conkling, executed by the purchasers of the road, was duly recorded in every county in Florida in which the road existed, and that those trustees had endorsed a large number of bonds, which were sold to various *bona fide* holders, and which were then outstanding, secured by the said deed of trust. He further stated that the road was in the possession of the company defendant and not of Yulee, the vice-president of the company, or of any other person.

On the same day Yulee filed an affidavit, in which he denied the essential allegations of the complainant's bill. He afterwards embodied the substance of his affidavit in his answer.

On September 27, 1873, the case was considered by Bradley, Circuit Justice, as to the complainant's motion for an injunction and the appointment of a receiver of the road, and the motion was denied.

The Atlantic, Gulf and West India Transit Company filed its answer on November 3, 1873, in which it denied, on information and belief, all the allegations of the bill which charged the Florida Railroad Company, the trustees of the internal improvement fund, and others with fraud, and denied that they had done any act in fraud of the complainant or any other bondholder or creditor of the Florida Railroad Company. The said defendant company averred that until the bill was filed it never heard that any of the bond-

holders claimed that it was indebted to them, or that it held the property subject to the lien of the bonds, although the holders of almost all of the bonds had been in communication with the defendants. It further averred that the road was in its possession exclusively, and not in the possession or control of Yulee or any other person, and that Yulee had no authority over the road, except such as he derived from the company as one of its officers.

John McRae, surviving trustee of the second mortgage bonds, in his answer filed July 22, 1874, denied, in answer to the allegations of the bill, that he had neglected and refused to resist the sale of the road, or to have it set aside as fraudulent; and averred that until he saw such allegations he never heard it intimated or suggested, to the best of his recollection, that there was any fraud or irregularity in the sale by the trustees of the internal improvement fund, and that, therefore, the charge that he refused to interfere concerning the sale was untrue.

The answer of David L. Yulee was filed December 3, 1874. This defendant referred to the fifth section of the internal improvement act, and stated that, as the road of the Florida Railroad Company authorized by its charter, and determined upon by a competent engineer and by the directors of the company, was upon the route from Amelia Island to Cedar Key, in the direction of Tampa Bay, the company gave notice to the trustees of the internal improvement fund of its full acceptance of the provisions of the act, and specified the line from Amelia Island to Cedar Key as the part of the road which it proposed to construct; that soon after such notification it entered into a contract for the construction of this portion of the road, in which contract it was stipulated that the contractors should receive the bonds which were to be issued under the said act; that all the bonds authorized by the act were issued; that under the said contract the road from Amelia Island to Cedar Key was built; that the object of the act amending the company's charter was to enable it to construct the remainder of the line to Tampa, which it designed to do as soon as it had completed the line to Cedar

Key and was able to provide the means necessary for the work; that upon the completion of the road from Amelia Island to Cedar Key the said trustees regarded it as a completed road under the said act and under the charter of the company; that the company was liable thereafter for the sinking fund charges and interest; and that the company, believing that such were its obligations, paid several instalments of sinking fund charges, and also a due proportion of its net earnings, as required by law, down to August, 1864, as the defendant believed.

The defendant Yulee then described the dilapidated and impoverished condition of the road, caused by the interruption of business brought about by the war, and the great injury done the road by acts of the opposing armies, and averred that he used every means in his power to comply with the requirements of the internal improvement act and to prevent the sale of the road which he feared would be necessary. He denied that he procured an order for the sale; that he agreed with the trustees that the road should be purchased for an amount sufficient to pay 20 per cent of the outstanding first mortgage bonds; that the failure to make payment to the sinking fund was with intent to procure the seizure of the road and its purchase by Dickerson and associates, and he averred that, on the contrary, the sale of the road was caused by its wrecked condition, and the failure of the company to obtain means to extricate itself from the situation in which it was left by the war. He denied that any of the first mortgage bonds were unissued and held in hypothecation for the company, or that any of such bonds were used for any other purposes than those contemplated by law, and averred that all of the said bonds were issued by the company, under its contract for the building of the road, in payment for the bridges and other structures crossing the marshes and waters of Amelia River, and for iron and equipments put on the railroad. He denied, further, that the defendant company was identical with the original Florida Railroad Company, or was in any way connected with the transactions or obligations of the same; that lands conveyed to Soutter and McRae,

trustees, had been suffered by McRae to be fraudulently and collusively sold for the benefit of the defendant Yulee; that the property on the road was worth at the time of the sale $1,000,000, or even, in cash, the sum of $323,000, for which it was sold; and denied that he was one of the persons included in the designation Edward N. Dickerson and associates.

On March 17, 1877, W. W. Corcoran was made a party defendant, and on the 2d of the following month he filed his bill, alleging his ownership of certain of the second mortgage bonds of the Florida Railroad Company, the principal of which was due on March 1, 1877, and upon which interest was due from March 1, 1860. He stated that he adopted all of the statements and allegations of the original bill filed by Johnson, and asked that he might be admitted to share in the relief therein prayed.

John H. Stewart and Frederick Conkling, trustees named in the deed of trust executed for the benefit of the holders of bonds issued by the purchasers at the said sale of the railroad property, were made parties defendant on October 16, 1877, and on the following day they filed their answer, which was devoted mainly to showing that it would be inequitable for the complainants to profit by their own laches, and to enjoy the advantages derived from the sale of the bonds to secure which the said deed of trust was made to the respondents, and thus to deprive the innocent holders of those bonds of the security upon which the loan was made.

These parties also filed a cross-bill, on October 17, 1877, averring therein that they had accepted their trust in good faith, and without notice of any pretended claim on the property by the complainant in the original bill; that the bonds issued by the purchasers of the road were issued properly; and that the value thereof was greatly impaired by the pretended lien of the said second mortgage bondholders. They therefore prayed for a decree that the deed of trust to them was a valid conveyance; that the holders of the second mortgage bonds be required to resort to lands in the hands of the said McRae, trustee; that the suit be dismissed; and that the complainants Johnson and Corcoran be enjoined from seeking

to enforce their pretended lien. Upon this cross-bill no subpœna was issued nor proceedings had.

The Atlantic, Gulf and West India Transit Company, on August 29, 1877, filed its answer to Corcoran's bill, in which answer, among other things, it set out that Corcoran was fully informed of all the essential transactions at the time they were made, upon which the claims of himself and Johnson were based, and had chosen to sleep upon his rights, and stated that, therefore, Corcoran ought not to be permitted, after a silence of about ten years, to come into court with charges of fraud against the participants in those transactions.

Replications were duly made to all of the said answers, and the taking of testimony was begun on November 8, 1877.

On June 13, 1883, Bella A. Johnson, executrix of Robert H. Johnson, deceased, W. W. Corcoran, and others presented to the said court a bill styled by them a bill of supplement, revivor, and amendment, seeking to bring in additional plaintiffs and defendants, and setting up matters which, as the complainants averred, had only come to their knowledge since the filing of their said bills, namely, that on November 10, 1879, there was submitted to the Secretary of the Interior of the United States by the Florida Railroad Company, attempting to secure the advantages of certain laws relative to government land grants to certain railroads, a map, and evidence showing that a map of definite location of the company's road from Waldo to Tampa had been filed in the Secretary's office by the company on December 14, 1860, (which map had been lost,) and that the map last presented was a duplicate of the original map; that thereupon the Secretary of the Interior had approved the map and the original location and survey, and had directed that the necessary withdrawal of United States lands be made to secure the proper adjustment of the grant along the original line of the road; that this withdrawal was made on March 26, 1881. It was alleged that the company, having performed within the proper time such work on the road between Waldo and Tampa as was required by the internal improvement act, became entitled to land along the road: that therefore the trustees of the second mortgage bonds

became entitled to such land, and to hold the same for the benefit of the holders of those bonds, and subject to the lien thereof; that on March 1, 1859, the Florida Railroad Company issued other bonds, known as southern extension bonds, attempted to be secured by a deed of trust executed to James E. Broome, who was succeeded as trustee by S. A. Swann; that such bonds were inferior to the said second mortgage bonds, which constituted a first lien on the constructed portion of the road between Waldo and Tampa, on the franchise necessary for its operation, and on all the land granted or to be granted by the United States in aid of the construction of the road. Relief was asked appropriate to these allegations. Leave to file this bill was denied by the court.

On December 7, 1887, after a hearing upon the bills, answers, and evidence, the bills of the complainants were dismissed. The case was then brought here on appeal.

Mr. George F. Curtis, *Mr. Wilkinson Call*, and *Mr. A. H. Garland* for appellants. *Mr. Heber J. May* was on their brief.

Mr. A. H. Wintersteen, (with whom was *Mr. John A. Henderson* on the brief,) for appellees.

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

On the 21st day of August, 1873, Robert H. Johnson, a citizen of the State of New York, filed, in the Circuit Court of the United States for the Northern District of Florida, a bill of complaint against the Atlantic, Gulf and West India Transit Company, a corporation of the State of Florida, the Florida Railroad Company, and other persons.

The complainant alleged that he was the owner of two bonds of one thousand dollars each, made by the Florida Railroad Company, dated March 1, 1856, payable on March 1, 1891, and secured by a second mortgage on the railroad, franchises, and property of said company, and which bonds, with interest thereon, were due and unpaid.

The object of the bill was to set aside and have declared

null and void a sale of the property and franchises of the Florida Railroad Company, made on November 1, 1866, by the trustees of the internal improvement fund, in pursuance of the provisions of the acts of assembly under which the company was incorporated, and possessed its rights and property. It appears that after said sale a deed, bearing date November 3, 1866, was executed and delivered by the trustees to Edward N. Dickerson and his associates representing the purchasers at the sale, and that subsequently the purchasers organized themselves into a new corporation by the name of the Florida Railroad Company. This new company was reorganized January 1, 1870, under authority of an act of the legislature of Florida of June 24, 1869, and afterwards, by an act of assembly dated January 18, 1872, its name was changed to that of the Atlantic, Gulf and West India Transit Company.

As already stated, the original bill of Robert H. Johnson was filed August 21, 1873 — almost seven years after the sale. W. W. Corcoran filed an intervening bill alleging ownership of some of the second mortgage bonds on April 2, 1877. In 1883, Bella A. Johnson, as executrix of Robert H. Johnson, deceased, W. W. Corcoran, and some new parties applied for leave to file a supplementary bill, which was refused by the court. In February, 1886, Karrick V. Z. Riggs, Francis B. Riggs, and William C. Riggs, of New York, filed intervening petitions, alleging ownership of second mortgage bonds, and praying to be admitted as parties entitled to share in the relief prayed for.

On December 7, 1887, after final hearing, a decree was filed dismissing the bills. On November 6, 1889, an appeal was allowed to this court.

The principal grounds for relief stated in the bill were illegality in the form and manner of the sale and fraud and collusion between Dickerson, Yulee, and others, the purchasers, sufficient to vitiate the sale, even if it were valid in form. The charge of illegality in the sale of the railroad is based on two particulars — first, that the power of sale given to the trustees of the internal improvement fund in the act approved January 6, 1855, entitled "An act to provide for and encour-

age a liberal system of internal improvements in this State," did not authorize a sale, even in event of a default, until after the completion of the railroad in question, and that the said railroad was not completed at the time of the sale; and, secondly, because the persons who officiated as such trustees and made the sale were not lawfully constituted officers of the State, and their action was consequently null and void.

The original company was incorporated by an act approved January 8, 1853, entitled "An act to incorporate a company to construct a railroad across the peninsula of Florida, under the style of the Florida Railroad Company." The route of the railroad was thus designated in the second section of the act: "That the said railroad shall commence in East Florida, upon some tributary of the Atlantic Ocean, within the limits of the State of Florida, having a sufficient outlet to the ocean to admit of the passage of sea steamers, and shall run through the eastern and southern part of the State in the most eligible direction to some point, bay, arm, or tributary of the Gulf of Mexico in South Florida, south of the Suwanee River, having a sufficient outlet for sea steamers, to be determined by a competent engineer, with the approval of a majority of the directors of the said company." Under this proviso a route was selected beginning at Fernandina on Amelia Island, and terminating at Cedar Key, being on a bay of the Gulf of Mexico and south of the Suwanee River.

Afterwards the general improvement act of January 6, 1855, was passed, in the fourth section of which were enumerated certain lines of railroad as proper improvements to be aided in manner provided in said law, and among them "a line from Amelia Island on the Atlantic to the waters of Tampa Bay, in South Florida, with an extension to Cedar Key." The fifth section of the act provided that the several railroad companies then organized or chartered by the legislature, or that might thereafter be chartered, any portion of whose routes, as authorized by their different charters and amendments, should be within the lines or routes laid down in section four, should have the right and privilege of constructing that part of the line embraced by their charter, on giving notice to the trustees

of the internal improvement fund of their full acceptance of the provisions of said act, specifying the part of the route they proposed to construct. The Florida Railroad Company, it is undeniably shown, gave such notice of acceptance, specifying the line from Amelia Island to Cedar Key as the part of the route which it proposed to construct; and, on June 11, 1855, entered into a contract with Joseph Finegan & Company, whereby the latter agreed to construct a railroad from Fernandina, on Amelia Island, to Cedar Key, in all respects conformable to the requirements of the general improvement act of January 6, 1855.

Afterwards, in December, 1855, the legislature authorized the Florida Railroad Company to "construct the railroad from Amelia Island, on the Atlantic, to the waters of Tampa Bay, in South Florida, with an extension to Cedar Key, in East Florida, under the provisions of the act approved January 6, 1855."

The line between Amelia Island and Cedar Key was completed in 1861.

The general improvement act of January 6, 1855, authorized companies accepting its provisions to issue first mortgage bonds at the rate of $10,000 per mile, which bonds were to be countersigned by the state treasurer and the trustees. It was further provided that the railroad company should pay to the trustees of the improvement fund fifty per cent of its net receipts every six months, to be applied by the trustees towards the payment of the interest on the bonds of the company, and should further pay, after the completion of the road, to the trustees at least one-half of one per cent on the amount of indebtedness or bond account as a sinking fund.

Upon the failure of any railroad company accepting the provisions of the act to provide interest on the bonds issued by it and the percentage for the sinking fund, it was made the duty of the trustees, after the expiration of thirty days from said default or refusal, to take possession of said railroad and all its property and to advertise the same for sale at public auction to the highest bidder, either for cash or approved security, as they might think most advantageous, the proceeds to be ap-

plied to the purchase and cancelling of outstanding bonds, but the purchasers of the road to be bound to continue the payment of one per cent into the sinking fund until all the outstanding bonds should be discharged.

In pursuance of these provisions and of the contracts of June, 1855, the Florida Railroad Company issued and paid over to the contractors and their successors, from time to time as the work progressed, all its first mortgage bonds, secured by a mortgage on its railroad from Fernandina to Cedar Key, and also a portion of its bonds, secured by a mortgage which was a second lien on the railroad from Fernandina to Cedar Key, but a first lien on certain town sites and other lands belonging to the company.

As heretofore stated, the road from Fernandina to Cedar Key was completed in 1861, and, the company having failed to pay its interest, the trustees of the internal improvement fund took possession of the road, and sold it at auction to the highest and best bidder as provided for in the act of 1855.

The contention now is that such sale was void, because the road between Fernandina and Cedar Key was not the road designated and pointed out, in the various acts of the legislature, as the one on whose completion and after default the trustees were authorized to sell; that the road intended should extend from Fernandina to Tampa Bay.

We think that this contention has not been successfully maintained. No doubt, some of the language used in the act of 1853 and in the amendatory act of December, 1855, might be read as indicating or designating Tampa Bay as the western terminus of the railroad, and Cedar Key as the terminus of a branch or extension. Yet the history of the legislation and of the transactions thereunder satisfactorily shows that such a construction was not put upon the acts of incorporation, either by the company itself, by the contractors who constructed the road, by the trustees of the internal improvement fund, or by the State of Florida.

As we have seen, the company, in accepting the benefits of the act of January 6, 1855, designated the road which they intended to build as extending from Amelia Island in the

direction of Tampa, as far as a point proper for divergence, to Cedar Key, and from said diverging point to Cedar Key. In the same letter of acceptance it was further said that if the amendment to their charter then pending in the legislature (meaning the act of December, 1855) were granted, they would also construct the balance of the road to Tampa.

Before the act of December, 1855, was passed the company contracted for the construction of the road from Fernandina to Cedar Key, and agreed to pay the contractors with first mortgage bonds upon that road, and these bonds and mortgage were issued accordingly. Subsequently the company made separate contracts for the construction of the route from the diverging point to Tampa and put a distinct mortgage upon it.

The railroad company, upon the completion of its road to Cedar Key, and the trustees of the improvement fund, recognized this as a road completed under the provisions of the act of 1855, the one by paying and the other by receiving the interest and the sinking fund charges on the first mortgage bonds from March, 1861, to November 5, 1863, when default was made.

The contractors agreed to build the road as an entirety from Fernandina, or Amelia Island, to Cedar Key, and accepted in payment, and sold to the public, bonds of the company, secured by a first mortage thereon.

The trustees of the improvement fund not only recognized these first mortgage bonds as securities coming within the provisions of the act of 1855 by receiving and applying the interest paid them by the company, but, at last, in 1866, took possession of the road and franchises, as they were empowered to do in the act, and sold them to parties, who organized a new company.

Finally, the State of Florida, by its act of January 18, 1872, recognized the new company as one owning the property formerly belonging to the Florida Railroad Company, and authorized its change of names.

The second ground relied on by the appellants, as invalidating the regularity of the sale, is the allegation that the persons who acted as trustees of the internal improvement

fund, in taking possession of the railroad and selling it, were not legally entitled to act as such; that they were not really officers of the State of Florida.

The second section of the act of January 6, 1855, declares that the governor of the State, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, shall constitute the trustees to act under the provisions of the act. And we are asked to take notice of the historical facts of the civil war, and that the state government of Florida, in 1866, was declared by the act of March 2, 1867, to be illegal, and that between the outbreak of the rebellion and the adoption by the people of Florida, in May, 1868, of a new constitution, there was an interim or interregnum, during which there were no state officers in Florida qualified and competent to exercise the powers and duties of trustees of the internal improvement fund in accordance with the provisions of the act of 1855.

This contention is disposed of by referring to the well-settled doctrine, affirmed in repeated decisions of this court, that "the acts of the several States, in their individual capacities and of their different departments of government — executive, judicial, and legislative — during the war, so far as they did not impair, or tend to impair, the supremacy of the National authority or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects when they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution." *Horn* v. *Lockhart*, 17 Wall. 570, 580.

In *Sprott* v. *United States*, 20 Wall. 459, 464, the same views were expressed: The insurgent States "merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights, remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or false Federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when in the use of these powers substantial aid and comfort were given or intended to be given to the rebellion, when the functions necessarily reposed in the State for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void."

Without further citation or consideration, we conclude that the act of the trustees in selling this railroad in November, 1866, cannot be impeached for want of power to act.

It is next claimed on behalf of the appellants that the sale and conveyance of the railroad were voidable by reason of the alleged fraud and collusion of the defendants Yulee, Dickerson, and their associates, conspiring together to procure the default of the Florida Railroad Company in the payment of its interest, and thus to bring about the sale of the road.

We do not feel constrained to enter at length into a discussion of the evidence adduced under this part of the case. We have, however, examined the evidence and considered it in the light of the verbal and printed arguments on behalf of the appellants; but we are unable to see that the complainants have overcome the direct, positive, and responsive answers of the several defendants. As against those answers the complainants have adduced very little, if any, satisfactory proof. The weight of the evidence, apart from the evidential character of the answers, is clearly to the effect that the railroad, at the

time of the sale, was in a thoroughly dilapidated condition, and that, in view of such condition and of the state of the country, the price realized was not inadequate.

The court below, in dismissing the bills, proceeded chiefly on the ground that the complainants had lost whatever rights they might have had by their gross laches. In this view of the case we fully concur.

Robert H. Johnson did not file his bill till nearly seven years had elapsed from the time of the sale, and he gives no satisfactory explanation of his delay. Within that time, in May, 1869, a mortgage had been issued by the new company to Stewart and Conkling as trustees, and who are parties defendant by intervention. This mortgage was to secure an issue of bonds amounting to $2,300,000, the proceeds of which have gone into the reconstruction and equipment of the railroad. Those trustees and the purchasers and holders of those bonds must be deemed *bona fide* purchasers, without notice of the claim of the complainants. The other complainants, Corcoran and Riggs, did not come into the case till it had been pending for years. Neither do they or Johnson give any explanation of their long delay. They do not aver any concealment of the facts as they existed at the time of the sale of the road in 1866. They do not aver, much less prove, that they were in ignorance of those facts, or that they were in anywise prevented or impeded from ascertaining the facts or from instituting proceedings.

In *Galliher* v. *Cadwell*, 145 U. S. 368, 372, this court said: "In *Harwood* v. *Railroad Co.*, 17 Wall. 78, a delay of five years on the part of stockholders in a railroad company in bringing suit to set aside judicial proceedings, regular on their face, under which the railroad property was sold, was held inexcusable. In *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587, a director of a corporation who had loaned money to it, and subsequently bought its property at a fair public sale by a trustee, was protected in his title as against the corporation, suing four years thereafter to hold him as trustee of the property for its benefit, it appearing that in the meantime the property purchased had increased rapidly in value. In *Brown* v. *County*

of Buena Vista, 95 U. S. 157, a county was held barred by its laches from maintaining, at the end of seven years, a suit to set aside a judgment fraudulently obtained against it; and that, too, though it did not affirmatively appear that the supervisors of the county had knowledge of the existence of the judgment till about twenty months before the commencement of the suit . . . The cases all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties." In *Johnston* v. *Standard Mining Co.*, 148 U. S. 360, it was said: "The law is well settled that where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. This principle was applied . . . in *Foster* v. *Mansfield &c. Railway*, 146 U. S. 88, to a case where a stockholder in a railway company sought to set aside the sale of the road, which had taken place ten years before, when the facts upon which he relied to vacate the sale were of record, and within easy reach. . . . Where property has been developed by the courage and energy, and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud but prompt assertion of plaintiff's rights."

We are thus brought to the conclusion that the appellants have not sustained their claim that the action of the trustees in making the sale of the railroad was void either from a mistake in interpreting the meaning of the statutes or from any want of power as official persons; that they have likewise failed to show by preponderating evidence any fraud or collusion on the part of Dickerson and his associates in their purchase of the Florida railroad; and, finally, that they are precluded by the long and unexplained lapse of time between the acts complained of and the institution of legal proceedings from

maintaining such proceedings as against innocent third parties whose interests have become involved.

The decree of the court below dismissing the bills of complaint is

Affirmed.

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

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 173. Argued January 24, 1895. — Decided March 4, 1895.

A special statutory exemption or privilege (such as immunity from taxation or a right to fix and determine rates of fare) does not accompany the property of a railroad company in its transfer to a purchaser, in the absence of an express direction in the statute to that effect.

When a state legislature establishes a tariff of railroad rates so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, courts of the United States may treat it as a judicial question, and hold such legislation to be in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and as depriving it of the equal protection of the laws.

Railroad Commission Cases, 116 U. S. 307 ; *Dow* v. *Beidelman*, 125 U. S. 681 ; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418 ; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339 ; and *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, examined in detail.

When, by legislation and consolidation, a railroad which was originally all in one State becomes consolidated with other roads in other States, and the State originally incorporating it enacts laws to regulate the rates of the consolidated road within its borders, the proper test as to the reasonableness of these rates is as to their effect upon the consolidated line as a whole.

When a State prescribes rates for a railroad, only a part of which is within its borders, the company may raise the question of their reasonableness by way of defence to an action for the recovery of penalties for violating the directions.

On the 16th day of August, 1880, under the general laws of the State of Arkansas, a company was incorporated under the name and style of the St. Louis, Arkansas and Texas

Railway Company, and authorized to construct a railway from the northern boundary of the State of Arkansas to Fayetteville, in that State. This railroad was connected at its northern terminus with the railroad of the St. Louis, Arkansas and Texas Railway Company, a corporation of the State of Missouri, and at its southern terminus with the railroad of the Missouri, Arkansas and Southern Railway Company, a corporation of the State of Arkansas.

Under provisions of the laws of the States of Arkansas and Missouri, on the 10th day of June, 1881, the three companies mentioned were consolidated into a single corporation, under the style of the St. Louis, Arkansas and Texas Railway Company, consolidated.

On and previous to the 21st day of February, 1882, it was provided by the laws of the States of Arkansas and Missouri that any railroad company incorporated under the laws of the State of Missouri might lease or purchase any part of a railroad with all its rights, privileges, immunities, real estate, and other property, the whole or a part of which was in the State of Missouri, and constructed, owned, or leased by any other company, if the lines of the roads of said companies were connected and continuous, and that any railroad company incorporated under the laws of the State of Arkansas, whose road was wholly or in part constructed and in operation, was authorized to sell, lease, or otherwise dispose of the whole or any part of its railroad, with all the rights, privileges, franchises, and immunities thereunto belonging, to any connecting railroad or any railroad corporation then or thereafter organized under the laws of the State of Missouri, or of the United States, or of both.

In the manner provided by those laws, the St. Louis, Arkansas and Texas Railway Company, consolidated, on the 21st day of February, 1882, sold and conveyed all of its railway in the States of Arkansas and Missouri, together with all its rights, privileges, franchises, and immunities, to the St. Louis and San Francisco Railway Company, a corporation organized under the general laws of the State of Missouri and under several acts of the Congress of the United States.

Opinion of the Court.

By an act of the legislature of Arkansas, approved April 14, 1887, the maximum rate of passenger fares to be charged in that State was fixed at three cents per mile, and a penalty of $300 was given the passenger for each overcharge. At the fall term of 1887 of the Washington County Circuit Court, John B. Gill brought an action against the St. Louis and San Francisco Railway Company, alleging that said company, operating a railroad within the State of Arkansas more than seventy-five miles in length, had on five distinct occasions charged and received from the plaintiff more than three cents per mile, and demanding judgment for the penalties prescribed in the said statute.

The St. Louis and San Francisco Railway Company filed several pleas or special answers to the complaint, two of which are alleged to raise Federal questions. To these special pleas the plaintiff demurred, and the demurrers were sustained. The defendant then made several offers tending to show that the rate of three cents per mile for each passenger carried was unreasonable and did not enable the defendant to pay its interest or to earn anything on its capital stock. These offers were ruled out, on plaintiff's objection, as incompetent and irrelevant. Due exceptions were taken by the defendant to the action of the court in sustaining the demurrers and in excluding plaintiff's evidence. Judgment went for the plaintiff, which was on appeal affirmed by the Supreme Court of Arkansas, to whose judgment a writ of error was sued out to this court.

Mr. Edward D. Kenna for plaintiff in error. *Mr. George R. Peck*, *Mr. A. T. Britton*, and *Mr. A. B. Browne* were on his brief.

Mr. A. H. Garland for defendant in error. *Mr. D. W. Jones* and *Mr. J. H. Hill* were on his brief.

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

By the act of April 4, 1887, the legislature of Arkansas prescribed a maximum rate of three cents per mile for each passenger carried by the railroads of that State, and a penalty of three hundred dollars for each overcharge, payable to the passenger from whom such overcharge had been exacted.

It was found by the trial court, a jury having been waived, that John B. Gill, the plaintiff, had, on several occasions, while travelling on the railroad of the St. Louis and San Francisco Railway Company, between points within the territory of the State of Arkansas, been charged a rate in excess of that allowed by the statute. The defendant company set up, by way of defence, that it operated that portion of the railroad on which the plaintiff travelled as a purchaser and assignee of the St. Louis, Arkansas and Texas Railway Company, a corporation organized under the laws of the State of Arkansas; that, under the laws of Arkansas in force at the time of the incorporation of said last-mentioned company, in April, 1880, it had the right to fix and regulate the rate of charge for carrying passengers, not to exceed the sum of five cents per mile; that the legislature might from time to time, reduce the rates, but that the same should not be so reduced as to produce, as profits for the railroad company, less than fifteen per cent per annum on the capital actually paid in; and that until such profits did annually accrue to said company, it and its successors and assigns were entitled, without limitation, restriction, or control, to the right to fix such rates of fares as to it should seem proper, not exceeding the rate of five cents per mile; that such provisions of the law constituted a contract between the St. Louis, Arkansas and Texas Railway Company and the State, and that the St. Louis and San Francisco Railway Company having become, in a manner and form provided by the laws of the State, the assignee of the St. Louis, Arkansas and Texas Railway Company, and the owner of its road, franchise, and privileges, had succeeded to its right to charge passenger rates not in excess of five cents per mile, so long as its profits did not exceed fifteen per cent per annum on the capital actually paid in; that the said railroad, although completed for about five years, had never earned in profits an

amount equal to three per cent on the capital actually paid in; that the net earnings or profits for the next ensuing two years will not exceed three per cent on the capital actually paid in or on the amount actually expended in the construction of said railroad; that the consolidation of the St. Louis, Arkansas and Texas Railway Company of Arkansas with the company of the same name, incorporated in Missouri, and the sale by the company so formed of its railroad to the defendant, each severally became and were compacts made between the States of Missouri and Arkansas with each other, with the consolidated company, and with the defendant company, respectively; that the act of April, 1887, of the legislature of Arkansas, attempting to fix passenger rates at less than five per cent per mile, in so far as it relates to the defendant's line of railway, never received the assent of the State of Missouri or of the defendant company, and that such enactment was an alteration and impairment of a contract, and as such null and void under the provisions of the Constitution of the United States.

To this plea or special answer the plaintiff demurred.

As a further plea or special answer the defendant company alleged, in connection with a history of the formation of the original companies, their consolidation, and the purchase of the consolidated railroad by the defendant, that, by a provision of the constitution of the State of Arkansas, in force at the time of the transactions narrated, it was provided that no charter of any corporation should be altered, annulled, or repealed in such a manner as to do injustice to the corporators; that the owners of the capital stock of the St. Louis, Arkansas and Texas Railway Company are the same and identical persons who own the capital stock of the defendant company; and that, if the rates of fare prescribed by the act of April, 1887, are enforced, the defendant company will not be able to earn a reasonable rate of interest on its indebtedness, or to meet the actual cost of transporting passengers and maintaining said division of its road; and that, therefore, said act of April, 1887, as far as it is applicable to the said railroad, is in violation of the constitution of Arkansas, and is unreasonable, and a taking of private property for public use without com-

pensation, and is therefore in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The plaintiff demurred likewise to this plea, and the demurrers having been sustained, the defendant then offered to show that the St. Louis, Arkansas and Texas Railway Company had, on December 31, 1880, executed bonds to the amount of $600,000 and secured the same by a mortgage of all its property, franchises, and immunities to the United States Trust Company of New York, which bonds were yet wholly due and unpaid, and upon which the defendant was required to annually pay the sum of $36,000 as interest; that the defendant company has never, since the construction of said lines, been able to earn, from all sources, an amount, which, after paying for the actual expenditures, would yield to the defendant or to the original incorporators a profit equal to one per cent upon the capital stock actually paid in cash and used in the construction of such lines of railroads; that the actual cost of transporting each passenger over that portion of the defendant's railway in the plaintiff's petition mentioned exceeded the sum of three cents per mile; that at the times in plaintiff's petition mentioned the defendant could not actually perform the service of carrying the plaintiff or any other passenger over its railway for the sum of three cents per mile, but that the sum in cash which it was actually required to expend in the carriage of said plaintiff and other passengers was equal to three and three-tenths cents for each and every mile such passenger was carried, and that if defendant was required to perform the service at the rate of three cents per mile, it would be required to expend more money in cash for the performance of such service than it would receive from the passenger, and that the revenue or income which it would receive from all sources of profit other than the passenger traffic would not be sufficient to enable it to make good the amount which it would lose on its passenger business; that three cents per mile for the service rendered by the defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein described, was not reasonable compensation, and

that no less than five cents per mile would be a reasonable sum or one that would be just to the defendant; that defendant never had, since the construction or completion of said lines of railway, been able to earn from all its sources of revenue an amount which, after paying for the actual cash expenditures necessary for the operation of its road, would yield a profit equal to one per cent upon the actual cash cost of said road, which amounted to over $40,000 for every mile of railway constructed.

To this evidence the plaintiff objected as incompetent and irrelevant; the objection was sustained, and the defendant excepted to the action of the court in sustaining the demurrers and in rejecting the said offers of evidence. There was judgment for the plaintiff from which the defendant appealed to the Supreme Court of Arkansas, from whose judgment, affirming that of the court below, a writ of error was allowed to this court.

The plaintiff in error bases its demand that the judgment of the Supreme Court of Arkansas should be reversed, on two propositions, first, that the act of April, 1887, as applied to the defendant's railroad, was a violation of a contract between the State of Arkansas and the various corporations which constructed or subsequently acquired the line of railway in question; and, second, that, as the act, as applied to the defendant's railroad, requires the defendant to do business at a positive loss, it therefore constitutes a taking of defendant's property without just compensation or due process of law.

The first proposition requires the plaintiff in error to show that there existed a contract between the State of Arkansas and the St. Louis, Arkansas and Texas Railway Company, which, under the existing facts, forbade the application of the act of 1887 to the business of that company, and that the plaintiff in error, the St. Louis and San Francisco Railway Company, succeeded to such contract right.

As already stated, the constitution of Arkansas contained, when the St. Louis, Arkansas and Texas Railway Company was organized, a provision that the general assembly should have the power to alter, revoke, or annul any charter of incorporation then existing, or that might thereafter be created,

whenever, in their opinion, it might be injurious to the citizens of the State; in such manner, however, that no injustice should be done to the corporators. The law under which the St. Louis, Arkansas and Texas Railway Company was organized provided that the legislature might, when any such railroad should be opened for use, from time to time, alter or reduce the rates of toll, fare, freights, or other profits upon such road; but the same should not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless, on an examination of the amounts received and expended, to be made by the secretary of State, he should ascertain that the net income derived by the company, from all sources, for the year then last past, had exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in.

The contention is that, if the facts show that the company has not earned fifteen per cent per annum on the capital actually paid in, the State is precluded, notwithstanding the power reserved in the constitution, from reducing the rates or charges.

The Supreme Court of the State, 54 Arkansas, 101, as we learn from the record in this case, was of the opinion that the power to alter and amend charters, reserved to the State in its constitution, was not parted with or controlled by the subsequent act of the legislature incorporating the railroad company and authorizing it to establish rates, and that accordingly the passage of a subsequent general law, prescribing rates, could not be deemed an infringement of a contract between the State and the company.

We do not find it necessary to express an opinion on this view of the case, but prefer to base our judgment on another ground, which will bring us to the same result. It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation or a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176.

We find here no such express statutory direction, nor is there any equivalent implication by necessary construction. As is said in the decision of the Supreme Court of Arkansas in the present case: "The corporations owning the several parts of the road as to which it is charged that the act operates unjustly were dissolved years before it was passed. As to them it could not operate unjustly, and in their behalf no cause of complaint can exist."

These considerations dispose of the proposition that the act of April, 1887, if made to apply to the railroad of the plaintiff in error, would operate as a violation of a contract subsisting between the State of Arkansas and the St. Louis and San Francisco Railway Company.

We are thus brought to the second proposition relied on by the plaintiff in error, that, as the act, when applied to the defendant's railroad, requires the company to do business at a positive loss, it therefore constitutes a taking of defendant's property without due process of law.

Whether, if the power of the State to fix and regulate the passenger and freight charges of railroad corporations has not been restricted by contract, there can be found, by judicial inquiry, a limit to such power in the practical effect its exercise may have on the earnings of the corporations, presents a question not free from difficulty. Given the case of a general law prescribing rates to all companies, can the courts inquire whether such rates are reasonable, and may they find that as to one company the prescribed rates permit it to do business at a profit, and as to another, whose facilities are inferior, or where expenditures are greater, the rates afford no profit? And will the fate of the law, as to its validity, depend, in each case, on the result of such an inquiry?

This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the

United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S. 307, 331; *Dow* v. *Beidelman*, 125 U. S. 681; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362.

The so-called *Railroad Commission Cases*, 116 U. S. 307, arose under an act of the State of Mississippi passed March 11, 1884, which created a railroad commission, and charged it with the duty of supervising railroads, and particularly with the duty of revising the tariff of charges. The Mobile and Ohio Railroad Company had been theretofore incorporated by a charter which granted to it "the right from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation." A bill was filed by the Farmers' Loan and Trust Company, a New York corporation, to enjoin the railroad commission from enforcing against the Mobile and Ohio Railroad Company the provisions of the railroad commission act, and averring that the complainants were the trustees in a mortgage that had been executed prior to said act, and that the enforcement of the latter would impair their security.

The court held, two justices dissenting, that the statute incorporating the company did not deprive the State of its power, within the limits of its general authority, to act upon the reasonableness of the tolls and charges so fixed and regulated, and reversed the decree of the Circuit Court which had granted an injunction as prayed for in the bill. We now refer to this case for the purpose of calling attention to the facts that the act provided that proceedings to enforce its provisions were to be instituted by the commission, and that the suit was in form a bill in equity to restrain the commission from applying the terms of the act to the Mobile and Ohio Railroad Company.

The case of *Chicago Railway Co.* v. *Minnesota* was a writ of error to review a judgment of the Supreme Court of Minnesota, awarding a writ of mandamus against the railway company. The State of Minnesota by an act, approved March 7,

1887, had established a railroad and warehouse commission, providing that the rates of charge for the transportation of property published by the commission should be final and conclusive as to what are equal and reasonable charges, and that there should be no judicial inquiry as to the reasonableness of such rates; and the railroad company contended that the rates prescribed by the commission were unreasonable, and that, as the company was not permitted to put in testimony as to the reasonableness of such rates, the act was in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and by depriving it of the equal protection of the laws. As heretofore stated, the company's position was sustained, and the decree of the Minnesota court awarding the writ of mandamus was reversed. But it will be observed that the State was represented by the commission, and that the remedy went to the validity of the legislation as affecting the railroad company's business as a whole. It was not a suit between the company and an individual customer. Mr. Justice Miller, in his concurring opinion, said: "Until the judiciary has been appealed to to declare the regulation made, whether by the legislature or by the commission, voidable for unreasonableness, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals; that the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of the court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the rates as being within the limits of just compensation for the service rendered; that until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method; and that, in the present case, where an application is made to the Supreme Court of the State to com

pel the railroad companies to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceedings the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery."

Chicago Railway Company v. *Wellman*, 143 U. S. 339, was a contest over the validity of an act of the legislature of Michigan, passed in June, 1889, fixing the amount per mile to be charged by railways for the transportation of passengers. On the very day the law took effect, to wit, October 2, 1889, one Wellman went to the railroad company's office in Port Huron, and tendered for a ticket from that place to Battle Creek the sum of $3.20 instead of $4.80, which had been the regular fare. This was refused, and Wellman immediately brought an action for damages, and recovered a judgment for $101, an amount sufficient to take the case to a higher court; and ultimately the Supreme Court of Michigan affirmed the judgment sustaining the validity of the law. But the observations of this court by Mr. Justice Brewer are very pertinent to the present case. After stating the facts of the case, he said: "Can it be, under these circumstances, that the court erred in peremptorily refusing to instruct the jury that an act fixing a maximum rate at two cents per mile is unconstitutional? Is the validity of a law of this nature dependent upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinion as a finality? Must it be declared, as a matter of law, that a reduction of rates necessarily diminishes income? May it not be possible, indeed does not all experience suggest the probability, that a reduction of rates will increase the amount of business, and therefore the earnings?" And referring to the following observation made by the Supreme Court of Michigan in passing upon the case: "In the stipulation of facts or in the taking of testimony in the court below neither the attorney general nor any other person interested for or employed in

behalf of the people of the State took any part. What difference there might have been in the record had the people been represented in the court below, however, in our view of the case, is not of material inquiry," Mr. Justice Brewer added: "We think there is much in the suggestion. The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented the validity of any act of any legislature, state or Federal, and the decision necessarily rests on the competency of the legislature so to enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between parties. It was never thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. . . . Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be not to declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

Similar observations may be found in *Dow* v. *Beidelman*, 125 U. S. 680, a case wherein the validity of the very act now in question was assailed, and where this court affirmed the judgment of the Supreme Court of Arkansas sustaining the act. In that case the action had been brought by a passenger claiming penalties because he was charged more than the statutory rates, and the case went off on an agreed statement of facts, and it was said in this court, by Mr. Justice Gray: "The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this

case, by reason of the admitted facts, that with the same traffic that their road now has, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the company as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature was unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of the property without due process of law."

Reagan v. *Farmers' Loan and Trust Co.*, 154 U. S. 362, is the last case to which we deem it necessary to refer. The principal facts of the case were these: In April, 1891, the legislature of Texas passed an act establishing a railroad commission with power to classify and regulate rates. After the commission was organized it proceeded to establish certain rates for the transportation of goods over the railroads in the State. Thereafter, in April, 1892, the Farmers' Loan and Trust Company of New York filed a bill in the Circuit Court of the United States for the Western District of Texas, making as defendants the railroad commissioners, the attorney general, and the International and Great Northern Railroad Company. The bill alleged that the complainant was the trustee in a mortgage on said railroad to secure a series of bonds, and averred generally that the rates fixed by the commission were unreasonable and unjust, and set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates or any other

rates, and also restraining the attorney general from instituting any suits to recover penalities for failing to conform to such rates. The International and Great Northern Railroad Company appeared, filed an answer, and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The commission and the attorney at first filed answers, which they subsequently withdrew and filed demurrers, leave being given at the same time to the complainant and cross-complainant to amend the bill and cross-bill before the filing of the demurrer. The amendments contained allegations in considerable detail of the losses in revenue sustained by the company through the enforcement of the statutory rates, and the average reduction caused thereby in the rate theretofore existing.

The Circuit Court entered a decree granting the injunctions as prayed for, restraining and forbidding the commission from enforcing the established rates, and from making or publishing any other or further rates.

The opinion of this court on appeal was that while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself, or to restrain the commission from again establishing rates.

After recognizing the previous cases as establishing the proposition that, while it is not the province of courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of freights, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property, the court proceeded to consider and discuss the question whether the rates prescribed by the commission were unjust and unreasonable. Upon reading the opinion it is obvious that the principal difficulty encountered was whether the facts alleged in the bill and cross-bill, conceded by the demurrers to be true, furnished the court sufficient evi-

dence to enable it to find, as a judicial conclusion, that the statutory rates were unreasonable; and Mr. Justice Brewer, who delivered the opinion of the court, after reciting a broad allegation in the bill, said: "It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates, yet it is not to be ignored. There are often in pleadings general allegations of mixed law and fact, such as the ownership of property and the like, which, standing alone, are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a court of equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. It must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion can be drawn from that action, and that is, that upon the taking of the testimony defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts which, if proved, might induce a different conclusion, and compel a different result."

As already stated, the defendant's railway was composed by consolidation of one incorporated in Missouri and of two incorporated in the State of Arkansas. The allegations con-

tained in the fourth answer of the railroad company have reference to that part of the defendant's railroad that originally belonged to the St. Louis, Arkansas and Texas Railway Company, incorporated under the laws of the State of Arkansas. Those allegations were to the effect that such portion of the railroad was traversed by the plaintiff below, and was highly expensive to construct and maintain, and that the cost of transporting passengers over said division and the maintenance thereof exceed the maximum fixed by the act of 1887. The offers of evidence we also understand, notwithstanding their general terms, to have been intended to sustain the allegations contained in the fourth answer, and not to be applicable to the company's entire railroad. Thus one of the offers was to show that "the actual cost of carrying each passenger over that portion of defendant's railway in plaintiff's petition mentioned, and over all its railway therein referred to, did and does now exceed the sum of three cents per mile for each and every passenger so carried," and another was to show that "three cents per mile for the service rendered by defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein mentioned, was not reasonable compensation, and that no less than five cents per mile would be a reasonable sum."

It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety even in the State of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas and Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said State. In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such

part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the State of Arkansas.

Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.

But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defence to an action for the collection of the penalties.

However, we have seen that, in the present case, the evidence failed, in that it was restricted to a part only of the railroad, and that even if the evidence could be understood as applicable to the entire line in Arkansas, there was no finding of the facts necessary to justify the courts in overthrowing the statutory rates as unreasonable, but that, on the contrary, the company's case depended on allegations admitted by the demurrer of a party who, in no adequate sense, represented the public; and, upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the

legislature of Arkansas, which on its face appears to be a legitimate exercise of power, and which has not been shown, by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error.

The judgment of the Supreme Court of Arkansas is accordingly *Affirmed.*

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* STEVENSON, No. 174; SAME *v.* TRIMBLE, No. 175; SAME *v.* CARTER, No. 176. These cases were argued with, and are similar in their facts to, the case of *St. Louis and San Francisco Railway Company* v. *John B. Gill*, No. 173, just decided, and are to be similarly disposed of. An additional fact, that a portion of the road travelled over consisted of a bridge, built under authority of an act of Congress, is made to appear, but as no point is made or argued in the brief of the plaintiff in error, and as we see in such fact nothing that would affect the result, the judgments of the Supreme Court of Arkansas in those cases are

Affirmed.

Mr. Edward D. Kenna for plaintiff in error.

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

NORFOLK AND WESTERN RAILROAD COMPANY *v.* PENDLETON.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Nos. 158, 359. Submitted January 14, 1895. — Decided March 4, 1895.

The fifth section of the charter from the State of Virginia to the Atlantic, Mississippi and Ohio Railroad Company, which vested it "with all the rights and privileges conferred by the laws of this Commonwealth, and

subject to such as apply to railroad corporations generally, subjected it to state laws regulating rates, notwithstanding provisions of exemption in statutes organizing other previous companies to whose rights it succeeded; and the Norfolk and Western Railroad Company, when it became possessed of the property and rights of the Atlantic, Mississippi and Ohio Railroad Company, took them subject in like manner to such laws.

In the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee.

A mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but, at most, to reorganize as a new corporation subject to the laws existing at the time of the reorganization.

THE case is stated in the opinion.

Mr. William J. Robertson, *Mr. W. H. Bolling*, and *Mr. Joseph I. Doran* for plaintiff in error.

Mr. John J. A. Powell for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Edmund Pendleton brought two suits in the Circuit Court of Wythe County, Virginia, against the Norfolk and Western Railroad Company to recover statutory penalties for charging him more than the rates prescribed by law.

On behalf of the defendant it was not denied that the sums charged were in excess of the rates fixed by the general law of Virginia, dated January 14, 1853, c. 57, Acts of 1852–3, p. 62, regulating tolls upon railroads, but it was claimed that the defendant railroad company, as the legal successor of certain other companies, whose charters empowered them to fix their own charges, was not subject to the provisions of that statute.

The trials resulted in judgments against the railroad company, which were on error taken to the Supreme Court of Appeals of the State of Virginia, from whose judgments,

affirming those of the trial court, writs of error were sued out of this court.

The record discloses the following facts: On March 11, 1837, the legislature of Virginia passed an act entitled "An act prescribing certain regulations for the incorporation of railroad companies," in the twenty-fourth section whereof it was provided that it should be lawful for the president and directors of the company to charge certain rates of toll for the transportation of persons, not exceeding six cents per mile; for the transportation of goods, produce, merchandise, and other articles, except gypsum and lime, not exceeding eight cents per ton per mile; for the transportation of gypsum and lime, not exceeding four cents per ton per mile; and for the transportation of the mail such sum as they may agree for; and in the twenty-fifth section it was provided that when the net profits shall amount to a sum equal to the capital stock expended, with six per cent per annum interest thereon, then the tolls which the president and directors shall be entitled to demand and receive on their railroad shall be fixed and regulated from time to time by the board of public works, or by such agent or agents as may be appointed by the legislature for that purpose, so as to make them sufficient to pay a net profit of six per cent per annum on the capital stock, etc.; and in the thirty-fifth section it was provided that any part of any charter or act of incorporation granted agreeably to the provisions of the act "shall be subject to be altered, amended, or modified by any future legislation as to them shall seem proper, except so much thereof as prescribes the rate of compensation or tolls for transportation." Act of March 11, c. 118, Laws of 1836–7, 101, 110.

On March 24, 1848, and while the act of 1837 was in force, the legislature of Virginia passed an act incorporating the Lynchburg and Tennessee Railroad Company, by the second section whereof it was provided that whenever twelve hundred shares of stock shall have been subscribed, the subscribers, their executors, administrators, and assigns, should be declared to be a body politic and corporate, such should be "subject to all the provisions of the act prescribing certain general regulations

for the incorporation of railroad companies, passed March 11, 1837, and the supplements thereto;" and by the third section it was provided that "the tolls of said company shall be regulated and prescribed by the president and directors of said company: *Provided, however*, That if at any time hereafter the rates of toll and transportation shall enable the president and directors, after payment of all necessary expenses, and after setting apart a fair and reasonable sum for renewal and repairs, to divide more than fifteen per cent on their capital stock invested, then the legislature may regulate and reduce the tolls and transportation so as to enable the company to divide fifteen per cent and no more."

Under these acts a railroad extending from Lynchburg to Bristol, a point on the line between the States of Virginia and Tennessee, was built and operated by the Virginia and Tennessee Railroad Company, from 1855, the date of its completion, till November 12, 1870. The Atlantic, Mississippi and Ohio Railroad Company was incorporated under the provisions of an act of the general assembly of the State of Virginia, passed June 17, 1870, and entitled "An act to authorize the formation of the Atlantic, Mississippi and Ohio Railroad Company." Laws of 1869–70, c. 143, p. 181.

The avowed object of the organization of this company was to acquire the property and franchises of the Norfolk and Petersburg Railroad Company, whose railroad extended from Norfolk, Virginia, to Petersburg; of the Southside Railroad Company, owning a railroad between Petersburg and Lynchburg; and of the Virginia and Tennessee Railroad Company, whose road extended from Lynchburg to Bristol.

It was provided in the fifth section of the act that "the said Atlantic, Mississippi and Ohio Railroad Company shall be a body corporate and politic, vested with all the rights and privileges conferred by the laws of this Commonwealth, and subject to such as apply to railroad corporations thereof generally;" and in the fourteenth section, that "as the stock of the said Norfolk and Petersburg, Southside, Virginia and Tennessee, and Virginia and Kentucky Railroad Companies, (the several companies authorized by the act to subscribe to

and be absorbed by the Atlantic, Mississippi and Ohio Railroad Company,) respectively, shall be absorbed by the said Atlantic, Mississippi and Ohio Railroad Company, as contemplated in the terms of this act, the said company shall become absolutely vested with all the rights of franchise and of property which belong to the same."

On November 12, 1870, the organization of the new company was finally completed, and thereafter the said line of railroad from Norfolk to Bristol was operated, under one general management, by the said company, until in March, 1876, a bill was filed in the United States Circuit Court for the District of Virginia by trustees named in certain mortgages executed by the Atlantic, Mississippi and Ohio Railroad Company to foreclose the same. By a decree in this case the works, property, and franchises of the Atlantic, Mississippi and Ohio Railroad Company were sold to the Norfolk and Western Railroad Company, and to that company the same were conveyed by deed of May 3, 1881, in conformity with the provisions of the code of Virginia.

Under the foregoing state of facts it is contended that the Norfolk and Western Railroad Company, as a legal successor to the previous companies, is entitled to fix and regulate its rates for transportation until the profits of the traffic shall enable the president and directors to divide more than fifteen per cent per annum, which has never happened, and that to enforce the rates prescribed by the general law would deprive the said company of its legal rights and would impair the obligation of the contract alleged to subsist between the State of Virginia and the company.

The record discloses that the Supreme Court of Appeals disposed of this contention as follows: "The argument is that the provisions of the charter of the Lynchburg and Tennessee Railroad Company constituted a contract with the company, the obligation of which cannot be impaired by subsequent legislation, and moreover, that by the fourteenth section of the charter of the Atlantic, Mississippi and Ohio Railroad Company, which was granted in 1870, it was provided that the last-mentioned company should, among other things, be

vested with all the rights of franchise of the Virginia and Tennessee and the Lynchburg and Tennessee Railroad Companies, and that the defendant company succeeded to those rights as the successor of the Atlantic, Mississippi and Ohio Railroad Company. This argument, however, overlooks the fifth section of the act incorporating the Atlantic, Mississippi and Ohio Railroad Company, which must be read in connection with the said fourteenth section, whereby it was provided that the company should be subject to all the laws of the Commonwealth which apply to the railroad corporations generally, and the act of 1853 is, as we have seen, such a law. The defendant company, as the successor by purchase of the Atlantic, Mississippi and Ohio railroad, is, of course, bound by this provision, and is consequently subject to the provisions of the act last above mentioned. In other words, it succeeded to the right to operate a railroad, but subject, as to the regulation of its tolls, to the general laws of the Commonwealth, for the right of a State to reasonably limit the amount of charges by a railroad company for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce, is well settled and not disputed."

These views of the Supreme Court of Appeals, construing the railroad laws of the State, and pronouncing on their legal effect, seem to us to be sound and to properly dispose of the question. If the orignal companies did have a contract with the State whereby, until a certain amount of money should be earned, they should have the right to fix and regulate their charges, it is clear that the Atlantic, Mississippi and Ohio Railroad Company accepted their charter with a distinct provision that the company should be subject to the general laws of the Commonwealth, one of which was the very law, then and still in force, which prescribed the tariff of rates enforced in the present suits. It is equally obvious that the Norfolk and Western Railroad Company, the plaintiff in error, by becoming the legal successor to the Atlantic, Mississippi and Ohio Railroad Company, was brought within the scope of

those general laws, and cannot successfully claim immunity under the charters of the previous companies.

It may be added, perhaps unnecessarily, that even apart from the clause which in terms subjected the Atlantic, Mississippi and Ohio Railroad Company, and consequently the Norfolk and Western, as its successor, to the general law prescribing rates, that there was no clause or provision in the original charters which can be interpreted as necessarily meaning that subsequent corporations, organized under later laws, can assert a valid succession to immunities and privileges like those in question. We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize as a new corporation subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176.

The judgments of the Supreme Court of Appeals are

Affirmed.

FOX *v.* HAARSTICK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 577. Submitted January 7, 1895. — Decided March 4, 1895.

In an action upon a contract to sell shares of stock to the plaintiff, the defendant set up allegations of fraud. A jury was waived and the court found separately and specifically upon all the allegations respecting the contract, and that the contract set up in the complaint was sustained by the evidence. No error was assigned or exceptions taken. *Held*,

(1) That this court cannot review those findings;

(2) That they are sufficient to sustain the judgment.

THIS was an action brought in the District Court of the Third Judicial District of Utah by Henry C. Haarstick against Moylan C. Fox, executor of Sarah M. McKibben, deceased, to recover damages for the refusal of the defendant to assign and transfer to the plaintiff fourteen hundred and fourteen shares of the capital stock of a corporation known as the St. Louis and Mississippi Valley Transportation Company, as called for by a contract subsisting between the plaintiff and Mrs. McKibben during the lifetime of the latter.

At the trial a jury was waived and the case was tried by the court. The trial judge made certain findings of facts and conclusions of law as follows:

"1. That the defendant, Moylan C. Fox, is the executor, duly qualified and acting, of the last will and testament of Sarah M. McKibben, deceased.

"2. That by written correspondence between Sarah McKibben and the plaintiff, dated February 25, 1890, and March 1, 1890, the said Sarah McKibben contracted to sell and deliver to the plaintiff, within forty days after said date, 1414 shares of the capital stock of the St. Louis and Mississippi Valley Transportation Company, a corporation organized under the laws of the State of Missouri, for the sum of ninety-two thousand five hundred dollars.

"3. That before the time of the completion of said contract

arrived, to wit, on the 5th day of March, 1890, the said Sarah M. McKibben died, and the said executor then refused, and ever since has refused and declined to deliver said stock and to carry out and fulfil the contract.

"4. That the plaintiff has been ready and willing to pay the said sum of ninety-two thousand five hundred dollars for the said stock upon the delivery thereof, but the said executor still refuses and declines to accept the same.

"5. That the said stock, at the time when the same should have been delivered, to wit, on or about the 10th day of April, 1890, was of the value of one hundred and four thousand five hundred dollars, and that the plaintiff was damaged, by reason of the defendant's failure to deliver the said stock and fulfil the said ———, in the sum of twelve thousand dollars, with interest thereon at the rate of eight per cent per annum, from the 10th day of April, 1890, amounting at this date to one thousand four hundred and eighty-five dollars, and making the plaintiff's damage in all thirteen thousand four hundred and eighty-five dollars.

"6. That on the 30th day of October, 1890, the plaintiff presented a claim in writing, pursuant to the statute in such case made and provided, demanding the payment of the sum of thirty-six thousand one hundred and seventy-four dollars damages to Moylan C. Fox, executor of said Sarah M. McKibben, deceased, and that on said day the said executor rejected said claim.

"As conclusions of law from the foregoing facts, the court now hereby finds and decides —

"That the plaintiff is entitled to have and recover of and from the defendant the sum of thirteen thousand four hundred and eighty-five dollars, with interest thereon from this date until paid, at the rate of eight per cent per annum, and costs of suit, and judgment is hereby ordered to be entered accordingly."

A motion for a new trial was made and overruled, judgment was entered, and an appeal was taken to the Supreme Court of the Territory of Utah, from whose judgment affirming that of the court below an appeal was taken to this court.

Mr. C. W. Bennett, *Mr. J. A. Marshall*, and *Mr. William M. Bradley* for appellant.

Mr. Given Campbell, *Mr. F. S. Richards*, and *Mr. Arthur Brown* for appellee.

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

The appellant's contentions are that the trial court erred in failing to make an express finding as to certain defences set up in the defendant's answer, which are alleged to have constituted new matter in avoidance of the contract declared on by the plaintiff, and to have been sustained by evidence, and that the Supreme Court of the Territory erred in approving that action of the trial court by affirming its judgment.

The defensive matter adverted to was thus set forth in the defendant's answer:

"The defendant alleges that, prior to the date of the alleged contract mentioned in the complaint, the plaintiff agreed with the said Sarah M. McKibben to act as her agent in the matter of the sale and disposal of said shares of said stock for her, and represented to her by writing that the said company had lately sustained large losses, and that the shares aforesaid had just depreciated 40 per cent in value, and were not worth the value she placed on them, and undertook to sell and dispose of them for her for $92,500; that, in fact, said company was then in extra prosperous condition and had lately acquired a large cash reserve in its treasury, and was about to declare and pay a large dividend on said shares of stock, and that the shares had an increased value by reason of that fact and had not depreciated in value; that plaintiff was then and is now president of said company and knew the foregoing facts, and said deceased did not know said facts; and, so knowing, the plaintiff wilfully and fraudulently concealed said facts from the deceased and induced the deceased to believe that she was about to make an advantageous sale, and any and all action taken and communication had by deceased with plaintiff was

induced by and based upon that belief on her part, brought to her mind as aforesaid."

Claiming that this paragraph of his answer presented a distinct, affirmative defence, the appellant contends that, without a formal replication thereto, it was put in issue by virtue of an enactment by the legislature of Utah, which provides that "every material allegation of the complaint not controverted by the answer must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defence or counterclaim, must, on the trial, be deemed controverted by the opposite party." Sec. 3248, Compiled Laws of Utah, vol. 2, p. 251. With a material issue thus presented, the appellant claims that the trial court erred doubly in not making a finding on the same, and in not finding that it was sustained by the evidence.

In failing to find at all upon a material issue raised by the pleadings, it is said that the court disregarded certain provisions of the laws of Utah, which are in the following terms: "Sec. 3379. Upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." "Sec. 3380. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly." "Sec. 3381. Findings of fact may be waived by the several parties to an issue of fact, 1, by failing to appear at the trial, 2, by consent in writing filed with the clerk, or 3, by oral consent in open court, entered in the minutes." As it appears in the present record that the defendant did not fail to appear, nor consent in writing, nor by oral consent in court to waive a finding of the issue in question, and as the court made written findings on other issues, it is claimed that the error of the court in failing to make a finding is thus made manifest.

On the part of the appellee it is claimed that the issue presented in the paragraph of the answer heretofore cited was not a material one, containing new matter in avoidance of the plaintiff's claim, but was essentially a mere traverse, equivalent to the general issue; that, whether material or not, it

was not sustained by any substantive evidence, and that therefore there was no error in the action of the trial court, whose findings substantially covered all the real issues in the cause. The appellee cites as pertinent a decision of the Supreme Court of California, from the code of which State the laws of Utah in question in this case are said to have been taken:

"When upon the trial of a cause the court renders its decision without making findings upon all the material issues presented by the pleadings, it is held that such decision can be reviewed upon a motion for a new trial. . . . In such a case there has been a mistrial, and the decision, having been rendered before the case has been fully tried, is considered to have been a decision 'against law.' It will be observed, however, that this rule is only applicable in a case where the issues upon which there is no finding are 'material'—that is, where a finding upon which issues would have the effect to countervail or destroy the effect of the other findings. If a finding upon such issues would not have this effect the issues cannot be regarded as material, and the failure to make a finding thereon would not be prejudicial. . . . If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or to omit to make findings upon other issues which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such finding is immaterial. . . . If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial or render the decision against law." *Brison* v. *Brison*, 90 California, 323, 329.

The record discloses the affirmative findings of the trial court, which, of themselves, fully warrant the conclusion of law based upon them, that the plaintiff was entitled to recover. No assignments of error on exceptions taken ask or

empower us to review those findings. If, then, those findings are to be accepted as justified by the evidence, it is difficult to see how the defendant was injured by the failure of the court to pass, in express terms, on those averments of the answer now urged. If, indeed, it be indisputably true, as so found, that by written correspondence between the parties Mrs. McKibben agreed to sell and the plaintiff to buy a stated number of shares of stock at a fixed price, and that the plaintiff, in due time and manner, tendered the purchase money and demanded a delivery of the stock, and that the defendant, as executor of Mrs. McKibben, declined to receive the purchase money and to deliver the stock, those allegations of the answer which are now relied upon must be deemed to have been thereby negatived. In other words, the plaintiff's affirmative case is wholly inconsistent with the truth of the defendant's case, and the conclusive establishment of the truth of the former is necessarily a complete negative of the case asserted by the defendant.

This was the conclusion reached by the Supreme Court of the Territory, which disposed of the question in the following terms: "It is contended that the court erred in failing to find facts on the question of fraud set up in the answer. The court found separatively and specifically that the contract set up in the complaint was sustained by the evidence. This finding necessarily negatives any fraud as alleged, and is sufficient to sustain the judgment."

It is true that this ruling of the Supreme Court of the Territory does not, even in a question of practice arising under the local law, preclude this court from reviewing it, as would a decision of a state Supreme Court in similar circumstances; but unless a manifest error be disclosed, we should not feel disposed to disturb a decision of the Supreme Court of a Territory construing a local statute. So far from discovering manifest error in that ruling, we concur with the Supreme Court of the Territory in their disposition of the question.

The opinion of the Supreme Court of the Territory, disclosed in the record, further shows that that court considered at length the evidence in the entire case, as well that sustaining the

plaintiff's claim as that relied on by the defendant as showing fraud, and concurred in and affirmed the findings and judgment of the trial court. But we do not regard any aspect of the case as open for our consideration except the errors assigned to the action of the Supreme Court of the Territory in ruling that the findings of the trial court sufficiently embraced the issues presented by the pleadings.

The judgment of the Supreme Court of the Territory of Utah is hereby

Affirmed.

DAVIS *v.* WAKELEE.

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

No. 181. Argued January 25, 1895. — Decided March 4, 1895.

An appeal authorized by the appellant personally, and in good faith entered in this court in the name of his attorney and counsel below, will not be dismissed simply because that counsel had not authorized such entry, when the appellant, on learning of the mistake, appears by other counsel and prosecutes it in good faith.

The omission to describe in an appeal bond the term at which the judgment appealed from was rendered is an error which may be cured by furnishing new security.

D. was adjudicated a bankrupt in 1869 in California. W. then held six promissory notes executed by him which were proved in bankruptcy against D. D. then removed to New York. After that W., by leave of court, reduced his claim to judgment in a state court of California, the only notice to D. being by publication, and D. never appearing. In 1875 D. petitioned for his discharge. W. opposed it. D. moved to dismiss the objection on the ground that the claim of W. had been absorbed in a judgment obtained after the commencement of the proceedings in bankruptcy, which would remain in force. The court sustained the motion, cancelled the proof of the debt and dismissed the specification of opposition. W. then filed a bill in equity in the Circuit Court of the United States for the Southern District of New York to enforce an estoppel, and to enjoin D. from asserting in defence of any suit which might be brought upon the judgment that the debt upon which it was obtained was not merged in it, and from denying its validity as a debt against D. unaffected by the discharge. *Held*,

(1) That the judgment was undoubtedly void for want of jurisdiction;

Statement of the Case.

(2) That nevertheless D. was estopped in equity from claiming that it was void ;
(3) That in view of the uncertainty which appeared to exist in New York as to whether a complaint in an action at law would or would not be demurrable, it must be held that the remedy at law was not so plain or clear as to oust a court of equity of jurisdiction ;
(4) That the decree below restraining D. from asserting that the judgment was invalid should be affirmed.

THIS was a bill in equity, filed by Angelica Wakelee, a citizen of the State of California, against Davis, a citizen of New York, to enforce an estoppel, and to enjoin the defendant from asserting, in defence of any suit which may be brought upon a certain judgment recovered by Henry P. Wakelee against Davis, in one of the state courts of California, that the debts upon which such judgment was obtained were not merged in such judgment, and from denying the validity of the judgment, as a debt against Davis, unaffected by his discharge in bankruptcy.

The bill averred, in substance, that in August and September, 1869, Davis executed six promissory notes, amounting to about $15,725, to the order of Henry P. Wakelee, and delivered them to him, and that they subsequently became the property of the plaintiff; that on or about September 30, 1869, Davis was adjudged a bankrupt upon his own petition, by the District Court for the District of California, and the notes in question were duly proved against his estate; that on July 8, 1873, the bankruptcy court granted the said Henry P. Wakelee leave to bring an action upon these notes, and that such action was begun by publication of a summons, under the laws of the State, and without personal service upon Davis; that on November 18, 1873, Davis not appearing, and no service having been made upon him, judgment was entered against him in the sum of $22,760.26.

The bill further alleged that on December 23, 1875, Davis filed in the bankruptcy court a petition for his discharge, and that Wakelee thereupon filed specifications of opposition, which Davis moved to dismiss, upon the ground that Wakelee, subsequent to the commencement of the proceedings in

bankruptcy, had, by leave of the court, brought suit upon such notes, obtained judgment thereon, "and that said judgment still stood of record in said fifteenth District Court, and was in full force." That such motion came on for argument, and it was there claimed by counsel duly authorized to represent Davis, that, by reason of the above facts, the original debt of Davis to Wakelee, which had been proved up in the bankruptcy proceeding, had become merged in the judgment obtained November 18, 1873, in the state court of California, and thereby became a new debt, created since the adjudication of Davis as a bankrupt. That such judgment was subsisting, valid, and enforceable, and would not be barred, discharged, or in anywise affected by the discharge of the defendant in bankruptcy. That by reason thereof, Wakelee had no standing, was not interested in the bankruptcy proceedings, and was not, therefore, competent to oppose the discharge of Davis. That upon such motion an order was made by the District Court in bankruptcy that Wakelee's proof of debt be cancelled, and his specifications of opposition to the discharge be dismissed and set aside. That Wakelee relied upon the claims and admissions of Davis and of his counsel, and accepted as correct and binding the order of the District Court dismissing his opposition, and did not appeal therefrom. That the order was accepted by Davis, who subsequently obtained his discharge.

That the judgment was subsequently assigned to Angelica Wakelee, the plaintiff, and in equity was of full and binding force and validity by reason of the facts above stated; but that in sundry actions instituted upon such judgment between Davis and the then owner of the judgment, Davis claimed and set up that the judgment was void, because of the lack of jurisdiction of the court wherein it was entered, for the reason that he was not personally served with process, and did not appear in the action, and also pleaded his discharge in bankruptcy as a bar to a recovery upon such judgment. That plaintiff is about to commence an action at law upon such judgment against Davis in the State of New York, wherein defendant now resides; and that she is informed that, under

the law of the State of New York, the facts herein set forth cannot be pleaded in the plaintiff's complaint in aid of her cause of action, but that such action must be brought upon such judgment alone, and that it is necessary to allege in the complaint either the facts showing the jurisdiction of the court, or that the judgment was *duly* entered, which cannot be truthfully done.

Wherefore plaintiff prayed for the assistance of a court of equity to adjudge Davis to be estopped by his conduct, and that he be enjoined from asserting that the debts proved up by Wakelee against him were not merged in the judgment, or from asserting the invalidity of the judgment, or that the same does not constitute a new debt unaffected by Davis' final discharge in bankruptcy.

A demurrer was filed to this amended bill, which was overruled, 38 Fed. Rep. 878, and defendant answered admitting, denying, or ignoring the several allegations of the bill, but setting up no new matter.

Upon a final hearing upon pleadings and proofs the plaintiff was awarded a decree for an injunction restraining the defendant from asserting that the judgment of November 18, 1873, was invalid, and did not still stand of record. 44 Fed. Rep. 532. From this decree the defendant appealed to this court. A motion to dismiss the appeal was made and submitted. *Mr. Anson Maltby* for the motion to dismiss. *Mr. Henry A. Root*, *Mr. Joseph H. Choate*, *and Mr. Thaddeus D. Kenneson* opposing.

Mr. Walter S. Logan, (with whom was *Mr. Charles M. Demond* on the brief,) for appellant, on the merits.

Mr. Anson Maltby for appellee, on the merits.

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

Motion was made to dismiss the appeal in this case, upon the ground (1) that the appearance of Mr. Henry A. Root, as counsel for the appellant herein, which was entered at the time the case was docketed, was unauthorized by him, and

made without his knowledge; and (2) that the appeal bond is defective in failing to state the term at which the decree of the Circuit Court was rendered.

1. So far as the first ground is concerned, it appears that Mr. Root, then residing in the city of New York, was solicitor for the defendant in the court below; that he had taken no steps to sever his connection with the case, by substituting other counsel; and that his appearance in this court was entered at the time the case was docketed, by other counsel, in good faith, and by virtue of a supposed authority from him. Under these circumstances, and, inasmuch as other counsel have appeared and taken charge of the case, the appellant should not lose his right to a review of the case by this court through a mistake which not only appears to have been purely accidental, but one which could not possibly have prejudiced the appellee. It was held by this court in the case of *United States* v. *Curry*, 6 How. 106, 111, and *Tripp* v. *Santa Rosa Street Railroad*, 144 U. S. 126, that service of a citation on appeal upon the solicitor in the court below was good, upon the ground that no attorney or solicitor can withdraw his name after he has once entered it without the leave of the court; and while his name continues on the record the adverse party has the right to treat him as the authorized attorney or solicitor, and service of notice upon him is as valid as upon the party himself. That even after the case is finally decided the court will not permit an attorney who has appeared at the trial to withdraw his name, and thus to embarrass and impede the administration of justice. While it does not follow that the attorney or solicitor in the court below is presumed to continue as such, after the docketing of the case in this court, the fact that Mr. Root had charge of the case in the Circuit Court might have induced the counsel, who entered his appearance in this court, to believe that it was authorized by him. As the petition was signed and sworn to by the appellant in person, there can be no claim that the appeal was taken without authority.

2. The second ground is that the appeal bond is defective, in failing to mention the term at which the decree was ren-

dered. This ground is also insufficient. To a person reading the bond, there could be no mistaking the identity of the decree appealed from. The bond is properly entitled in the cause, the name of the court is correctly given, and there is nothing to indicate that a decree had been rendered in any other cause between the same parties in that court. Of a similar mistake it was said by the Chief Justice in *New Orleans Insurance Co.* v. *Albro Co.*, 112 U. S. 506, 507: "The better practice undoubtedly is to specify the term in describing the judgment, but the omission of such a means of identification is not necessarily fatal, and certainly, before dismissing a case on that account, opportunity should be given to furnish new security."

3. The facts of this case are not complicated, nor its merits difficult to understand. Henry P. Wakelee held six promissory notes, executed by Davis, in August and September, 1869. On September 30, 1869, Davis was adjudicated a bankrupt upon his own petition, in the District Court of California, and in July, 1873, Wakelee applied for and was granted leave to reduce his claim to judgment in the state court. On July 19, 1873, Wakelee brought suit in the District Court of the Fifteenth Judicial District of California, and obtained a judgment in the following November, upon a service by publication only, in the sum of $22,760.26 in gold. As Davis, who then lived in New York, was never served with process, and never appeared in the action, such judgment was undoubtedly void. *Pennoyer* v. *Neff*, 95 U. S. 714.

Subsequently, and in December, 1875, Davis filed his petition for discharge, and Wakelee filed specifications of opposition thereto, which Davis moved to dismiss upon the ground that Wakelee had reduced his claim to judgment, since the commencement of the bankruptcy proceedings; that such judgment was in full force, and (argumentatively) would be unaffected by the discharge. The court took this view, cancelled the proofs of debt, and dismissed the specifications of opposition to his discharge. Wakelee did not appeal. The question before us is, whether Davis is now estopped to claim that the judgment is void for want of jurisdiction.

Defendant's principal contention is that a court of equity has no jurisdiction of this case, not only because a bill will not lie to enjoin a person from setting up a defence in an action which may never be brought, but that the plaintiff may avail herself of the alleged estoppel *in pais* in any action at law she may choose to bring upon the California judgment. Bills in equity to enjoin actions at law are not infrequently brought by defendants in such actions to enable them to avail themselves of defences which would not be valid at law. Examples of such bills are found in the case of *Drexel* v. *Berney*, 122 U. S. 241, wherein a bill was sustained by a defendant in an action at law, to enjoin the plaintiff in such action from setting up certain facts, of which it was claimed she was equitably estopped to avail herself in such action; and in the recent case of *Wehrman* v. *Conklin*, 155 U. S. 314, decided at the present term, in which a bill was sustained by a defendant in ejectment, to enjoin the plaintiff from availing himself of a deed, against the use of which he was held to be equitably estopped. Analogous cases are those in which bills have been sustained to enable a defendant to make use of an equitable set-off. *Rolling Mill Co.* v. *Ore and Steel Co.*, 152 U. S. 596; *Greene* v. *Darling*, 5 Mason, 201, 209; *Howe* v. *Sheppard*, 2 Sumner, 409; *Duncan* v. *Lyon*, 3 Johns. Ch. 351; *Dale* v. *Cooke*, 4 Johns. Ch. 11.

While our attention has not been called to any case wherein a bill has been sustained in favor of a *plaintiff* in a proposed action at law, to enjoin the defendant from setting up a threatened defence, upon the ground that he is equitably estopped from so doing, we know of no good reason why he should not be permitted to do so, unless his remedy at law be plain, adequate, and complete. And therein lies the stress of defendant's argument in this case.

We are not impressed with the strength of his position in this connection, that this is a bill to declare future rights, within the principle of *Cross* v. *De Valle*, 1 Wall. 1, wherein the Circuit Court was held not to have erred in dismissing a cross-bill, in which it was called upon to declare the fate of certain contingent remainders. The cross-bill was held to have been

properly dismissed, upon the ground that the court had no power to decree *in thesi*, as to the future rights of parties not before the court, or *in esse*. The bill under consideration, however, does not involve questions of future rights, but of the present right of a party to set up a defence in an action, which may hereafter be brought against him.

Plaintiff's theory in this connection is thus stated in her bill, that "under the law of the State of New York, where said action is to be brought, in an action at law to recover the amount due upon said judgment, the facts subsequent to such judgment, as hereinbefore set forth, and constituting the estoppels as herein claimed and insisted upon, may not be pleaded in the plaintiff's complaint as or in aid of a cause of action, but that such action must be brought upon such judgment alone, and that by the law of the said State of New York it is necessary in an action at law upon such judgment to allege in the complaint either the facts showing the jurisdiction of the court in which the judgment was entered, or that the judgment was *duly* entered, and that unless this be done the complaint would be dismissed on demurrer; that your oratrix is unable truthfully to allege in such complaint such jurisdictional facts or that such judgment was duly entered, and that your oratrix is thus remediless in an action at law," etc. In support of this contention we are cited to section 532 of the New York Code, which reads as follows: "In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction." Appellant argues with great insistence that this refers only to courts or officers "of special jurisdiction;" and this appears to be the implication from the language and the punctuation, although this provision was taken from section 138 of the Code of Civil Procedure of 1847, which reads as follows: "In pleading a judgment, or other determination of a court, or officer of special jurisdiction," indicating that

the words "special jurisdiction" referred only to the word "officer."

The section, however, was probably intended to change the common law in some particular, and as in declaring upon judgments of courts of general jurisdiction, it was never necessary to state the facts showing jurisdiction, while the contrary was true with regard to courts of special or limited jurisdiction, (*Turner* v. *Rody*, 3 N. Y. 193,) the provision was doubtless intended to apply to the latter class. But even supposing it were sufficient to allege simply the recovery of a judgment, the judgment record when put in evidence, would show that personal service had never been obtained upon the defendant, and the plaintiff would inevitably be non-suited. Whether the plaintiff could go still farther, and set up an invalid judgment and a subsequent estoppel *in pais*, appears to be under the authorities in New York and other States, a matter of considerable doubt. *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; *Gaylord* v. *Van Loan*, 15 Wend. 308; *Hostler* v. *Hays*, 3 California, 302; *Bank of Wilmington* v. *Wollaston*, 3 Harr. (Del.) 90; *Caldwell* v. *Auger*, 4 Minnesota, 217.

So, too, whether the section above quoted applies to judgments rendered in other States seems to be doubtful, the New York authorities being divided upon the question.

In the uncertainty which appears to exist in that State, as to whether a complaint setting forth all the facts would or would not be demurrable, we think it may be fairly said that the remedy at law is not so plain or clear as to oust a court of equity of jurisdiction. It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. *Boyce* v. *Grundy*, 3 Pet. 210; *Watson* v. *Sutherland*, 5 Wall. 74, 79; *Rathbone* v. *Warren*, 10 Johns. 587; *King* v. *Baldwin*, 17 Johns. 384; *American Insurance Co.* v. *Fisk*, 1 Paige Ch. 90; *Teague* v. *Russell*, 2 Stew. (Ala.) 450; *Southampton Dock Co.* v. *Southampton Harbour Board*, L. R. 11 Eq. 254; *Weymouth* v. *Boyer*, 1 Ves. Jr. 416. Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.

4. If jurisdiction be conceded, there can be no doubt that the court made a proper disposition of the case upon the facts. Davis procured the dismissal of Wakelee's specifications of opposition to his discharge, upon the ground that he had a valid judgment against him which was still in full force, and under the law would be unaffected by his discharge. The court was of the same opinion, and dismissed the specifications. Wakelee acquiesced in this and did not appeal. It is true that it had theretofore been held in California that a personal judgment obtained by service by publication was valid. *Hahn* v. *Kelly*, 34 California, 391. But the case of *Pennoyer* v. *Neff*, 95 U. S. 714, holding such judgments to be invalid, was not decided until the following year. This case was afterwards followed in California in *Belcher* v. *Chambers*, 53 California, 635. The weight of authority appears also to have been that a judgment, obtained after the commencement of bankruptcy proceedings, merged the debt upon which it was obtained, and was unaffected by a subsequent discharge; though this court subsequently held in *Boynton* v. *Ball*, 121 U. S 457, that a discharge in bankruptcy might be set up to stay the execution of a judgment recovered against a bankrupt after the commencement of proceedings in bankruptcy and before the discharge. But even if Davis had been mistaken as to his legal rights with respect to this judgment and its subsequent discharge, his assertion that it was still of record and in full force, is none the less binding upon him, in view of Wakelee's acquiescence in the ruling of the court sustaining this contention.

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Thus in *Philadelphia &c. Railroad* v. *Howard*, 13 How. 307, 332, 333, 336, 337, where a corporation sought to defend against an instrument by showing that the corporate seal was affixed thereto without authority, and that it was not, sealed or

unsealed, intended to be the deed of the corporation, evidence was held to be admissible to show that, in a former suit, the corporation had treated and relied upon the instrument as one bearing the corporate seal. In delivering the opinion, the court observes: "The plaintiff was endeavoring to prove that the paper declared on bore the corporate seal of the Wilmington and Susquehanna Railroad Co. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. . . . The defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, a fraud in law, if he does not know it to be true. . . . We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on a former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it."

So in *Railroad Company* v. *McCarthy*, 96 U. S. 258, 267, it appeared that defendant proved on the trial in the court below that it was impossible to forward certain cattle on Sunday, for want of cars, and it was held to be fairly presumed that no other reason was given for the refusal at that time; and that the railway company could not, in this court, set up the illegality of such a shipment on the Sabbath, under the Sunday Law of West Virginia. In delivering the opinion of the court Mr. Justice Swayne says: "Where a party gives a reason for his conduct, and decision touching anything involved in a controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend

his hold." To the same effect are *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Everett* v. *Saltus*, 15 Wend. 474; *Holbrook* v. *Wight*, 24 Wend. 169; *Winter* v. *Coit*, 7 N. Y. 288; *Mills* v. *Hoffman*, 92 N. Y. 181; *Wood* v. *Seely*, 32 N. Y. 105; *Ellis* v. *White*, 61 Iowa, 243; *Test* v. *Larsh*, 76 Indiana, 452.

The case of *Abbot* v. *Wilbur*, 22 La. Ann. 368, is directly in point. This was a suit by Abbot for the purpose of annulling a judgment obtained by Wilbur, upon the ground that such judgment had been rendered by default, and without personal service of citation upon the defendant. Wilbur pleaded in answer to this, and proved that, in a suit by Abbot against one Borge, the latter had set up a reconventional demand or set-off to a large amount, in answer to which Abbot set up that the reconventional demand had already been reduced to judgment against him in the suit which he now sought to annul for the want of personal service. It was held that, Abbot having defeated a large demand against him by a plea that there was pending against him a suit for the same demand, he was estopped to say that the assertion was false, and that he had never been cited in such suit.

It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it. He obtained an order which he could only have obtained upon the theory that the judgment was valid — his statement that it was in force was equivalent to a waiver of service, a consent that the judgment should be treated as binding for the purposes of the motion, and he is now estopped to take a different position.

There is another circumstance, however, which shows that Davis did not act under a *bona fide* mistake of law, and that he never intended to recognize the judgment as valid any

longer than it was for his interest to do so; since, immediately after his discharge was obtained, he made application to the state court in which the judgment had been rendered, for an order to vacate it upon the ground that the judgment was void by reason of the service of summons by publication, as well as that it had been barred by the discharge in bankruptcy. The court granted his motion to vacate his judgment upon the latter ground, though this order was reversed on appeal to the Supreme Court.

Our conclusion is that, as matter of law, appellant is now estopped to claim that the judgment of the California court was void for want of jurisdiction.

The decree of the court below is, therefore,

Affirmed.

CITIZENS' SAVING AND LOAN ASSOCIATION *v.* PERRY COUNTY.

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

No. 56. Argued and submitted March 29, 1894. — Decided March 4, 1895.

July 3, 1869, the qualified voters of Perry County, Illinois, voted to subscribe to the capital stock of the Belleville & Southern Illinois Railroad and to issue its bonds in payment thereof, conditioned that "no bonds should be issued or stock subscribed until the railroad company should locate their machine shops at Duquoin." In December, 1870, the county court directed the bonds to be issued, and they were issued duly executed, and were delivered to the company and by it put into circulation; but the shops were never located at Duquoin. *Held*, In view of the legislation of Illinois reviewed in the opinion, and of the provisions in the constitution of 1870, which came into force after the vote to issue the bonds, but before their issue, that the county court by its order to issue the bonds, and the county officers by issuing them, violated their duty as prescribed by the statutes; and as the bonds contained no recital precluding inquiry as to the performance of the condition upon which the people voted in favor of their issue, it was open to the county to show

that it had not been performed, which being shown, the bonds became subject to the provisions of the constitution of 1870, and were invalid. The bonds issued by the same county to the Chester & Tamaroa Coal & Railroad Company were issued in obedience to a vote of the people taken at an election ordered and held with reference to the act of April 16, 1869, referred to in the opinion of this court, which act required that a majority of the legal voters living in the county should be in favor of the subscription; and as the county court, in ordering the issue of the bonds, certified on its record that all the conditions prescribed had been complied with, and as the fact that a majority of the voters living in the county at the time of the election did not vote for the issue of the bonds is not determinable by any public record, *Held*, that it would be rank injustice to permit it to be set up after the lapse of so many years, and that the issue was valid and the bonds are binding in the county.

THE case is stated in the opinion.

Mr. George A. Sanders for plaintiff in error. *Mr. William B. Sanders* filed a brief for same.

Mr. Thomas J. Layman, for defendant in error, submitted on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought to recover the amount of certain coupons taken from bonds issued in the name of Perry County, Illinois, and made payable, some of them, to the Belleville and Southern Illinois Railroad Company or bearer; others, to the Chester and Tamaroa Coal and Railroad Company or bearer.

The bonds, in each instance, were issued in payment of a subscription in the name of that county to the capital stock of the corporations to which they were respectively made payable.

The parties, by written stipulation, waived a jury and the case was tried by the court.

It was found by the court that an election was held in the county of Perry on the 3d day of July, 1869, upon the

question of subscription to the capital stock of the Belleville and Southern Illinois Railroad Company, to be paid by the bonds of that county; that the notices for the election contained a clause providing, among other things, that "no bonds should be issued or stock subscribed *until the railroad company should locate their machine shops at Duquoin*," and that the shops, costing about $150,000, were located at East St. Louis and not at Duquoin.

In respect of the bonds issued to the Chester and Tamaroa Railroad Company it was found that the proposition for a subscription by the county to the capital stock of that corporation, upon which the people voted February 19, 1870, "*did not receive a majority of the qualified voters of the county*, 986 votes only being cast in favor of it, while at the last preceding general election held in November, 1869, there were 2024 votes thrown;" in other words, that the proposition failed, by 27 votes, to receive a majority of the qualified voters of the county.

The conclusion of law as to each class of bonds was that, by reason of the facts so found, they were void for want of power to issue them.

First. The bonds issued to the Belleville and Southern Railroad Company.

The Belleville and Southern Illinois Railroad Company was incorporated by an act of the general assembly of Illinois, approved February 14, 1857, with authority to locate, construct, and operate a railroad from the city of Belleville in St. Clair County southwardly by way of the village of Pinckneyville to some eligible point on the Illinois Central Railroad in Perry County. By the ninth section of its charter the directors of the company were "authorized and empowered to take and receive subscriptions to their said capital stock on such terms and in such amounts as they may deem for the interest of said company, and as they may prescribe by their by-laws and regulations, from any other railroad company or corporation, and from any county, city, town, or village; and any such subscriptions shall be valid and binding upon any railroad company, corporation, county,

city, town, or village making the same: *Provided*, Said subscriptions shall be made in every respect subject to the provisions and restrictions of an act supplemental to an act entitled 'An act to provide for a general system of railroad incorporations,' approved November 6 1849." It was provided that the road should be completed within eight years from the passage of the act.

The act of 1849, here referred to, gave cities and counties authority to purchase or subscribe for shares of the capital stock of any railroad company then organized or incorporated, or which might be thereafter organized or incorporated, in any sum not exceeding one hundred thousand dollars for each city or county — the stock so subscribed for or purchased to be under the control of the county court of the county or the common council of the city making the subscription or purchase in all respects as stock owned by individuals. § 1. Authority was given to pay for such stock by borrowing money or issuing bonds. § 2. Railroad companies then or thereafter organized or incorporated, under the laws of the State, were authorized to receive at par the bonds of any county or city becoming subscribers to their capital stock. 1 Gross' Ill. Stat. 1869, p. 552.

By that act it was further provided:

"§ 4. No subscription shall be made, or purchase or bond issued by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers) shall vote for the same; . . . and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall be then made by said judges or common council. In case any election had under this act is held upon a day of general election, then the number of votes thrown at such general

election for county officers shall be the standard of the number of qualified voters as aforesaid. . . ." 1 Gross' Ill. Stat. 1869, pp. 552, 553.

These bonds were dated January 1, 1871, and made payable twenty years after date to the railroad company or bearer, with interest at seven per cent per annum. Each bond, signed by the county judge and the county clerk, and attested by the county seal, contained the following recitals: "This bond is one of a series of one hundred of like tenor and date, issued under the authority, and in accordance with the requirements of an act of the legislature of the State of Illinois, entitled 'An act to incorporate the Belleville and Southern Illinois Railroad,' approved February 14, 1857, and is redeemable at the pleasure of said county at any time after the first day of January, A.D. 1876." Each coupon, signed by the same officers, was in this form: "The county of Perry, State of Illinois, will pay to the bearer seventy dollars on the first Monday of January, 1889, being the interest on bond No. issued to the Belleville and Southern Illinois Railroad Company."

On the day the bonds were directed by the county court to be issued, namely, December 5, 1870, the following communication and certificate under the county seal, and verified by the oath of the county judge, was sent to the Auditor of Public Accounts of Illinois:

"SIR: I herewith transmit to you for registration in your office under the provisions of the act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns, in force April 16, 1869,' the following bonds, being one hundred in number, dated January 1, 1871, amounting to ($100,000) one hundred thousand dollars, payable on the first day of January, 1891, and bearing interest at the rate of seven per centum per annum — payable annually. These bonds are issued by the county court of the county of Perry and State of Illinois to the Belleville and Southern Illinois Railroad Company, under and by authority of the provisions of an act entitled 'An act to incorporate the Belleville and Southern Illinois Railroad,' approved February 14, 1857; and I, as judge of the county court of said county, do hereby

certify that all the preliminary conditions in the act in force April 16, 1869, required to be done to authorize the registration of these bonds and entitle them to the benefits of the said act last referred to have been fully complied with, to the best of my knowledge and belief."

Upon each bond was endorsed a certificate by the Auditor of Public Accounts of the State of Illinois, under his seal of office, "that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869."

Although these bonds did not upon their face expressly refer to the railroad act of 1849, the recital in them that they were issued under the authority of and in accordance with the act of 1857 incorporating the railroad company imports a compliance with the provisions of the former act; for the act of 1857 declares that the subscriptions authorized by it should be made in every respect subject to the provisions and restrictions of the act of 1849. If, therefore, the case depended alone on the acts of 1857 and 1849, in connection with the recitals in the bonds, the conclusion would be that the county of Perry rightfully subscribed to the stock of the Belleville and Southern Illinois Railroad Company to the extent of one hundred thousand dollars (for which amount the subscription was made and the bonds issued), and that the county was estopped, by the representations made in the recitals of the bonds, as between it and *bona fide* holders thereof, from relying upon any irregularities in the exercise of its power to subscribe that did not involve the substance of the power itself.

But we are not at liberty to look alone to the acts of 1857 and 1849, and the recitals in the bonds. Although the election relating to the subscription of the stock was held July 3, 1869, the county court did not make its order for the issue of bonds until after the section of the constitution of Illinois of 1870, forbidding municipal subscriptions to the stock of railroad corporations, went into operation, which, as held in *Schall* v. *Bowman*, 62 Illinois, 321, *Louisville* v. *Savings*

Bank, 104 U. S. 469, and *Concord* v. *Robinson*, 121 U. S. 165, 169, was on the second day of July 1870. That provision was in these words: "No county, city, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions *where the same have been authorized, under existing laws* by a vote of the people of such municipalities prior to such adoption." 1 Charter and Constitutions, 491. Touching this constitutional provision, we have heretofore held that, since July 2, 1870, "no municipal corporation of Illinois has possessed authority to subscribe to the stock of a railroad or private corporation, or to make donations to or loan its credit to them, except that a subscription or donation, lawfully voted by the people before the adoption of that section, could be completed upon the terms and conditions approved by the electors. There is no saving of the right of such corporations to loan their credit to railroad corporations, where such loan of credit was not embraced in a vote previously taken under existing laws, and which was favorable to a subscription of stock or a donation." "The constitution took away all power to impose upon the township any greater burdens than the people had by vote lawfully assumed under existing statutes." "They [purchasers of the township bonds] were bound to know that the power of the township, after July 2, 1870, was restricted by the constitution to a completion of such subscription or donation as had been lawfully voted before that date; if not upon the precise terms and conditions attached thereto by the vote of the people, upon such terms as did not increase the burden." *Concord* v. *Robinson*, 121 U. S. 165, 169.

At the time — May 26, 1869 — the county court ordered an election to ascertain the popular will as to the proposed subscription to be paid by bonds of the county, the act of April 16, 1869, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and

towns," was in full force. That act was referred to in the endorsement made on each bond by the Auditor of State, as well as in the official communication of the county judge of Perry County transmitting them for registration. It applied to every county, township, incorporated city or town that had created a debt in aid of the construction of railways that were to be completed within ten years after its passage, as well as those which should create a debt of the character named under any law of the State. It contained the following, among other provisions:

"§ 7. And it shall not be lawful to register any bonds under the provisions of this act, or to receive any of the benefits or advantages to be derived from this act, until after the railroad in aid of the construction of which the debt was incurred shall have been completed near to or in such county, township, city, or town, and cars shall have run thereon; and none of the benefits, advantages, or provisions of this act shall apply to any debt unless the subscription or donation creating such debt was first submitted to an election of the legal voters of said county, township, city, or town, under the provisions of the laws of this State, and a majority of the legal voters living in said county, township, city, or town were in favor of such aid, subscription, or donation; and any county, township, city, or town shall have the *right*, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which bonds, subscriptions, or donations shall be made, and such bonds, subscriptions, or donations *shall not be valid and binding until such conditions precedent shall have been complied with.* And the presiding judge of the county court, or the supervisor of the township, or chief executive officer of the city or town, that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into, or through such county, township, city, or town as may have been agreed upon, and the cars running thereon, shall certify under oath that all the preliminary conditions in this act required to be done, to authorize the registration of such bonds and to entitle them to the benefits of this act, have been complied

with, and shall transmit the same to the state auditor, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company and under what law issued; and thereupon the said bonds shall be subject to registration by the state auditor, as hereinbefore provided." Pub. Laws Ill. 1869, pp. 317, 319.

Now it is found as a fact that the people voted for the subscription on the condition, specified in the election notices, that no subscription should be made nor bonds issued until the company's machine shops were located at Duquoin. The act of 1869 not only authorized the electors to prescribe such a condition, but declared that no bonds, subscriptions, or donations, that were voted on prescribed conditions, shall have been "valid and binding until such conditions precedent should have been complied with." That the location of the company's machine shops at Duquoin was a condition precedent to the making of a subscription or the issuing of bonds in payment thereof is placed beyond question not only by the special finding of facts but by the orders of the county court which were made part of the record for the purpose of presenting the exceptions taken to those orders as evidence in the case.

The order of the county court, made May 24, 1869, submitting to popular vote, at an election to be held July 3, 1869, the question of subscription, provided:

"And be it further ordered, that no bonds be issued or stock be subscribed by said court to the Belleville and Southern Illinois Railroad Company, unless twelve hundred and thirty legal voters of said county shall have voted in favor of the same at said election; nor until said company shall have built said road, and put the same in operation from Belleville to Duquoin, through the town of Pinckneyville, with depot and depot buildings at said town, nor unless said road shall be in operation from Belleville to Duquoin on or before the first day of January, A.D. 1871, *and shall locate their machine shops at said Duquoin.* And be it further ordered that said bonds shall be in the sums of not less than one hundred nor more than one thousand dollars, payable at any time within twenty years from their date, at the option of the said county

court, bearing interest at the rate of 7 per cent per annum, and issued under the provisions of the act of the legislature of Illinois of November 6, 1849, *and act of April* 16, A.D. 1869, entitled 'An act to fund and provide for the paying of the railroad debts of counties, townships, cities, and towns.'"

Looking then at the act of April 16, 1869, and the constitution of Illinois, there is no escape from the conclusion that the condition precedent, imposed by popular vote, that no bonds should be issued until or unless the company located its machine shops at Duquoin, was in full force when the election was ordered and held, as well as when the constitutional limitation upon municipal subscriptions was prescribed; and that both the county court by its order of December 5, 1870, directing the issue and delivery of the bonds, and the county officers, who executed them, violated their duty as prescribed by the statute.

But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a *bona fide* purchaser for value. This argument would have force, if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against *bona fide* holders for value. But this court, in *Buchanan* v. *Litchfield*, 102 U. S. 278, 292, upon full consideration, held that the *mere* fact that the bonds *were* issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued.

In the bonds here in question there are no recitals precluding inquiry as to the performance of the conditions upon which the people, after the passage of the act of April 16, 1869, voted in favor of a subscription to be paid by bonds of the county. Those recitals only imply that the bonds were issued under the authority and in accordance with the acts of

1857 and 1849. Those who took them must be held to have known that the constitution of 1870 withdrew from municipal corporations authority to subscribe to the stock of, or to lend their credit to, railroad corporations, except for the purpose of *completing* subscriptions authorized under previous laws by a vote of the people. And they must also be held to have known that by the act of 1869 no subscription voted on conditions precedent could be rightfully made nor bonds rightfully issued until such conditions were performed. If, notwithstanding the express declaration in the act of 1869 as to the invalidity of bonds issued without the performance of conditions precedent imposed by popular vote, the county court prior to the constitution of 1870, without the sanction of a popular vote, could have waived the condition as to the location of the machine shops at Duquoin, there is no evidence on its records or otherwise that it did so. And it is clear that they could not, after the 2d of July, 1870, materially change the conditions imposed by the electors. It is equally clear that the recitals by the county officers in the bonds themselves do not import any such change nor a compliance with the provisions of the act of 1869 in respect to the performance of the conditions voted.

The plaintiff in error is mistaken when it insists that its position, as to the conclusive effect of the recitals in the bonds, is sustained by the decision in *Insurance Co.* v. *Bruce*, 105 U. S. 328. The bonds there in suit recited that they were issued by virtue of the charter, approved April 15, 1869, of the particular company to which they were delivered, *as well as by virtue of the act of April* 16, 1869. The court held that the latter act did not make it obligatory to impose conditions upon the issuing of bonds, but only gave the *right* to prescribe conditions; that the recitals fairly imported that nothing remained to be done in order to make the bonds binding obligations upon the town in the hands of *bona fide* purchasers. "Under these circumstances," the court said, "the town, by every principle of justice, is estopped, as against a *bona fide* holder, to plead conditions, the existence of which were withheld from the public either to facilitate the negotia-

tion of the bonds in the markets of the country, or because it had full confidence that the railroad company would meet the prescribed conditions. It should not now be heard to make a defence inconsistent with the recitals upon its bonds, or upon the ground that the conditions imposed, of which the purchasers had no notice, have not been performed."

The fact that the bonds in suit in *Insurance Co.* v. *Bruce* recited that they were issued in virtue of the act of April 16, 1869 — implying thereby that they were issued conformably, in all respects, to the provisions of that act — was alluded to by this court in *German Bank* v. *Franklin County*, 128 U. S. 526, 540, 542, where one of the questions was whether a county in Illinois, issuing bonds which, upon their face, made no reference whatever to the act of April 16, 1869, was estopped to show that they were issued in disregard of certain conditions precedent imposed by popular vote. The court, referring to the grounds of the decision in *Insurance Co.* v. *Bruce*, said: "The view taken was that, as the town of Bruce had power, under the seventh section of the act of April 16, 1869, to make an unconditional subscription, and to issue and deliver its bonds in advance of the construction of the road, and *as the bonds recited that they were issued by virtue of the act of April* 16, 1869, it was too late to claim that they had been issued in violation of the special conditions. In the case now before us, as before said, there is no reference, in the bonds, to the act of April 16, 1869, and no statement in the bonds that they were issued by virtue of that act." And what was said in *German Bank* v. *Franklin County* in relation to the registration of the bonds is applicable to the present case: "The registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which the stock was voted or subscribed. Neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote on which alone the bonds were to be issued. The recital in the bonds does not contain any reference to the act of April 16, 1869, or certify any compliance with the provisions of that act; and the certificate of registry

merely certifies that the bond has been registered in the auditor's office pursuant to the provisions of the act of April 16, 1869. The statute does not require that the auditor shall determine or certify that the bonds have been regularly or legally issued." In *Cairo* v. *Zane*, 149 U. S. 122, 141, 142, this court, while holding, upon the authority of *German Bank* v. *Franklin County*, that the certificate of registry was not conclusive that the bonds were issued in full compliance with the terms and conditions of a subscription of stock, adjudged that the certificate of registry in the office of the state auditor could be relied upon as showing that what the city of Cairo did, in that case, amounted to a subscription of stock, which the statute gave it a right to make, rather than to a donation, which it could not legally make. It is to be observed, also, that the bonds there in suit recited that they were issued pursuant as well to an ordinance of the city council of Cairo as to a vote of the citizens of that city, and in accordance with the laws of the State. The recital that they were issued in accordance with the laws of the State brought that case within the rule announced in *Insurance Co.* v. *Bruce*, rather than within that announced in *German Bank* v. *Franklin County*.

We cannot assume that the location of the company's machine shops at Duquoin was deemed by the voters to be a matter of no consequence. It may well be that the election turned upon the question of the location of those shops in the county at a named place.

It results from what has been said, that, as the recitals in the bonds issued to the Belleville and Southern Illinois Railroad Company neither expressly nor by necessary implication imported a compliance with the condition precedent imposed by popular vote in reference to the location of the company's shops at Duquoin, it was open to the county to show that that condition was not performed when the bonds were issued by order of the county court, and had never been performed. That being shown, the case is not brought within the reservation or saving made by the state constitution in favor of subscriptions authorized by popular vote prior to July 2, 1870.

In this view the judgment, holding the bonds issued to the Belleville and Southern Illinois Railroad Company to be invalid, was right.

Second. The bonds issued to the Chester and Tamaroa Coal and Railroad Company.

The Chester and Tamaroa Coal and Railroad Company was incorporated by an act approved March 4, 1869, with authority to construct, complete, and operate a railroad from Chester in Randolph County, Illinois, easterly on the most eligible route by the way of Pinckneyville to Tamaroa in Perry County.

The history of the bonds issued to this company is fully disclosed in the orders of the county court of Perry County.

On the 18th day of January, 1870, that body, at a special term on that day begun, ordered an election to be held at the usual places of voting in the several precincts of the county of Perry, on the 19th day of February, A.D. 1870, by the judges of election appointed at the September term, 1869, of the court, to ascertain if the county court would subscribe one hundred thousand dollars to the capital stock of the Chester and Tamaroa Coal and Railroad Company. The order provided that no stock be subscribed "unless nine hundred and eighty-four (984) legal voters of said county shall have voted for the same at said election;" "that the subscription should be paid in county bonds in sums of not less than one hundred dollars nor more than one thousand dollars each, payable at any time within twenty years from date, at the option of the county court, bearing interest at the rate of seven per cent per annum," "said bonds to be registered and paid as provided in an act entitled an 'Act to fund and provide for paying railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; but no bonds shall be registered or paid except in the following manner and upon the following conditions, to wit: $50,000 of said bonds shall be issued to said railroad and coal company, when they shall have completed said road and cars for passengers and freight, shall have run thereon to Pinckneyville, in said Perry County, and depot and depot buildings shall have been established or built within the corporate limits of said town of Pinckneyville, provided the work on

said road shall commence at Tamaroa and depot and depot buildings shall have been established or built within the corporate limits of said town of Tamaroa; and be it further ordered that the residue, $50,000, shall be issued when said road shall be completed through the county, and thence to the terminus of said road, and cars shall have been run thereon, and all necessary depot and depot buildings have been established or built as above required and specified. The ballots in favor of subscribing the stock shall contain the words 'for subscription' and those against the subscription, 'against subscription.'"

At the regular term of the county court, held March 8, 1870, an order was made which referred to the previous one for an election, and proceeded: "And whereas, in pursuance of said order and published notices thereof, as required by law, said election was held in said county on the 19th day of February, A.D. 1870; and whereas it appears from the returns of said election on file in the county clerk's office of said county, and the certificate of the board of canvassers that a *majority of the legal voters of said county of Perry* (assuming the standard *required by law and the said order of the court, taking as a basis the number of votes cast at the last general election for county officers*) having voted in favor of subscribing said stock: Now, therefore, it is ordered by the court, in pursuance of said order of court and the election held thereunder, and the statutes in such case made and provided, that the county of Perry, in the State of Illinois, do subscribe one hundred thousand dollars to the capital stock of the Chester and Tamaroa Coal and Railroad Company, to be paid in bonds issued in accordance with said order of court under which said election was held, and to be registered and paid as provided by an act of the general assembly of the State of Illinois, in force February 16, 1869, entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns;' and it is further ordered by said court that the judges of this court subscribe said stock on the books of said company, and that the same be attested by the clerk of this court under the seal of this court."

On the 8th of June, 1870, the county court, in regular term, made an order showing the delivery to it on that day of a

certificate of stock issued by the Chester and Tamaroa Coal and Railroad Company, which certificate was ordered to be recorded and filed; that the county had subscribed and was entitled to the benefits of one thousand shares of $100 each, of the capital stock of the company, "to be paid in Perry County bonds, as provided by the terms of subscription made by the county court on the books of the company and the election held on the 19th day of February, 1870, authorizing said court to make said subscription, and transferable on conditions as provided in the by-laws."

At a special term of the county court, held November 10, 1871, the county court made an order reciting all previous orders, and stating that the company had completed their railroad from Tamaroa to Pinckneyville, had run cars for freight and passengers thereon, had built depot buildings in Tamaroa and Pinckneyville, and had complied with and fulfilled *all the conditions of the order of the court made at its January special term,* 1870, *to entitle it to have and receive from the county of Perry the first issue of said bonds.* That order concluded as follows:

"Now, therefore, be it ordered by the court that Charles E. R. Winthrop, judge of the county court, and J. Carroll Harriss, clerk of said court, sign and deliver to said company or their authorized agent or attorney fifty bonds of said county for the sum of one thousand dollars each; that the said bonds be of date of the first day of July, 1871, and draw interest from their date, payable semi-annually, at the American Exchange National Bank, in the city of New York, and that all coupons on said bonds maturing on and previous to the said first day of July, 1871, be cut off by the said Charles E. R. Winthrop, judge, and J. Carroll Harriss, clerk of said court, before delivering the same to said company, and that the said judge of the county court be authorized to certify *under oath that all the conditions of the order made on the 18th day of January,* 1870, *above recited, have been complied with by the said Chester and Tamaroa Coal and Railroad Company,* and that said bonds be registered and paid in pursuance of an act of the general assembly of the State of Illinois

entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns.'"

On the 15th of November, 1871, a certificate similar in form to the one issued December 5, 1870, in reference to the bonds to the Belleville and Southern Railroad Company, and verified by the oath of the county judge and under the county seal, was sent by that officer to the Auditor of Public Accounts of Illinois. And on the 6th day of December, 1871, a like certificate was made by the county judge in respect to fifty other bonds issued by the county to the Chester and Tamaroa Coal and Railroad Company.

The bonds issued to the last-named company were similar, in their general form, to those issued to the Belleville and Southern Illinois Railroad Company, each one being signed by the county judge and the county clerk, under the county seal, and containing the following recitals: "This bond is one of a series of bonds, issued by the county of Perry, in payment of one hundred thousand dollars of the capital stock of the Chester and Tamaroa Coal and Railroad Company, in pursuance of an election held by the legal voters of Perry County, Illinois, on the 19th day of February, 1870, and by virtue of the provisions of an act of the general assembly of the State of Illinois, entitled 'An act to provide for a general system of railroad incorporation,' approved November 6, 1849. And for the payment of said sum of money, and accruing interest thereon, and in the manner aforesaid, the faith of the county of Perry, State of Illinois, is hereby irrevocably pledged, as also its property, revenue, and resources." Each coupon signed by the county judge and county clerk was in this form: "The county of Perry will pay to bearer on the 1st day of July, 1888, at the American Exchange Bank, in the city of New York, thirty-five dollars, it being six months' interest on bond No. 52 for $1000."

Upon each bond was endorsed a certificate by the auditor of public accounts to the effect "that the within bond has been registered in this office this day pursuant to the provisions of an act entitled 'An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns, in force April 16, 1869."

Opinion of the Court.

We have seen that the only ground upon which the court below held these bonds to be not binding obligations of the county was that the proposition to subscribe $100,000 to the capital stock of the company received only 986 votes in its favor; whereas at the last general election in the county 2024 votes were cast. The court, we infer, had in mind the provision of the act of November 6, 1849, under the authority of which the bonds purport upon their face to have been issued.

If we looked alone to the act of 1849 as authority for issuing these bonds, there would be ground for holding that the provision of the constitution of 1870 relating to municipal subscriptions and bonds would be an insuperable obstacle in the way of any recovery on the coupons of bonds issued to this company. For the act of 1849 in express words forbade the making of subscriptions or the issuing of bonds except upon a vote of a majority of qualified voters, taking as a standard the vote cast at the next preceding general election for county officers. What number of votes would meet that requirement could be determined by reference to the official record of the election. All who took bonds issued under the act of 1849 were bound to take notice of what that record disclosed. The constitution intended that that record, being accessible to all, should speak for itself. The number of votes at the last preceding general election was not dependent upon any calculation or investigation or weighing of facts by officers charged with the duty of issuing bonds under that act. If, therefore, the case depended upon the act of 1849, the judgment of the court below would be sustained on the authority of *Northern Bank* v. *Porter Township*, 110 U. S. 608, 616, in which it was said: "The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation issuing bonds in aid of the construction of a railroad, was not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were

issued, not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it." In the same case it was said that, although, the power existing, a municipality may be estopped by recitals to prove irregularities in its exercise, and when the law prescribes conditions upon the exercise of the power granted and commits to the officers of such municipalities the determination of the question whether those conditions have been performed, the corporation will also be estopped by recitals importing such performance, nevertheless, "the question of legislative authority in a corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals."

But we are of opinion that the court below erred in holding, as in effect it did, that there could be no valid subscription to the stock of the Chester and Tamaroa Railroad Company except upon a vote of the majority of the qualified voters of the county, taking as the standard the number of votes cast at the last preceding general election for county officers. The plea of the county did not proceed distinctly on that ground. It only alleged that the bonds issued to this company were not authorized "by a majority vote of the electors of said county *as required by law*." The orders of the county court, under which the election of February 19, 1870, was held, show that the election was ordered and held *with reference to the act of April* 16, 1869, and that the purpose of the county was to take the benefits and advantages of that act — one of the provisions of which, as we have seen, was that its benefits, advantages, or provisions shall not apply to any debt created, unless the subscription or donation, by which it was created, was first submitted to the qualified voters of the municipality under the provisions of the laws of the State, and "a majority of the legal voters *living in said county*, township, city, or town were in favor of such aid, subscription, or donation." The order of the county court for the election provided that no subscription of stock should be made "unless nine hundred and eighty-four legal voters of

said county shall have voted for the same at said election." Two more than that number of votes were cast in favor of the subscription, and only ninety-one against it. There is no finding to the effect that nine hundred and eighty-four votes was *not* a majority of legal voters *living in the county* at the time of the election.

We have seen that the county court, at its special term in November, 1871, not only certified, upon its record, that *all* the conditions prescribed by its order at the January term, 1870, had been complied with by the railroad company, but authorized the county judge to make a similar certificate under oath. It even certified, upon its records, that the subscription had been voted for by a majority of the qualified voters, *taking as the standard the vote cast at the preceding general election for county officers.* The number of such voters who, at the time of election, *lived in the county* was a fact dehors any official record of votes, and was to be ascertained by the county court or county judge upon examination. It did not depend wholly upon an official record, speaking as of the date of the election. Under any reasonable interpretation of the act, the county court was invested with authority to determine whether the majority of voters living in the county voted in favor of the subscription proposed. If the purchaser had examined the orders of the county court, he would have ascertained that those orders several times expressly stated that all the conditions prescribed by the county and upon which the people voted had been fully complied with. It would be rank injustice to permit the county, after the lapse of so many years, to say that a majority of the voters *living in the county* at the time of election — a matter not determinable by any public record — did not vote for the subscription. What may be the fact upon this point it is, perhaps, impossible now to determine. Indeed, as we have said, the court below did not find that those who voted for the subscription were not a majority of all the voters living in the county at the time of the election. It only found that the subscription failed, by twenty-seven votes, to secure in its favor a majority of the qualified voters, taking as a standard the votes cast at

the next preceding general election for county officers. But, as has already been shown, that was not the true test.

This construction of the act of 1869 is in harmony with the decision of the Supreme Court of Illinois in *Town of Prairie &c.* v. *Lloyd*, 97 Illinois, 179, 197, 198, one of the questions in which case was whether certain municipal bonds were entitled to be registered under the act of 1869. Mr. Justice Mulkey, speaking for the court, said: "Before railroad aid bonds can be properly registered under the above act, it must appear that they were issued in pursuance of a vote of a majority of the voters living in the municipality issuing them. When once registered, the presumption is they were rightfully registered, and the burden of establishing the contrary rests upon the party affirming it. It is well settled by the decisions of this court where a majority of those voting at an election of the kind vote in favor of subscription or donation, as the case may be, for the purposes of registration it will be presumed that such majority so voting is a majority of all the legal voters living in the municipality at the time of the election; and where, in such case, the authorities, acting upon such presumption, have admitted the bonds to registration, and the municipality issuing them has, as in this case, treated them as properly registered by paying previous taxes levied by the auditor for the liquidation of accruing interest, and the bonds thus registered have passed into the hands of innocent holders, nothing but the clearest and most satisfactory proof will authorize a court of equity to enjoin the collection of a tax levied by the auditor on account of such bonds, on the alleged ground that the majority voting for such subscription or donation was not a majority of the legal voters." In the case now before us it appears that the county paid interest on the bonds in suit for about seventeen years, and there is no proof whatever that the votes cast for subscription, payable in bonds, did not represent a majority of all qualified voters living at the time in the county.

The case is within numerous decisions of this court sustaining the validity of bonds issued by municipal corporations. *Town of Coloma* v. *Eaves*, 92 U. S. 484; *Buchanan* v. *Litch-*

field, 102 U. S. 278; *Dixon County* v. *Field*, 111 U. S. 83, 92, 93; *Cairo* v. *Zane*, 149 U. S. 122.

We are of opinion that the court below erred in holding that the bonds issued to the Chester and Tamaroa Railroad Company were not binding upon the county of Perry, and in not giving judgment against the county for the amount of the coupons of such bonds in suit.

The judgment is reversed, and the cause remanded for a judgment, upon the facts found, in conformity with this opinion.

APPENDIX.

ADDENDUM.

In *Sparf* v. *United States*, *ante*, 51, there should be added to the dissenting opinion of Mr. Justice Gray, after the last full paragraph on page 158, the following:

In a charge to the grand jury of the Circuit Court of the United States for the District of Georgia in 1792, Mr. Justice Iredell said: "Where a *killing* is clearly proved, if the case be not very plain indeed, the grand jury should find the indictment for murder, and leave the consideration as to the species of homicide to the court and jury on the trial. I say the *court and jury* — for though it is held to be the province of the court to decide what species of homicide the offence belongs to, and that the province of the jury is merely to be confined *to the facts*, yet, in my opinion, this can mean nothing more, according to the true principles of law, than that, if a jury find a special verdict stating the facts, the court may pronounce the law upon it, and give judgment as effectually as they could have done on a general verdict. But as it is in the option of the jury to give a special verdict or not, and as they unquestionably may find a general verdict, I conceive they must find that verdict conscientiously, on the best of their judgment, after receiving all such assistance as the court may think proper to give them; which assistance, where points of law are complicated with facts, will often be found very useful, and in some instances absolutely necessary. But as they, in the case of a general verdict, are by the law *judges in the last resort* (so far at least as the giving of that verdict is concerned), they have, I think, clearly a *right* as well as *power*, to determine as shall appear to them just; *since it seems to me absurd to say, that where there is a lawful authority to determine, that determination must be made, not according to the judgment of those who have such authority, but according to the judgment of those*

who have it not. I know no trammels of precedent in this country to overrule a principle which appears to me so plain, and which is so well calculated to guard against indecent altercations between a court and jury, as well as, in my opinion, to prevent any of the rights or liberties of the citizens being overborne (as might otherwise sometimes be the case) by violent exertions of power." 2 McRee's Life of Iredell, 350.

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CIRCUIT JUDGE.

CONFESSION.

See CRIMINAL LAW, 1, 2, 4.

CONSPIRACY.

See INDICTMENT, 7.

CONSTITUTIONAL LAW.

CUSTOMS DUTIES.

DAMAGES.

1. The court having instructed the jury that the obligation of the defendant rested entirely upon the theory that he had stocked the plaintiff's lands to their full capacity and enjoyed their exclusive use, it would have been irrelevant to further charge that defendant's liability was limited to the consumption by his own stock. *Lazarus* v. *Phelps*, 202.
2. The measure of damages for the purpose of jurisdiction, in an action against the grantor of real estate on the warranty of title in his deed of conveyance, is the purchase money paid with interest. *Brown* v. *Webster*, 328.

EQUITY.

1. After the execution and delivery of a mortgage of real estate in South Carolina to a citizen of New York, the estate was sold under a judgment obtained subsequent to the mortgage and the purchasers went into possession. The mortgagee filed a bill in equity against them in the Circuit Court of the United States for the District of South Carolina, asking an injunction against commission of waste, a discovery of the amount and value of trees cut by them since they came into possession, and an accounting to the court for the same, and for a sale of the mortgaged premises for the payment of the mortgage debt. The mortgagor had died before the commencement of the suit, and his heirs were not made parties, they being citizens of the same State as the plaintiff. No objection was made to proceeding in their absence, and a decree of foreclosure and sale was made as to them, and they were further ordered to account for the conversion of the property which they had taken. *Held*, (1) That as the decree was operative to the extent of the foreclosure and sale, it could be sustained in respect of the accounting; (2) that the appellants could not insist, in this court, upon an objection which, if sustained, would curtail the relief to which the appellee was entitled, or overthrow the jurisdiction of the Circuit Court. *McGahan* v. *Bank of Rondout* 218.
2. A national bank commenced an action in a Circuit Court of the United States to have an assessment of the shares of its capital stock made by state officers declared invalid. The defendants demurred upon the ground that the remedy was in equity. The demurrer was overruled, the case went to trial before a jury, and the plaintiff obtained judgment. *Held*, That although the proceedings might have been in accordance with practice in the courts of the State, the plaintiff's remedy was in equity according to practice in the Federal courts, and that the demurrer should have been sustained. *Lindsay* v. *First National Bank of Shreveport*, 485.
3. The road between Fernandina and Cedar Key was the road designated and pointed out in the various acts of the legislature of Florida

ESTOPPEL.

EVIDENCE.

EXCEPTION.

FRAUD.

HABEAS CORPUS.

INDICTMENT.

MANDAMUS.

1. The judge in a Circuit Court having settled and signed a bill of exceptions, this court will not, on an application, supported by affidavits that the bill as settled and signed is incorrect, issue a writ of mandamus requiring him to resettle them. *Streep, Petitioner, In re*, 207.
2. A corporation organized under the laws of Pennsylvania brought an action in ejectment in the Circuit Court of the United States in the Western District of Virginia. The defendant by plea set up that a conveyance of the land had been made to the Pennsylvania corporation collusively, and for the purpose of conferring jurisdiction on the Circuit Court. The court was of opinion that the allegations of the plea were sustained, and dismissed the action for want of jurisdiction. The plaintiff duly excepted and the exceptions were allowed and signed. The plaintiff then prayed for a writ of error to this court upon the question of jurisdiction, and a writ was allowed "as prayed for" at the same term of court. At a subsequent term the plaintiff applied to the court below for an order certifying the question of jurisdiction to this court pursuant to § 5 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826. This application being denied, the plaintiff applied to this court for leave to file a petition for a writ of mandamus requiring the court below to certify the question of jurisdiction to this court. *Held*, that leave should be denied, as, independently of other considerations, the requisition of the statute in that respect had already been sufficiently complied with. *In re Lehigh Mining & Manufacturing Co., Petitioner*, 322.

See CONTRACT;
JURISDICTION A, 11.

MASTER AND SERVANT.

See NEGLIGENCE.

MORTGAGE.

See EQUITY, 1;
JURISDICTION, A, 7;
TRUST, 3.

MUNICIPAL BOND.

1. July 3, 1869, the qualified voters of Perry County, Illinois, voted to subscribe to the capital stock of the Belleville & Southern Illinois Railroad and to issue its bonds in payment thereof, conditioned that "no bonds should be issued or stock subscribed until the railroad company should locate their machine shops at Duquoin." In December, 1870, the county court directed the bonds to be issued, and they were issued and duly executed, and were delivered to the company and by it put into circulation; but the shops were never located at Duquoin. *Held*, in view of the legislation of Illinois reviewed in the opinion, and of

PATENT FOR INVENTION.

RAILROAD.

REASONABLE DOUBT.

REMOVAL OF CAUSES.

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A. Statutes of the United States.

See Constitutional Law, 1, 2; Indictment, 1, 2, 7; Criminal Law, 5, 9, 24; Jurisdiction, A, 5, 11, 17, 18; Mandamus, 2.

B. Statutes of States and Territories.

Florida. *See* Equity, 3.
Louisiana. *See* Constitutional Law, 7; Contract.
Missouri. *See* Constitutional Law, 4.
Montana. *See* Trust, 3.

SUBROGATION.

See Railroad, 1.

SUPERSEDEAS.

See Jurisdiction, A, 11.

TAX AND TAXATION.

1. When Congress grants to a railway company organized under the laws of a Territory a right of way over an Indian reservation within the Territory, and the road is constructed entirely within the Territory, that part of it within the reservation is subject to taxation by the territorial government. *Maricopa and Phœnix Railroad Co.* v. *Arizona*, 347.
2. The question whether it is so subject to taxation is one within the jurisdiction of this court, when properly brought here, irrespective of the amount involved. *Ib.*

TENANT IN COMMON.

1. In South Carolina a tenant in common of real estate, who takes sole possession of it, excluding his cotenant, is chargeable with what he has received in excess of his just proportion, and is liable to account to him for the rents and profits of so much of the common property as he has occupied and used in excess of his share. *McGahan* v. *Bank of Rondout*, 218.

TRUST.

1. A provision, in a deed of real estate in trust to secure the payment of a debt, which authorizes the trustee to sell the property at auction on breach of condition, first giving thirty days' notice of the time and place of sale by advertising the same for three successive weeks in a newspaper, is complied with so far as respects notice, by publication